

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. ICC-02/11-01/11 OA 4

Date: 29 October 2013

THE APPEALS CHAMBER

Before:

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

Public redacted version

Judgment

**on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber
I of 11 July 2013 entitled “Third decision on the review of Laurent Gbagbo’s
detention pursuant to article 60(3) of the Rome Statute”**

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

Legal Representatives of Victims
Ms Paolina Massidda
Ms Sarah Pellet

REGISTRY

Registrar
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I entitled “Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute” dated 11 July 2013 and registered on 12 July 2013 (ICC-02/11-01/11-454),

After deliberation,

By majority, Judge Anita Ušacka dissenting,

Delivers the following

JUDGMENT

The “Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute” is confirmed. The appeal is dismissed.

REASONS

I. KEY FINDINGS

1. It is first for the Pre-Trial Chamber to determine whether changed circumstances exist to warrant the disturbing of a previous ruling on detention, rather than addressing each factor underpinning detention in a *de novo* manner to determine whether any of these have changed.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

2. On 23 November 2011, Pre-Trial Chamber III 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 Gbagbo (hereinafter: “Mr Gbagbo”)

¹ ICC-02/11-01/11-1.

² ICC-02/11-01/11-9-US-Exp; public redacted version: ICC-02/11-01/11-9-Red.

first appeared before Pre-Trial Chamber III on 5 December 2011.³ He has been in detention at the Court since.

3. On 1 May 2012, Mr Gbagbo filed the “Requête de la Défense demandant la mise en liberté provisoire du Président Gbagbo”⁴ (hereinafter: “Application for Interim Release”), submitting that the grounds for detention under article 58 (1) (b) of the Statute are not met, that the [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.⁵

4. Judge Fernández de Gurmendi, acting as single judge (hereinafter: “Single Judge”), rendered, on 13 July 2012, the “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”⁶ (hereinafter: “Decision of 13 July 2012”), rejecting the Application for Interim Release. The Appeals Chamber, by majority, Judge Ušacka and Judge Kourula dissenting, dismissed Mr Gbagbo’s appeal in its judgment of 26 October 2012⁷ (hereinafter: “*Gbagbo* OA Judgment”).

5. On 12 November 2012, the Single Judge issued the “Decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (hereinafter: “Decision of 12 November 2012”), rejecting Mr Gbagbo’s request for interim release.⁸

6. On 18 January 2013, the Single Judge issued the “Decision on the request for the conditional release of Laurent Gbagbo and on his medical treatment” (hereinafter: “Decision of 18 January 2013”), rejecting Mr Gbagbo’s request for conditional release.⁹

³ See ICC-02/11-01/11-T-1-ENG.

⁴ ICC-02/11-01/11-105-Conf-Red-Corr. See also ICC-02/11-01/11-105-Conf-tENG.

⁵ Application for Interim Release, para. 1.

⁶ ICC-02/11-01/11-180-Red.

⁷ “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’”, 26 October 2012, ICC-02/11-01/11-278-Conf (OA).

⁸ ICC-02/11-01/11-291, para. 61; p. 25.

⁹ ICC-02/11-01/11-362-Conf, p. 15.

7. On 12 March 2013, the Single Judge issued the “Second decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (hereinafter: “Decision of 12 March 2013”), deciding that Mr Gbagbo should remain in detention.¹⁰

8. On 3 June 2013, Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”) issued the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (hereinafter: “Adjournment Decision”), in which it decided, by majority, to adjourn the confirmation of charges hearing to allow for the Prosecutor to consider providing further evidence or conducting further investigation with respect to all charges.¹¹

9. On 3 July 2013, the Office of the Public Counsel for Victims¹² (hereinafter: “OPCV”), the Prosecutor,¹³ and Mr Gbagbo¹⁴ submitted their respective observations on the continued detention or release of Mr Gbagbo (hereinafter, respectively: “OPCV Observations of 3 July 2013”, “Prosecutor’s Submissions of 3 July 2013” and “Mr Gbagbo’s Submissions of 3 July 2013”).

10. On 11 July 2013, the Pre-Trial Chamber issued the “Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute”¹⁵ (hereinafter: “Impugned Decision”), in which it decided that Mr Gbagbo should remain in detention.¹⁶

¹⁰ ICC-02/11-01/11-417-Conf, p.16.

¹¹ ICC-02/11-01/11-432, p. 22.

¹² “Observations du Représentant légal commun des victimes relatives au réexamen périodique de la détention de M. Gbagbo”, ICC-02/11-01/11-444. *See also* ICC-02/11-01/11-444-tENG.

¹³ “Observations de l’Accusation sur le réexamen de la détention provisoire de Laurent Gbagbo selon l’article 60(3) du Statut”, ICC-02/11-01/11-445-Conf. *See also* ICC-02/11-01/11-445-Conf-tENG.

¹⁴ “Soumissions de la défense sur les conditions d’application des dispositions de l’article 58(1), faites à l’invitation de la Chambre, dans le cadre du réexamen périodique de la détention”, ICC-02/11-01/11-446-Conf.

¹⁵ ICC-02/11-01/11-454.

¹⁶ Impugned Decision, p. 19.

B. Proceedings before the Appeals Chamber

11. On 19 July 2013, Mr Gbagbo filed his appeal against the Impugned Decision¹⁷ (hereinafter: “Appeal”), submitting that the Appeals Chamber should reverse the Impugned Decision.¹⁸

12. On 23 July 2013, the OPCV filed the “Application to Participate in the Interlocutory Appeal Filed by the Defence against the ‘Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute’ of 12 July 2013”¹⁹, dated 22 July 2013 and registered on 23 July 2013 (hereinafter: “Victims’ Application”).

13. On 27 August 2013, having considered the responses to the Victims’ Application of both the Prosecutor²⁰ and Mr Gbagbo,²¹ the Appeals Chamber rendered a decision granting the 199 victims authorised to participate in the proceedings by the Pre-Trial Chamber (hereinafter: “Victims”) the right to participate in the present appeal.²²

14. Having sought²³ and obtained²⁴ an extension of the time limit for the filing of his document in support of the appeal, Mr Gbagbo filed, on 19 August 2013, the “Document in support of the Defence appeal against Pre-Trial Chamber I’s *Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the*

¹⁷ “Acte d’appel de la Défense relatif à la « Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60 (3) of the Rome Statute » de la Chambre préliminaire I décidant du maintien en détention du Président Gbagbo”, ICC-02/11-01/11-459-Conf (OA 4).

¹⁸ Appeal, para. 40.

¹⁹ ICC-02/11-01/11-460 (OA 4).

²⁰ “Prosecution’s Observations on the ‘Application to Participate in the Interlocutory Appeal Filed by the Defence against the ‘Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute’ of 12 July 2013””, 14 August 2013, ICC-02/11-01/11-476.

²¹ “Réponse de la défense à la demande de participation à la procédure d’appel relative à la « Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60 (3) of the Rome Statute » (ICC-02/11-01/11-454) déposée par la Représentante Légale des Victimes le 22 juillet 2013 (ICC-02/11-01/11-460)”, 21 August 2013, ICC-02/11-01/11-488 (OA 4).

²² “Decision on the application by victims for participation in the appeal”, ICC-02/11-01/11-491 (OA 4), p. 3.

²³ “Requête aux fins de prorogation des délais déterminés par la Norme 64(5) du Règlement, de façon à ce qu’ils courent à partir de la rentrée judiciaire, fixée au lundi 12 août 2013”, 16 July 2013, ICC-02/11-01/11-456-Conf-Exp.

²⁴ “Decision on the ‘Requête aux fins de prorogation des délais déterminés par la Norme 64(5) du Règlement, de façon à ce qu’ils courent à partir de la rentrée judiciaire, fixée au lundi 12 août 2013””, 18 July 2013, ICC-02/11-01/11-458-Conf-Exp.

Rome Statute, ordering President Gbagbo's continued detention (ICC-02/11-01-11-454)"²⁵ (hereinafter: "Document in Support of the Appeal").

15. On 26 August 2013, the Prosecutor filed her response²⁶ (hereinafter: "Prosecutor's Response to the Document in Support of the Appeal").

16. On 3 September 2013, the OPCV filed the "Observations of the Common Legal Representative on the 'Document à l'appui de l'appel de la Défense interjeté à l'encontre de la « Third decision on the review of Laurent Gbagbo's detention pursuant to article 60 (3) of the Rome Statute » de la Chambre préliminaire I, décidant du maintien en détention du Président Gbagbo (ICC-02/11-01/11-454)'"²⁷ (hereinafter: "Victims' Observations").

17. On 11 September 2013, Mr Gbagbo filed a response to the Victims' Observations²⁸ (hereinafter: "Mr Gbagbo's Response to the Victims' Observations"), submitting that they should be rejected.²⁹ The Prosecutor did not file a response.

III. STANDARD OF REVIEW

18. In considering appeals in relation to decisions granting or denying interim release, the Appeals Chamber has previously held that it "will not review the findings of the Pre-Trial Chamber *de novo*, instead, it will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision".³⁰ It is also recalled that an appellant, in his or her

²⁵ ICC-02/11-01/11-485-Conf-tENG (OA 4).

²⁶ "Prosecution's response to the Defence's 'Document à l'appui de l'appel de la Défense interjeté à l'encontre de la « Third decision on the review of Laurent Gbagbo's detention pursuant to article 60 (3) of the Rome Statute » de la Chambre préliminaire I, décidant du maintien en détention du Président Gbagbo (ICC-02/11-01/11-454)'" ICC-02/11-01/11-490-Conf (OA 4).

²⁷ ICC-02/11-01/11-497-Conf (OA 4).

²⁸ "Réponse aux observations présentées par la Représentante légale des victimes à propos de l'appel interjeté par la défense de la décision de la Chambre préliminaire I portant sur la « review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute », décidant du maintien en détention du Président Gbagbo", ICC-02/11-01/11-501 (OA 4).

²⁹ Mr Gbagbo's Response to the Victims' Observations, para. 45.

³⁰ *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) (hereinafter: "*Bemba OA 2 Judgment*"), para. 62, cited in *Prosecutor v. Callixte Mbarushimana*. "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'", 14 July 2011, ICC-01/04-01/10-283 (OA) (hereinafter: "*Mbarushimana OA Judgment*"), para. 15.

document in support of the appeal, is not only obliged to set out an alleged error, “but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision”.³¹ Failure to do so may lead to the Appeals Chamber dismissing arguments *in limine*, without full consideration of their merits.³²

IV. MERITS

A. Arguments in relation to alleged lack of reasoning

19. As a preliminary issue, Mr Gbagbo submits that the “Pre-Trial Chamber should have paid greater attention to the need to provide reasoning for its decision”,³³ particularly in light of the *Gbagbo* OA Judgment, in which, Mr Gbagbo argues, the majority of the Appeals Chamber “criticised the paucity of reasoning in the Single Judge’s decision, issuing a clear warning to the Pre-Trial Chamber about the need to fulfil its obligation to demonstrate and provide reasoning”.³⁴ Mr Gbagbo further avers that the insufficiency of this reasoning in the Decision of 13 July 2012 means that the establishment of “changed circumstances” for the purposes of future article 60 (3) decisions is rendered problematic.³⁵

20. Mr Gbagbo submits in relation to the Impugned Decision that the concerns of the Appeals Chamber in relation to the Decision of 13 July 2012 “have proven to be prescient” insofar as the “Pre-Trial Chamber provide[s] little or no reasoning” for the Impugned Decision. He notes further that the Impugned Decision refers to the merits of the Decision of 13 July 2012, which, in his submission, the Appeals Chamber found to be insufficiently reasoned.³⁶

21. The Prosecutor argues that Mr Gbagbo fails to demonstrate that the Pre-Trial Chamber’s “reasoning and its decision were incorrect either in law or fact”.³⁷ The Prosecutor also notes that the Decision of 13 July 2012 was in fact upheld by the

³¹ See Prosecutor’s Response to the Document in Support of the Appeal, para. 17, referring, *inter alia*, to *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’”, 19 October 2010, ICC-01/05-01/08-962 (OA 3) (hereinafter: “*Bemba* OA 3 Judgment”), para. 102.

³² *Mbarushimana* OA Judgment, para. 18.

³³ Document in Support of the Appeal, para. 15.

³⁴ Document in Support of the Appeal, para. 16.

³⁵ Document in Support of the Appeal, paras 18-19.

³⁶ Document in Support of the Appeal, para. 19.

³⁷ Prosecutor’s Response to the Document in Support of the Appeal, para. 22.

majority of the Appeals Chamber, and therefore Mr Gbagbo's arguments in relation to its reasoning constitute an attempt to "improperly litigate a final ruling for the second time before the Appeals Chamber".³⁸

22. In addition to fully supporting the arguments advanced by the Prosecutor more generally,³⁹ the Victims submit that "while having been criticised for a certain deficiency in reasoning, the Decision on Interim Release of 13 July 2012 was nevertheless upheld by the Appeals Chamber and now constitutes a valid legal basis for the Chamber to rely on".⁴⁰ The Victims argue further that, insofar as the Pre-Trial Chamber was not required to determine the conditions under article 58 (1) *de novo*, but only the existence of "changed circumstances" under article 60 (3), "the Impugned Decision fully complies with the requirement of reasoning as interpreted by the international human rights jurisprudence".⁴¹

23. In addressing this preliminary matter, the Appeals Chamber finds that Mr Gbagbo's overarching argument regarding the purportedly insufficient reasoning of the Decision of 13 July 2012 misrepresents the Appeals Chamber's findings. While the Appeals Chamber noted in the *Gbagbo* OA Judgment that the reasoning of the Single Judge in the Decision of 13 July 2012 was "relatively sparse", the Appeals Chamber nevertheless concluded that it did "not consider that the decision [wa]s 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".⁴² Therefore, this aspect of Mr Gbagbo's argument is dismissed.

24. The Appeals Chamber also rejects Mr Gbagbo's preliminary argument in relation to the purportedly insufficient reasoning of the Impugned Decision, on the basis that he fails to demonstrate an error of law in relation to the reasoning which materially affects the Impugned Decision. Mr Gbagbo merely asserts that the reasoning was insufficient, without substantiating this claim any further.

³⁸ Prosecutor's Response to the Document in Support of the Appeal, para. 22.

³⁹ Victims' Observations, para. 24.

⁴⁰ Victims' Observations, para. 33.

⁴¹ Victims' Observations, para. 45.

⁴² *Gbagbo* OA Judgment, para. 48.

B. First ground of appeal

25. As his first ground of appeal, Mr Gbagbo submits that the Pre-Trial Chamber erred in law by finding that the Adjournment Decision did not constitute changed circumstances requiring verification that the condition under article 58 (1) (a) of the Statute is still met.⁴³

1. Relevant part of the Impugned Decision

26. In the Impugned Decision, when considering whether “changed circumstances” existed pursuant to article 60 (3) of the Statute in relation to Mr Gbagbo’s detention, the Pre-Trial Chamber referred to the argument contained in Mr Gbagbo’s Submissions of 3 July 2013 that the Adjournment Decision constitutes a new circumstance affecting the grounds for his detention insofar as it “negat[ed] reasonable grounds to believe that Mr Gbagbo has committed a crime within the jurisdiction of the Court” under article 58 (1) (a) of the Statute.⁴⁴

27. The Impugned Decision dismissed this argument, holding that it “inappropriately seeks to approximate a decision adjourning the hearing under article 61(7)(c) of the Statute to a decision declining to confirm the charges under article 61(7)(b) of the Statute”.⁴⁵ It noted that, under the latter provision, pursuant to article 61 (10) of the Statute, the result of declining to confirm the charges is that the arrest warrant would cease to have effect,⁴⁶ and that, in contrast, “no such provision exists with respect to adjournment of the hearing under article 61(7)(c)”.⁴⁷ Therefore, the Adjournment Decision did not “represent a final disposal of the merits of the case by the Pre-Trial Chamber, but is an intermediate procedural step [...]”,⁴⁸ and has no effect on the previous finding in relation to the warrant of arrest that there are “reasonable grounds to believe” that Mr Gbagbo committed a crime within the jurisdiction of the Court.⁴⁹

28. The Impugned Decision also recalled the standard of proof for findings under article 58 (1) (a) of the Statute, which it found to be significantly lower than the

⁴³ Document in Support of the Appeal, p. 7.

⁴⁴ Impugned Decision, para. 34.

⁴⁵ Impugned Decision, para. 34.

⁴⁶ Impugned Decision, para. 34.

⁴⁷ Impugned Decision, para. 34.

⁴⁸ Impugned Decision, para. 35.

⁴⁹ Impugned Decision, para. 35.

standard required for confirmation of charges under article 61 (7). On this basis, the Pre-Trial Chamber held that “a finding that the available evidence does not meet the evidentiary threshold of article 61(7) of the Statute does not imply that there is insufficient evidence for the purposes of article 58(1)(a) of the Statute”.⁵⁰ The Impugned Decision therefore considered that the Adjournment Decision did not constitute “new circumstances” affecting the grounds of Mr Gbagbo’s detention.⁵¹

2. *Mr Gbagbo’s submissions before the Appeals Chamber*

29. Mr Gbagbo argues, firstly, that the Pre-Trial Chamber erred in holding that the Adjournment Decision did not constitute “changed circumstances”,⁵² and secondly, that this error arose from a distortion of Mr Gbagbo’s arguments on the issue.⁵³ In respect of his first argument, Mr Gbagbo cites the *Gbagbo* OA Judgment to emphasise that “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”.⁵⁴

30. Mr Gbagbo argues that more information was available to the Pre-Trial Chamber at the time of its rendering of the Impugned Decision than when the arrest warrant was issued, and that the Pre-Trial Chamber was therefore duty-bound to consider whether the conditions of article 58 (1) (a) of the Statute continued to be met in light of this new information.⁵⁵ Specifically, Mr Gbagbo argues that the Pre-Trial Chamber’s findings in the Adjournment Decision that there was a dearth of probative evidence to support the charges against Mr Gbagbo “are new factors which may affect the existence of reasonable grounds to believe that President Gbagbo committed a crime within the Court’s jurisdiction”,⁵⁶ and that it was therefore incumbent on the Chamber to verify *de novo* whether article 58 (1) (a) conditions continued to be met,⁵⁷ particularly given that it has never explicitly ruled upon this issue, relying instead

⁵⁰ Impugned Decision, para. 35.

⁵¹ Impugned Decision, para. 37.

⁵² Document in Support of the Appeal, p. 7.

⁵³ Document in Support of the Appeal, p. 9.

⁵⁴ Document in Support of the Appeal, para. 20 (without emphasis of Document in Support of the Appeal), erroneously referring to *Gbagbo* OA Judgment, para. 23 (*see*, instead, para. 14).

⁵⁵ Document in Support of the Appeal, para. 21.

⁵⁶ Document in Support of the Appeal, para. 23.

⁵⁷ Document in Support of the Appeal, para. 26.

upon the finding in the original Arrest Warrant Decision in relation to the existence of “reasonable grounds to believe”.⁵⁸

31. Secondly, Mr Gbagbo argues that the Pre-Trial Chamber’s alleged error of law in holding the Adjournment Decision not to be “changed circumstances” arose from a “distortion” of his arguments in relation to this issue. Mr Gbagbo avers that he never argued that the Adjournment Decision “bore the legal implication that article 58(1)(a) conditions were no longer met [...] [w]hat the Defence was saying in its submissions was that the *substance* of the Chamber’s findings on the probative insufficiency of the evidence presented by the Prosecution in support of its allegations could constitute a lack of ‘reasonable grounds to believe’”.⁵⁹

3. *The Prosecutor’s submissions before the Appeals Chamber*

32. The Prosecutor argues that Mr Gbagbo’s arguments lack merit as, while attempting to cast the Chamber’s findings as a legal error, they in fact constitute “a mere disagreement with the Chamber’s conclusions”.⁶⁰ The Prosecutor argues that the Pre-Trial Chamber correctly articulated the difference between the evidentiary thresholds of articles 61 and 58 of the Statute, and therefore, the fact that the Prosecution had not proved its case under article 61 (7) does not mean that “the threshold under Article 58(1)(a) is automatically not met”.⁶¹ She argues that an Adjournment Decision made pursuant to article 61 (7) (c) of the Statute is not a decision declining to confirm charges pursuant to article 61 (7) (b), and that they are “decisions of a different character and have different implications”.⁶²

33. The Prosecutor argues further that Mr Gbagbo fails to “identify any ‘new fact’ or change in facts relied upon in the prior decision on detention that would negate its validity or that the Chamber failed to consider”,⁶³ and that his first ground of appeal should therefore be dismissed. She also avers that Mr Gbagbo’s criticism that the Pre-Trial Chamber failed to rule on article 58 (1) (a) of the Statute in the Decision of 13 July 2012 should also be similarly dismissed on the basis that the Appeals Chamber has already rejected these arguments in the *Gbagbo* OA Judgment in holding that the

⁵⁸ Document in Support of the Appeal, para. 27.

⁵⁹ Document in Support of the Appeal, para. 31.

⁶⁰ Prosecutor’s Response to the Document in Support of the Appeal, para. 25.

⁶¹ Prosecutor’s Response to the Document in Support of the Appeal, para. 25.

⁶² Prosecutor’s Response to the Document in Support of the Appeal, para. 27.

⁶³ Prosecutor’s Response to the Document in Support of the Appeal, para. 28.

factors underlying the original Arrest Warrant Decision may be the same as those for the decision under article 60 (2), and that the Pre-Trial Chamber may therefore refer to an arrest warrant decision “without this affecting the *de novo* character of the Chamber’s decision”.⁶⁴

4. *Observations of the Victims*

34. The Victims submit, in addition to fully supporting the arguments advanced by the Prosecutor,⁶⁵ that “a decision under article 60(3) of the Rome Statute requires only a review of a prior decision on detention and does not necessitate the re-evaluation of the conditions of article 58(1)”.⁶⁶ The Victims argue that the only obligation on the Pre-Trial Chamber is to determine whether there are “changed circumstances”; where they are determined not to exist, “the conditions under article 58(1) of the Rome Statute should be deemed met without any need to be determined *de novo*”.⁶⁷ The Victims argue that Mr Gbagbo has failed to establish that the Adjournment Decision constitutes “changed circumstances” within the definition laid down by the Appeals Chamber,⁶⁸ and that his appeal on this issue should consequently be dismissed.⁶⁹

5. *Mr Gbagbo’s response to the observations of the Victims*

35. Mr Gbagbo makes the overarching argument that the Victims’ Observations should be dismissed because they are outside the authorised legal scope of their participation, insofar as they do not reflect the victims’ personal interests⁷⁰ and merely reiterate the Prosecutor’s arguments.⁷¹ In relation to the Victims’ Observations regarding “changed circumstances”, Mr Gbagbo argues, *inter alia*, that the question around the sufficiency of the reasoning in the Decision of 13 July 2012 is pertinent to his current review of detention.⁷² He avers further that, contrary to the Victims’ Observations, it was indeed reasonable to submit that the Adjournment Decision could be considered to constitute “changed circumstances” that warranted the Pre-Trial Chamber to re-examine the factors concerning continued detention under article

⁶⁴ Prosecutor’s Response to the Document in Support of the Appeal, para. 28, referring to *Gbagbo* OA Judgment, para. 27.

⁶⁵ Victims’ Observations, para. 24.

⁶⁶ Victims’ Observations, para. 26.

⁶⁷ Victims’ Observations, para. 27.

⁶⁸ Victims’ Observations, paras 34-36.

⁶⁹ Victims’ Observations, p. 15.

⁷⁰ Mr Gbagbo’s Response to the Victims’ Observations, paras 12-15.

⁷¹ Mr Gbagbo’s Response to the Victims’ Observations, paras 16-19.

⁷² Mr Gbagbo’s Response to the Victims’ Observations, para. 22.



58 (1), given the insufficiency of the evidence underpinning the charges expressed therein.⁷³

6. *Determination by the Appeals Chamber*

36. The principal question raised under the first ground of appeal is whether, in accordance with the review of detention provided for under article 60 (3) of the Statute, the Adjournment Decision constituted “changed circumstances” requiring the Pre-Trial Chamber to assess *de novo* whether the available evidence against Mr Gbagbo still reached the threshold of article 58 (1) (a) (“reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court”), so as to justify his ongoing detention. This question arises in light of the Pre-Trial Chamber’s finding in the Adjournment Decision that the evidence against Mr Gbagbo did not meet the higher evidentiary threshold under article 61 (7) of the Statute (“substantial grounds to believe that the person committed each of the crimes charged”) for the purposes of confirming the charges against him.

37. The Appeals Chamber recalls that the Pre-Trial Chamber indicated in the Adjournment Decision “that the Prosecutor’s evidence, viewed as a whole, although apparently insufficient, does not appear to be so lacking in relevance and probative value that it leaves the Chamber with no choice but to decline to confirm the charges”⁷⁴ thus indicating that, while the Prosecutor’s evidence in relation to the charges against Mr Gbagbo was inadequate, there remained a degree of suspicion in relation to his alleged commission of crimes. The Pre-Trial Chamber further held that, “[d]espite these difficulties in the evidentiary record of the Prosecutor”, it “does not exclude that the Prosecutor might be able to present or collect further evidence” in relation to the alleged crimes.⁷⁵ For these reasons, the Pre-Trial Chamber elected to adjourn the hearing on the confirmation of charges “[r]ather than making a final determination on the merits at this time”.⁷⁶

38. Furthermore, the Appeals Chamber notes that the Pre-Trial Chamber, in the Adjournment Decision, specifically adverted to the “progressively higher thresholds applicable in the course of the different stages of the proceedings”, including the fact

⁷³ Mr Gbagbo’s Response to the Victims’ Observations, paras 23-24.

⁷⁴ Adjournment Decision, para. 15.

⁷⁵ Adjournment Decision, para. 37.

⁷⁶ Adjournment Decision, para. 15.

that the evidentiary threshold for the confirmation of charges is higher than that required to issue a warrant of arrest.⁷⁷ This was reiterated in the Impugned Decision, in which the Pre-Trial Chamber noted that findings under article 58 (1) (a) of the Statute “are made to a significantly lower standard of proof” than those under article 61 (7), and the fact that the available evidence did not meet the evidentiary threshold for article 67 (1) does not mean there was insufficient evidence for the purposes of article 58 (1) (a) of the Statute.⁷⁸

39. The Appeals Chamber finds, therefore, that the Pre-Trial Chamber *did* advert in the Impugned Decision to the issue of whether the sufficiency of the evidence affected the condition under article 58 (1) (a) of the Statute.⁷⁹ This is evidenced by the Pre-Trial Chamber’s analysis of the different evidentiary thresholds under articles 58 (1) (a) and 67 (1) of the Statute and its decision to adjourn the confirmation hearing rather than decline to confirm the charges. In these circumstances there was no obligation for the Pre-Trial Chamber to assess anew whether there were reasonable grounds to believe that Mr Gbagbo committed a crime within the jurisdiction of the Court.

40. The Appeals Chamber recalls that “changed circumstances” have been found to exist where there is a “change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary”.⁸⁰ Where no changed circumstances are found to exist, “the Chamber is not required to further review the ruling on release or detention”.⁸¹ Further, as stated in the *Bemba* OA 4 Judgment, when conducting periodic review, given that the ruling on detention may be subsequently modified under article 60 (3) of the Statute, if “changed circumstances so require”, it is necessary to interpret the “ruling on detention” as being the initial decision made under article 60 (2) of the

⁷⁷ Adjournment Decision, para. 17.

⁷⁸ Impugned Decision, para. 35.

⁷⁹ Adjournment Decision, para. 37.

⁸⁰ *Bemba* OA 2 Judgment, para. 60.

⁸¹ *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’”, ICC-01/05-01/08-2151-Conf (OA 10), 5 March 2012 (hereinafter: “*Bemba* OA 10 Judgment”), para. 1.

Statute as well as any potential subsequent modifications made to that decision under article 60 (3).⁸²

41. The Appeals Chamber notes that it was the Pre-Trial Chamber, in the same composition, that rendered the Adjournment Decision mere weeks before the Impugned Decision, and elected *not* to decline to confirm the charges under article 61 (7) (b). If it believed that “reasonable grounds” no longer existed, then it would have been required at this point to decline to confirm the charges, and it explicitly rejected this course of action.⁸³ In light of this, the Appeals Chamber finds that it was open for the Pre-Trial Chamber to find that no changed circumstances existed, thus obviating any requirement for a *de novo* review of article 58 (1) (a) factors. The Appeals Chamber has previously held that it “will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision”.⁸⁴ In the instant case, the Appeals Chamber finds no error in the approach of the Pre-Trial Chamber, and dismisses Mr Gbagbo’s arguments under this ground of appeal.

C. Second Ground of Appeal

42. Mr Gbagbo’s second ground of appeal is that the Pre-Trial Chamber erred in law by not examining facts pertaining to each item of evidence previously used to justify detention and thereby declined to assess whether there were “changed circumstances” for the purposes of article 60 (3) of the Statute.⁸⁵

1. Relevant part of the Impugned Decision

43. At the outset, it is observed that the Pre-Trial Chamber outlined in detail the statutory provisions and jurisprudence upon which it relied in relation to assessing

⁸² *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-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence of Procedure and Evidence’”, ICC-01/05-01/08-1019 (OA 4) (hereinafter; “*Bemba OA 4 Judgment*”), para. 46. *See also 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. 94.

⁸³ Adjournment Decision, paras 15; 37; *see also* Impugned Decision, paras 34-35.

⁸⁴ *Bemba OA 2 Judgment*, para. 62, cited in *Mbarushimana OA Judgment*, para. 15.

⁸⁵ Document in Support of the Appeal, p. 10.

“changed circumstances” pursuant to article 60 (3) of the Statute.⁸⁶ In examining the facts pertaining to each item of evidence previously used to justify detention (for example, in relation to existence of a network of Mr Gbagbo’s supporters), the Pre-Trial Chamber concluded that there were no changed circumstances that could affect the factors underpinning detention under article 58 (1) (b) (i) to (iii).⁸⁷

44. In examining whether “changed circumstances” existed pursuant to article 60 (3) in the context of article 58 (1) (b), the Pre-Trial Chamber referred to the Decisions of 13 July 2012 and 12 November 2012, noting that it was previously held that the existence of a “large and well-organised network of political supporters of Mr Gbagbo” posed a risk that Mr Gbagbo may use the means of his support network in order to “abscond, obstruct the investigation or continue with the commission of crimes within the jurisdiction of the Court”.⁸⁸ The Pre-Trial Chamber, referring to its Decision of 12 November 2012, recalled that the level of military and political organisation of pro-Gbagbo groups had been strengthened in the preceding months, increasing the risks under article 58 (1) (b) (i)-(iii) in relation to Mr Gbagbo.⁸⁹ These circumstances were held to be unchanged in the most recent article 60 (3) decision.⁹⁰

45. In assessing the current situation in relation to the pro-Gbagbo network, the Pre-Trial Chamber relied upon the findings of the “Final Report of the Group of Experts on Côte d’Ivoire pursuant to paragraph 16 of Security Council resolution 2045 (2012)”⁹¹ (hereinafter: “Final Report”), holding that it provided “sufficiently detailed information which can be relied upon for the purpose of determining, in line with article 58(1)(b) of the Statute, whether ‘[t]he arrest of the person appears necessary’”.⁹² The Pre-Trial Chamber acknowledged that the Final Report concluded that some of the military activities and operational capacity of the pro-Gbagbo groups had lessened,⁹³ but held that, nonetheless, the capacity of the network of Mr Gbagbo’s

⁸⁶ Impugned Decision, paras 26-32.

⁸⁷ Impugned Decision, para. 44.

⁸⁸ Impugned Decision, para. 38, referring to Decision of 13 July 2012, paras 60-62, 65, 69.

⁸⁹ Impugned Decision, para. 38, referring to Decision of 12 November 2012, para. 59.

⁹⁰ Impugned Decision, para. 38, referring to Decision of 12 March 2013, para. 39.

⁹¹ Impugned Decision, paras 40-42, referring to Annex A of the “Prosecutor’s submissions of 3 July 2013 (ICC-02/11-01/11-445-AnxA) - “Final report of the Group of Experts on Côte d’Ivoire pursuant to paragraph 16 of Security Council resolution 2045 (2012), ICC-02/11-01/11-445-AnxA). Also contained in [REDACTED].

⁹² Impugned Decision, para. 42.

⁹³ Impugned Decision, para. 41.

supporters has not been reduced to such an extent that the risks identified in the Decision of 13 July 2012 no longer existed.⁹⁴

2. *Mr Gbagbo's submissions before the Appeals Chamber*

46. Mr Gbagbo argues that the Pre-Trial Chamber erred in law by failing to perform “a systematic review of each of the circumstances which together had provided the basis for the detention decision, in order to determine whether any of these had changed”.⁹⁵ He avers that the Pre-Trial Chamber relied on mere “suppositions” to find that article 58 (1) (b) conditions were met “in one fell swoop”,⁹⁶ focusing on the finding that the ongoing existence of a pro-Gbagbo network meant that there existed “at one and the same time, a risk of abscondment, pressure on witnesses etc.”.⁹⁷ Mr Gbagbo also argues that the Pre-Trial Chamber merely adverted to earlier decisions in relation to his detention rather than analysing the current situation or the arguments of the parties.⁹⁸

47. Mr Gbagbo argues further that it is impossible to demonstrate changed circumstances in relation to article 58 (1) (b) (ii) factors in the absence of a definition of the “future crimes” the Impugned Decision alludes to, “since the Pre-Trial Chamber’s findings on the risk of obstruction to the investigation do not rely on any concrete evidence but instead on an abstract supposition”, making it impossible to show changed circumstances.⁹⁹ He also argues that the Pre-Trial Chamber failed in any event to revisit the alleged risks under article 58 (1) (b) (ii).¹⁰⁰ Mr Gbagbo submits further that the Pre-Trial Chamber failed to adequately examine current article 58 (1) (b) (iii) risks, which he avers are tainted by initial vagueness of the Single Judge’s decision on this issue.¹⁰¹

3. *The Prosecutor's submissions before the Appeals Chamber*

48. The Prosecutor argues that Mr Gbagbo has failed to establish any error of law, recalling that decisions under article 60 (3) of the Statute are made using a different

⁹⁴ Impugned Decision, para. 41.

⁹⁵ Document in Support of the Appeal, para. 38.

⁹⁶ Document in Support of the Appeal, para. 35.

⁹⁷ Document in Support of the Appeal, para. 34.

⁹⁸ Document in Support of the Appeal, para. 34.

⁹⁹ Document in Support of the Appeal, para. 40.

¹⁰⁰ Document in Support of the Appeal, para. 39.

¹⁰¹ Document in Support of the Appeal, para. 41.

standard to those under article 60 (2).¹⁰² She argues that, on this basis, the Pre-Trial Chamber is not obliged to “establish that each one of the factors underpinning the original decision on detention is met as this would entail a decision anew, which is only pertinent to decisions under Article 60(2)”.¹⁰³ The Prosecutor argues further that the Pre-Trial Chamber supported its conclusions in relation to whether the conditions under article 58 (1) (b) are met with evidence presented by the parties (such as that contained in the Final Report) rather than mere “abstract statements or assumptions”.¹⁰⁴ The Prosecutor avers that the Pre-Trial Chamber’s conclusion that there were no changed circumstances which would affect the grounds underpinning detention under article 58 (1) (b) (i) to (iii) was also justified in light of the Appeals Chamber jurisprudence that it is the “possibility, not the inevitability, of a future occurrence”¹⁰⁵ that underpins the notion of risk in relation to article 58 (1) (b) (i) to (iii).

4. *Observations of the Victims*

49. The Victims did not make observations specifically relating to this ground of appeal.

5. *Determination by the Appeals Chamber*

50. The principal issue under the second ground of appeal is whether the Pre-Trial Chamber should have examined anew each item of evidence previously used to justify Mr Gbagbo’s detention in order to assess whether there existed “changed circumstances”, instead of relying on the factors cited in previous decisions on his continued detention in light of the fresh information before it.

51. In the *Gbagbo* OA Judgment the Appeals Chamber recalled 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”.¹⁰⁶ While a review of detention pursuant to article 60 (2) entails a decision *de novo* in which the Pre-Trial Chamber must decide whether the conditions of article 58 (1) are met, the Pre-Trial Chamber may modify its ruling

¹⁰² Prosecutor’s Response to the Document in Support of the Appeal, para. 31.

¹⁰³ Prosecutor’s Response to the Document in Support of the Appeal, para. 31.

¹⁰⁴ Prosecutor’s Response to the Document in Support of the Appeal, para. 32.

¹⁰⁵ Prosecutor’s Response to the Document in Support of the Appeal, para. 33.

¹⁰⁶ *Gbagbo* OA Judgment, para. 23.

on release or detention under article 60 (3) if “it is satisfied that changed circumstances so require”.¹⁰⁷ The Appeals Chamber clarified further 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.¹⁰⁸

52. Indeed, the Appeals Chamber has previously held that “[t]he Chamber does not have to enter findings on the circumstances already decided upon in the ruling on detention”¹⁰⁹ in the absence of changed circumstances, given that “the scope of the review carried out in reaching a decision under article 60 (3) is potentially much more limited than that to be carried out in reaching a decision under article 60 (2) of the Statute”.¹¹⁰

53. In light of this jurisprudence, the Appeals Chamber finds that Mr Gbagbo’s argument that the Pre-Trial Chamber erred in failing to perform “a systematic review of each of the circumstances which together had provided the basis for the detention decision, in order to determine whether any of these had changed”,¹¹¹ distorts the manner in which reviews of detention pursuant to article 60 (3) of the Statute should be conducted. It is first for the Pre-Trial Chamber to determine whether changed circumstances exist to warrant the disturbing of a previous ruling on detention, rather than addressing each factor underpinning detention in a *de novo* manner to “determine whether any of these had changed”.¹¹²

54. On this basis, the Appeals Chamber finds that the Pre-Trial Chamber did not err in finding that there were no changed circumstances with regard to the existence of a network of Mr Gbagbo’s supporters that would affect the grounds justifying detention under article 58 (1) (b) (i) to (iii). The Pre-Trial Chamber explicitly adverted to the evidence put forward by the parties, referring to the findings of the Mid-Term Report of the Group of Experts submitted in accordance with paragraph 16 of Security

¹⁰⁷ *Gbagbo* OA Judgment, para. 23.

¹⁰⁸ *Bemba* OA 10 Judgment, para. 1, cited in *Gbagbo* OA Judgment, para. 23.

¹⁰⁹ *Bemba* OA 4 Judgment, para. 53.

¹¹⁰ Impugned Decision, para. 31, citing *Gbagbo* OA Judgment, para. 24.

¹¹¹ Document in Support of the Appeal, para. 38.

¹¹² Document in Support of the Appeal, para. 38.

Council resolution 2045 (2012),¹¹³ as relied upon in the Decision of 12 November 2012 and the Decision of 12 March 2013, in comparison with those contained in the Final Report, which is dated 17 April 2013. For example, it held that the risks previously identified in these decisions still exist in relation to a pro-Gbagbo network, based on the evidence before it, as of the issuance of the Final Report, that “[t]hese groups have the capacity to conduct military operations with weapons and related material obtained in violation of the sanctions regime and to recruit combatants, inside and outside Côte d’Ivoire”.¹¹⁴

55. The Appeals Chamber notes further that the arguments of Mr Gbagbo to a large extent criticise the purported lack of reasoning and specificity in previous decisions on his detention. These decisions, while forming the basis for the current assessment of his detention, are not under review in the present appeal. Accordingly, Mr Gbagbo’s arguments in this connection are dismissed *in limine*.

56. For the foregoing reasons, the Appeals Chamber dismisses Mr Gbagbo’s second ground of appeal.

D. Third and Sixth Grounds of Appeal

57. Mr Gbagbo’s third ground of appeal is that the Pre-Trial Chamber erred in law by declining to assess the probative value of the Final Report, despite Mr Gbagbo’s request,¹¹⁵ while his sixth ground of appeal is that the Pre-Trial Chamber committed an error of fact by relying on the findings of the Final Report, despite the report’s probative value being called into question.¹¹⁶

1. Relevant procedural context and part of the Impugned Decision

58. In the Impugned Decision, the Pre-Trial Chamber noted that Mr Gbagbo listed a number of factors in his Submissions of 3 July 2013 which, in his view, call into question the reliability of the work of the Group of Experts who produced the Final

¹¹³ See “Registration into the record of the case of materials presented during the hearings held in open and closed session on 30 October 2012 (ICC-02/11-01/11-HNE-5 to ICC-02/11-01/11-HNE-14-Conf)”, 1 November 2012, ICC-02/11-01/11-285 (“Rapport de mi-mandat du Groupe d’expert sur la Côte d’Ivoire en application du paragraphe 16 de la résolution 2045 (2012) du Conseil de sécurité, 15 octobre 2012”, ICC-02/11-01/11-285-Anx1) (hereinafter: “Mid-Term Report”).

¹¹⁴ Impugned Decision, para. 41, referring to Final Report, para. 19

¹¹⁵ Document in Support of the Appeal, p. 13.

¹¹⁶ Document in Support of the Appeal, p. 17.

Report and the Mid-Term Report relied upon by the Single Judge.¹¹⁷ Firstly, Mr Gbagbo argued that the Final Report differs markedly from the Mid-Term Report insofar as a number of accusations against pro-Gbagbo elements have been dropped, and the thrust of the Final Report levels responsibility for the situation in Côte d'Ivoire at the Ouattara regime, rather than Mr Gbagbo's supporters.¹¹⁸ It is noted in this connection that the Mid-Term Report was relied upon by the Single Judge in her Decision of 12 November 2012 in relation to the first article 60 (3) review of Mr Gbagbo's detention, as well as in the Decision of 12 March 2013 in relation to the second article 60 (3) review. In the former decision, the Single Judge relied on the Mid-Term Report to establish, *inter alia*, "the existence and activities of a network of Mr Gbagbo's supporters who appear to be raising funds in Europe in his support"¹¹⁹ and that "the network of Mr Gbagbo's supporters is well organized and capable of conducting military operations".¹²⁰ In the Decision of 12 March 2013, the Single Judge referred to the findings of the Decision of 12 November 2012, including those based on the Mid-Term Report, to find that no changed circumstances existed for the purposes of article 60 (3) of the Statute.¹²¹

59. Notwithstanding Mr Gbagbo's Submissions of 3 July 2013 questioning the reliability of the Group of Experts, the Pre-Trial Chamber held in the Impugned Decision that Mr Gbagbo was merely seeking to challenge a previous finding of the Single Judge by "arguing that the evidentiary basis for it was unsound".¹²² On this basis, the Pre-Trial Chamber elected not to address these arguments,¹²³ in light of the

¹¹⁷ Impugned Decision, para. 42.

¹¹⁸ Mr Gbagbo's Submissions of 3 July 2013, para. 47.

¹¹⁹ Decision of 12 November 2012, para. 48, referring to Mid-Term Report (ICC-02/11-01/11-285-Anx1), paras 132-133.

¹²⁰ Decision of 12 November 2012, para. 55, referring to Mid-Term Report, para. 31 and pp. 108-109.

¹²¹ Decision of 12 March 2013, para. 35, referring to para. 55 of the Decision of 12 November 2012: "[h]igh-ranking representatives of Mr Gbagbo's former regime, members of militias such as the *Jeunes Patriotes* and officials of the armed and security forces, took refuge in neighbouring countries like Benin, Ghana, Liberia and Togo after the post-electoral violence in Côte d'Ivoire. According to the same document, these groups of exiled representatives of the former Ivorian regime are suspected of organising and financing military operations in Côte d'Ivoire, recruiting mercenaries and purchasing weapons. The available material alleges specifically that a meeting took place in Takoradi, Ghana, on 12 July 2012, in which supporters of Mr Gbagbo's former regime discussed the establishment of a joint action plan to regain power in Côte d'Ivoire. The material available further suggests that the network of Mr Gbagbo's supporters is well organized and capable of conducting military operations. The report also lists operations recently launched on Ivorian territory which could be attributable to the pro-Gbagbo network referred to above".

¹²² Impugned Decision, para. 40.

¹²³ Impugned Decision, para. 40.

Appeals Chamber's finding that "[t]he Chamber does not have to enter findings on the circumstances already decided upon in the ruling on detention" and does not have to "entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions".¹²⁴

60. Secondly, the Pre-Trial Chamber in the Impugned Decision determined that the Final Report itself could, in fact, be relied upon, finding that, "bearing in mind the nature of the present exercise and the principles applicable to factual findings, [...] the Group of Experts Final Report provides sufficiently detailed information which can be relied upon for the purpose of determining, in line with article 58(1)(b) of the Statute, whether "[t]he arrest of the person appears necessary".¹²⁵

2. *Mr Gbagbo's submissions before the Appeals Chamber*

61. Mr Gbagbo advances two strands of argument in relation to the third ground of appeal: (i) he challenges the finding in the Impugned Decision that the arguments he advances in relation to the Group of Experts Reports do not constitute "changed circumstances",¹²⁶ and (ii) he challenges the Impugned Decision's finding that the reports satisfy the standard of proof applicable to the present proceedings.¹²⁷

62. In relation to the first strand of his argument, Mr Gbagbo contends that the Pre-Trial Chamber, in dismissing his arguments about the unreliability of the Group of Experts Reports, was overly restrictive in its interpretation of "changed circumstances", and erred in law in failing to assess the new evidence that Mr Gbagbo had provided for this purpose. He argues that evidence he puts forward points to the Group of Experts' alleged lack of credibility and the fact that some of their findings are devoid of factual foundation. Therefore, in Mr Gbagbo's submission, this should have been construed as "changed circumstances" for the purposes of article 60 (3) of the Statute, particularly in light of the fact that "their report is practically the sole source relied upon by both the Prosecution and the Single Judge, as well as, subsequently, the Chamber itself in refusing to grant provisional release".¹²⁸

¹²⁴ Impugned Decision, para. 40, erroneously referring to para. 32 instead of para. 31 of the Impugned Decision. *See Bemba* OA 4 Judgment, para. 53.).

¹²⁵ Impugned Decision, para. 42.

¹²⁶ Document in Support of the Appeal, p. 13.

¹²⁷ Document in Support of the Appeal, p. 14.

¹²⁸ Document in Support of the Appeal, para. 48.

63. Mr Gbagbo avers in relation to the second strand of his argument that the Pre-Trial Chamber failed to provide any reasons for why it dismissed these arguments, instead stating that it had determined that the Group of Experts Final Report was sufficiently probative in light of the “principles applicable to factual findings” articulated in its 13 July 2012 Decision.¹²⁹ Mr Gbagbo argues that the existence of such ill-defined “principles” does not, in and of itself, justify the dismissal of the Defence arguments,¹³⁰ and that the Pre-Trial Chamber failed to explain how they were applied in the context of the Impugned Decision.¹³¹ He submits that there is an absence of “objective criteria concerning the required standard of proof”, or reasoning from the Judges, in relation to the Final Report.¹³²

64. In relation to his sixth ground of appeal, Mr Gbagbo argues that the Pre-Trial Chamber “manifestly erred in fact by relying on the expert report to justify the continued detention of President Gbagbo, having refused to consider the evidence presented by the Defence questioning the veracity and therefore the probative value of this report (see Ground 3)”.¹³³ He argues that, on the basis of this evidence (for example, Mr Gbagbo’s questioning of the qualifications of the report’s authors and its use of anonymous sources), the Pre-Trial Chamber should have dismissed the report.¹³⁴ He avers that the Pre-Trial Chamber ought to have “reviewed the accusations that were discarded between the midterm report and the final report”, and submits that the Pre-Trial Chamber’s findings in relation to the Final Report were infected by the Single Judge’s uncritical acceptance of the Mid-Term Report, the findings of whom the Pre-Trial Chamber adverted in the Impugned Decision.¹³⁵

3. *The Prosecutor’s submissions before the Appeals Chamber*

65. The Prosecutor argues that Mr Gbagbo’s third ground of appeal does not amount to a legal error but rather shows a mere disagreement with the Pre-Trial Chamber’s conclusion that the Final Report could be relied upon to determine whether his detention is justified under article 58 (1) (b) of the Statute.¹³⁶ She argues

¹²⁹ Impugned Decision, para. 42.

¹³⁰ Document in Support of the Appeal, para. 50.

¹³¹ Document in Support of the Appeal, para. 51.

¹³² Document in Support of the Appeal, para. 53.

¹³³ Document in Support of the Appeal, para. 66.

¹³⁴ Document in Support of the Appeal, para. 66.

¹³⁵ Document in Support of the Appeal, para. 71.

¹³⁶ Prosecutor’s Response to the Document in Support of the Appeal, para. 37.

further that, in decrying the Pre-Trial Chamber's reliance on the "principles applicable to factual findings", Mr Gbagbo fails to identify what the correct legal standard should be.¹³⁷ The Prosecutor avers that the Pre-Trial Chamber did, in fact consider the factors which would arguably undermine the reliability of the Final Report,¹³⁸ with reference to the applicable standard by which it assessed the evidence before it.¹³⁹ She argues that, therefore, the Pre-Trial Chamber did not err in concluding that the Final Report could be relied upon "to establish jointly, with other factors, the necessity of the Appellant's arrest pursuant to Article 58(1)(b)".¹⁴⁰

66. The Prosecutor argues that Mr Gbagbo's sixth ground of appeal also "fails to establish that the Chamber's reliance on the Final Report is unreasonable".¹⁴¹ She notes that the Pre-Trial Chamber considered and dismissed Mr Gbagbo's submissions in relation to the lack of reliability and probative value of the Final Report.¹⁴² The Prosecutor reiterates that the Chamber carefully considered the differences between the Mid-Term Report and the Final Report, concluding "that the network of the Appellant's supporters was in existence and still active, notwithstanding a reduction of its activity".¹⁴³ She argues that the Pre-Trial Chamber therefore did not err in finding no change of circumstances in relation to the existence of a network of Mr Gbagbo's supporters.¹⁴⁴

4. *Observations of the Victims*

67. The Victims submit that the Final Report does not constitute a "changed circumstance" for the purposes of article 60 (3) "due to a lack of any bearing on the conditions under article 58(1)".¹⁴⁵ The Victims concur with the Pre-Trial Chamber's standard in assessing changed circumstances that "the existence of new or additional evidence for the same facts does not, as such, constitute a changed circumstance,

¹³⁷ Prosecutor's Response to the Document in Support of the Appeal, para. 36.

¹³⁸ Prosecutor's Response to the Document in Support of the Appeal, para. 38, erroneously referring to ICC-02/11-01/11-466-Conf, paras 46-47 (*see instead* ICC-02/11-01/11-446-Conf).

¹³⁹ Prosecutor's Response to the Document in Support of the Appeal, para. 38, referring to Decision of 13 July 2012, para. 48.

¹⁴⁰ Prosecutor's Response to the Document in Support of the Appeal, para. 39.

¹⁴¹ Prosecutor's Response to the Document in Support of the Appeal, para. 48.

¹⁴² Prosecutor's Response to the Document in Support of the Appeal, para. 48, referring to her arguments presented in relation to Mr Gbagbo's third ground of appeal at paras 36-39.

¹⁴³ Prosecutor's Response to the Document in Support of the Appeal, para. 49, referring to Impugned Decision, paras 41-42.

¹⁴⁴ Prosecutor's Response to the Document in Support of the Appeal, para. 49.

¹⁴⁵ Victims' Observations, para. 37.

insofar as it does not establish previously unknown facts that could amount to changed circumstances”.¹⁴⁶

5. *Determination by the Appeals Chamber*

68. In relation to his third ground of appeal, the Appeals Chamber finds that, to the extent that he argues that the Pre-Trial Chamber should have re-considered its previous findings that were based on the Group of Experts’ Mid-Term Report, Mr Gbagbo’s Submissions of 3 July 2013 did not contain “new evidence”, as he is now claiming on appeal.¹⁴⁷ Rather, he raised before the Pre-Trial Chamber a number of arguments, generally challenging the quality and reliability of the Group of Experts’ work. The majority of these arguments (for instance, the provenance of the experts and their purported lack of familiarity with the situation in Côte d’Ivoire) could have been raised in relation to the Decision of 12 November 2012 or of 12 March 2013, which relied upon the findings of the Mid-Term Report. The Appeals Chamber finds that, without more, the mere raising of new arguments does not amount to “changed circumstances” that would have required the Pre-Trial Chamber to reconsider its previous reliance on the Mid-Term Report.

69. In relation to the second strand of Mr Gbagbo’s arguments that is directed at the Final Report itself, being that the Group of Experts relied on very little documentary evidence in drawing their ultimate conclusions,¹⁴⁸ the Appeals Chamber finds no error of law on the part of the Pre-Trial Chamber in failing to analyse the probative value of the Final Report with reference to an appropriate standard. The Pre-Trial Chamber did, in fact, consider the factors which may have impacted on the reliability of the Final Report,¹⁴⁹ with reference to the applicable standard by which it assessed the evidence before it.¹⁵⁰

¹⁴⁶ Victims’ Observations, para. 37, referring to Impugned Decision, para. 40.

¹⁴⁷ See Document in Support of the Appeal, para. 48.

¹⁴⁸ Mr Gbagbo’s Submissions of 3 July 2013, para. 47.

¹⁴⁹ Impugned Decision, para. 42, referring to Mr Gbagbo’s Submissions of 3 July 2013, paras 46-47.

¹⁵⁰ Impugned Decision, para. 42, referring to the principles applicable to factual findings” in its Decision of 13 July 2012 at para. 48 - “[s]pecifically with respect to article 58(1)(b)(i) of the Statute, the Appeals Chamber has also held that ‘any determination by a Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction’. The Appeals Chamber has further held that ‘the apparent necessity of continued detention in order to ensure the detainee’s appearance at trial does not necessarily have to be established on the basis of one factor taken in isolation. It may also be established on the basis of an analysis of all relevant factors taken together” (footnotes omitted).

70. In sum, the Appeals Chamber finds that the Pre-Trial Chamber did not err in concluding that Mr Gbagbo's arguments advanced in relation to the work of the Group of Experts did not constitute "changed circumstances", nor did it err in holding that it could rely upon the Final Report to provide "sufficiently detailed information" for the purposes of article 58 (1) (b) considerations. Therefore, Mr Gbagbo's third ground of appeal is dismissed.

71. The Appeals Chamber finds that Mr Gbagbo's sixth ground of appeal should likewise be dismissed. It merely rehearses his arguments in relation to his third ground of appeal; the difference between an allegation of an error on the part of the Pre-Trial Chamber in declining to assess the *probity of the evidence* supporting the Final Report, and an allegation of an error in relation to a *subsequent reliance* on the said report, is negligible. The sixth ground of appeal is therefore dismissed *in limine*.

E. Fourth and Fifth Grounds of Appeal

72. Mr Gbagbo's fourth ground of appeal is that the Pre-Trial Chamber committed an error of fact in considering that the publication of the Final Report did not constitute a change of circumstances requiring a review of article 58 (1) (b) conditions.¹⁵¹ His fifth ground of appeal is that the Chamber committed an error of fact by refusing to consider the links between the Prosecution and the Group of Experts¹⁵² as well as an error of law in failing to clarify this issue upon Mr Gbagbo's request.¹⁵³

1. Relevant part of the Impugned Decision

73. In the Impugned Decision, the Pre-Trial Chamber referred to the *contents* of the Final Report as being conclusive of the fact that the capacity of the network of Mr Gbagbo's supporters, although somewhat diminished, still reflected the risks identified in the Decision of 13 July 2012.¹⁵⁴ It did not consider the *fact* of the publication of the final report itself in terms of a "changed circumstances" analysis. Nor did the Pre-Trial Chamber consider it necessary to re-visit its previous findings

¹⁵¹ Document in Support of the Appeal, p. 15.

¹⁵² Document in Support of the Appeal, p. 15.

¹⁵³ Document in Support of the Appeal, para. 65.

¹⁵⁴ Impugned Decision, para. 41.

that were based on the Mid-Term Report and assess whether those findings are supported in the Final Report.

74. Furthermore, as noted in the foregoing section, the Pre-Trial Chamber referred in the Impugned Decision to the list of factors raised by Mr Gbagbo “which in [his] submission militate against reliance on the work of the Group of Experts who produced the report in question and a previous report relied upon by the Single Judge”.¹⁵⁵ One of these factors raised in Mr Gbagbo’s Submissions of 3 July 2013 was the allegation that an improper link existed between the Office of the Prosecutor and the Group of Experts.¹⁵⁶ The Impugned Decision did not advert specifically to this issue, save for footnoting this reference to Mr Gbagbo’s Submissions of 3 July 2013, the substance of which it dismissed.¹⁵⁷

2. *Mr Gbagbo’s submissions before the Appeals Chamber*

75. In relation to his fourth ground of appeal, Mr Gbagbo argues that the Pre-Trial Chamber erred in fact by failing to characterise the publication of the Final Report as “changed circumstances”. He submits that, because all of the Single Judge’s findings were based on the Mid-Term Report, “it was for the Pre-Trial Chamber to review the findings and test them systematically in the light of the final report”.¹⁵⁸

76. In relation to his fifth ground of appeal, Mr Gbagbo argues that “there are established links between the group of experts and the Prosecution”.¹⁵⁹ He argues, *inter alia*, that the information regarding the alleged existence of a pro-Gbagbo network and Mr Gbagbo’s access to funds, upon which Mr Gbagbo’s article 58 (1) (b) risks were initially assessed, was sourced not from “the supposedly neutral and objective group of experts”, but from material that “originated from the Office of the

¹⁵⁵ Impugned Decision, para. 42, footnote 55, referring to Mr Gbagbo’s Submissions of 3 July 2013, paras 46–47.

¹⁵⁶ Mr Gbagbo’s Submissions of 3 July 2013, para. 47, stating that “[t]he ICC Prosecutor seems to have provided pieces of information to the experts, who made use of them in their report. Yet the Pre-Trial Chamber’s 3 June 2013 decision casts doubt on the probative value of the Prosecution evidence. Further still, the Prosecution drew on the experts’ work to challenge President Gbagbo’s release, without ever informing the Chamber and the Defence that it had held meetings with the experts and that information was exchanged. It behoves the Prosecution to illuminate the Chamber and the Defence in this connection” (footnotes omitted).

¹⁵⁷ Impugned Decision, para. 42.

¹⁵⁸ Document in Support of the Appeal para. 56.

¹⁵⁹ Document in Support of the Appeal, para. 57.

Prosecutor”.¹⁶⁰ He argues that the work of the Group of Experts is therefore unreliable, impugning the Final Report’s quality as a credible source,¹⁶¹ and submits that the Prosecutor “misled both the Chamber and the Defence” by failing to reveal these links.¹⁶²

77. Mr Gbagbo argues specifically that the findings in the Final Report are tainted by the fact that it contains a duplication of the Document Containing the Charges (hereinafter: “DCC”) submitted by the Prosecutor on 17 January 2013¹⁶³ which was considered insufficient for the purposes of confirming the charges against Mr Gbagbo.¹⁶⁴ He argues that the majority of the Group of Experts’ assertions repeat corresponding paragraphs from the DCC¹⁶⁵ and that they relied on the statements of high-ranking officers of former Ivorian security forces, who are also Prosecution witnesses, and who they could not have met without the Prosecutor’s consent.¹⁶⁶ Mr Gbagbo submits, that, on this basis, the Pre-Trial Chamber erred in law by failing to clarify whether an improper link existed between the Office of the Prosecutor and the Group of Experts.¹⁶⁷

3. *The Prosecutor’s submissions before the Appeals Chamber*

78. The Prosecutor argues that Mr Gbagbo’s submissions in relation to his fourth ground of appeal misinterpret the jurisprudence pertaining to “changed circumstances”, insofar as article 60 (3) requires “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”.¹⁶⁸ She submits that the mere fact of the publication of the Final Report fails this test,¹⁶⁹ and that, in any event, the Pre-Trial Chamber engaged in a factual comparison between the Mid-Term Report and the Final Report, drawing its conclusions accordingly. The Prosecutor submits that no

¹⁶⁰ Document in Support of the Appeal, para. 58.

¹⁶¹ Document in Support of the Appeal, para. 58.

¹⁶² Document in Support of the Appeal, paras 58-60.

¹⁶³ “Amended Document Containing the Charges”, 17 January 2013, ICC-02/11-01/11-357-Conf-Anx1-ENG.

¹⁶⁴ Document in Support of the Appeal, para. 61, referring to Adjournment Decision, para. 15.

¹⁶⁵ Document in Support of the Appeal, para. 63.

¹⁶⁶ Document in Support of the Appeal, para. 62.

¹⁶⁷ Document in Support of the Appeal, para. 65.

¹⁶⁸ Prosecutor’s Response to the Document in Support of the Appeal, paras 20,41..

¹⁶⁹ Prosecutor’s Response to the Document in Support of the Appeal, para. 41.

error was thus occasioned and that Mr Gbagbo's fourth ground of appeal should be dismissed.¹⁷⁰

79. In relation to Mr Gbagbo's fifth ground of appeal, the Prosecutor notes that Mr Gbagbo alleges an error of fact in the title of his fifth ground of appeal, but in the text argues that it constitutes a legal error.¹⁷¹ She avers that, regardless of the qualification of this ground, Mr Gbagbo provides no concrete evidence to support collusion between the Prosecutor and the Group of Experts,¹⁷² and that the allegations are "frivolous and unsubstantiated".¹⁷³ She submits that, while the Prosecution and Group of Experts had two meetings on 14 March 2012 and 14 March 2013, "these meetings were for lead purposes only".¹⁷⁴ The Prosecutor emphasises that no information regarding ongoing investigations was shared, and no access was given to Prosecution witnesses.¹⁷⁵ The Prosecutor also disputes the purported similarities between the DCC and the Final Report, noting that the former is significantly more detailed than the latter, and that any overlap is due to the essentially similar nature of the two investigations.¹⁷⁶

4. *Observations of victims*

80. The Victims' Observations in relation to the Final Report are outlined in the previous section at paragraph 67.

5. *Determination by the Appeals Chamber*

81. In the view of the Appeals Chamber, the mere fact of the Final Report's publication cannot support the existence of "changed circumstances" as defined by the Appeals Chamber's jurisprudence. Only the facts contained therein could possibly result in "changed circumstances" for the purposes of impacting upon underlying article 58 (1) factors. Furthermore, it is apparent from the Impugned Decision that the Pre-Trial Chamber *did* consider the facts contained within the Final Report. The Appeals Chamber also notes that Mr Gbagbo does not indicate which purported discrepancies between the Mid-Term Report and the Final Report should have been

¹⁷⁰ Prosecutor's Response to the Document in Support of the Appeal, para. 42.

¹⁷¹ Prosecutor's Response to the Document in Support of the Appeal, para. 43.

¹⁷² Prosecutor's Response to the Document in Support of the Appeal, para. 44.

¹⁷³ Prosecutor's Response to the Document in Support of the Appeal, para. 46.

¹⁷⁴ Prosecutor's Response to the Document in Support of the Appeal, para. 44.

¹⁷⁵ Prosecutor's Response to the Document in Support of the Appeal, para. 44.

¹⁷⁶ Prosecutor's Response to the Document in Support of the Appeal, para. 45.

taken into account by the Pre-Trial Chamber, or how they would have impacted on the Pre-Trial Chamber's findings.

82. In relation to his fifth ground of appeal, the Appeals Chamber finds that Mr Gbagbo fails to provide any concrete evidence establishing collusion between the Prosecutor and the Group of Experts and that his allegations are speculative at best. For example, Mr Gbagbo argues that “the experts continually refer to ‘reliable sources’ without ever specifying what kind of sources these might be”,¹⁷⁷ inferring that some of these sources may stem from the Office of the Prosecutor, and that, consequently, the Pre-Trial Chamber erred in law in failing to assess “whether one of the ‘reliable sources’ referred to by the experts is the Prosecutor of the ICC”.¹⁷⁸

83. The Appeals Chamber does not find such arguments persuasive. Recalling that it “will interfere only in the case of a clear error”,¹⁷⁹ the Appeals Chamber finds that the Pre-Trial Chamber did not err in failing to find that the “evidence” presented by Mr Gbagbo in respect of the Office of the Prosecutor’s conduct indisputably constitutes a “changed circumstance”.

84. The Appeals Chamber therefore dismisses Mr Gbagbo’s fourth and fifth grounds of appeal.

F. Seventh Ground of Appeal

85. Mr Gbagbo’s seventh ground of appeal is that the Pre-Trial Chamber committed an error of law in finding, without giving reasons, that Mr Gbagbo could have access to funds.¹⁸⁰

1. *Relevant procedural context and part of the Impugned Decision*

86. In the Impugned Decision, the Pre-Trial Chamber noted that Mr Gbagbo had argued in his 3 July 2013 Submissions that the accounts referred to in the Final Report are not being used by him.¹⁸¹ It also noted that the Prosecutor has been unable to

¹⁷⁷ Document in Support of the Appeal, para. 61.

¹⁷⁸ Document in Support of the Appeal, paras 64-65.

¹⁷⁹ *Bemba* OA 2 Judgment, para. 61; *Mbarushimana* OA Judgment, para. 17.

¹⁸⁰ Document in Support of the Appeal, p. 18.

¹⁸¹ Impugned Decision, para. 46, referring to Mr Gbagbo’s 3 July 2013 Submissions, paras 50-68.

ascertain if the said accounts are, in fact, frozen.¹⁸² The Pre-Trial Chamber considered the accounts referred to in the Final Report to be, “in all likelihood”, the same as those previously reported as frozen, and thus accepted that “Mr Gbagbo could not make use of the assets on these accounts in order to abscond”.¹⁸³

87. However, in analysing whether there existed “changed circumstances” for the purposes of its determination pursuant to article 60 (3), the Impugned Decision noted that “the freezing of these accounts was known to the Single Judge at the time of the issuance of the Decision of 13 July 2012, and the finding that certain accounts may not have been frozen was made in relation to other accounts”.¹⁸⁴ The Pre-Trial Chamber noted that no new information regarding these other accounts had emerged, and thus the previous findings on this point remained valid.¹⁸⁵ The Impugned Decision further noted that Mr Gbagbo’s arguments regarding the resources of the pro-Gbagbo support network did not “seek to identify changed circumstances but repeat[ed] previously unsuccessful submissions”, and therefore the Pre-Trial Chamber declined to respond to them.¹⁸⁶

88. The Impugned Decision stated that only one of Mr Gbagbo’s arguments regarding access to funds is premised on the existence of “changed circumstances”, namely that, in its Final Report, the Group of Experts abandoned the assertion that Mr Gbagbo’s supporters appeared to be raising funds in Europe in his support.¹⁸⁷ However, the Pre-Trial Chamber did not consider this factor to be of weight insofar as the Final Report “contains other specific information elucidating the financial capabilities and activities of the network of Mr Gbagbo’s supporters, and makes reference also to the collection of funds in the Ivorian diaspora”.¹⁸⁸ Therefore, the Pre-Trial Chamber considered there was “no change in the relevant circumstances” for the purposes of article 60 (3) concerning the possibility of Mr Gbagbo having access to funds that may be used to assist him in absconding, should he be released.¹⁸⁹

¹⁸² Impugned Decision, para. 46, referring to the Prosecutor’s 3 July 2013 Submissions, para. 27.

¹⁸³ Impugned Decision, para. 46.

¹⁸⁴ Impugned Decision, para. 47, referring to Decision of 13 July 2013, para. 59.

¹⁸⁵ Impugned Decision, para. 47.

¹⁸⁶ Impugned Decision, para. 48.

¹⁸⁷ Impugned Decision, para. 49, referring to Mr Gbagbo’s 3 July 2013 Submissions, para. 71.

¹⁸⁸ Impugned Decision, para. 49, referring to Group of Experts Final Report, paras 30-33 and 40.

¹⁸⁹ Impugned Decision, para. 50.



2. *Mr Gbagbo's submissions before the Appeals Chamber*

89. In his Document in Support of the Appeal, Mr Gbagbo argues that the Pre-Trial Chamber erred in law in finding that Mr Gbagbo could have access to funds, without stating reasons for this finding.¹⁹⁰ However, he also appears to be alleging a factual error insofar as he argues that he has only two current bank accounts (those mentioned in the Final Report that have been held to be frozen), and that, on the basis of his provision of “concrete evidence” to the Pre-Trial Chamber,¹⁹¹ “it remains that proof has been provided that **no ‘other accounts’ exist** and that the Pre-Trial Chamber ignored this fact”.¹⁹² He also argues that it is “impossible for the Defence to prove that such accounts do not exist”,¹⁹³ and that the risk identified by the Pre-Trial Chamber that he still had access to other or hidden accounts is based on a mere series of hypotheses, thereby rendering it impossible for Mr Gbagbo to prove changed circumstances.¹⁹⁴

90. Mr Gbagbo repeats his criticism of the Pre-Trial Chamber’s “lack of reasoning” in previous decisions in relation to finding that unfrozen bank accounts may exist,¹⁹⁵ arguing further that it is now incumbent on the Pre-Trial Chamber “as requested by the Appeals Chamber” to analyse the evidence tendered by the parties and “make reasoned findings thereon”.¹⁹⁶

3. *Prosecutor's submissions before the Appeals Chamber*

91. The Prosecutor argues that the findings in the Impugned Decision in relation to access to funds were “reasonable and adequately supported in both law and fact”.¹⁹⁷ She recalls the standard under article 60 (3) of the Statute whereby an obligation to review a decision is only triggered by the existence of “changed circumstances” – where no such circumstances exist, a *de novo* decision is not required to be issued.¹⁹⁸ The Prosecutor argues that, therefore, the Pre-Trial Chamber did not err in holding that the “previous findings remain valid” in relation to Mr Gbagbo’s access to funds

¹⁹⁰ Document in Support of the Appeal, p. 18.

¹⁹¹ Document in Support of the Appeal, para. 76.

¹⁹² Document in Support of the Appeal, para. 75 (emphasis in original).

¹⁹³ Document in Support of the Appeal, para. 77.

¹⁹⁴ Document in Support of the Appeal, para. 77.

¹⁹⁵ Document in Support of the Appeal, para. 78.

¹⁹⁶ Document in Support of the Appeal, para. 79.

¹⁹⁷ Prosecutor’s Response to the Document in Support of the Appeal, para. 50.

¹⁹⁸ Prosecutor’s Response to the Document in Support of the Appeal, para. 52.

to the extent that no further information has been provided about whether “other accounts” have since been frozen.¹⁹⁹

92. The Prosecutor also refutes Mr Gbagbo’s contention that the Pre-Trial Chamber’s factual finding that “certain accounts [belonging to Mr Gbagbo] may not have been frozen” is erroneous.²⁰⁰ She submits that the Appeals Chamber has confirmed that detention under article 58 (1) (b) needs only be justified by the “possibility, not the inevitability, of a future occurrence” where this is based on concrete evidence.²⁰¹ She argues that the Decision of 13 July 2012, which made the finding that some accounts may not be frozen, *was* based on concrete evidence, and that this evidence was itself cited in the Impugned Decision.²⁰² On the basis that neither Mr Gbagbo nor the Prosecutor possesses further evidence about whether the “other” bank accounts have since been frozen, the Prosecutor argues that the Impugned Decision contains no error.²⁰³

4. *Observations of the Victims*

93. The Victims did not make observations specifically relating to this ground of appeal.

5. *Determination by the Appeals Chamber*

94. The Appeals Chamber notes that Mr Gbagbo does not explicitly allege an error of fact in relation to the Pre-Trial Chamber’s appraisal of his access to funds. He argues instead that an error of law was occasioned by the Pre-Trial Chamber’s failure to give reasons for its findings. However, the Appeals Chamber notes that, according to its jurisprudence, there is no requirement to give reasoning or engage in a *de novo* review of detention where no changed circumstances are established insofar as “[t]he Chamber does not have to enter findings on the circumstances already decided upon in the ruling on detention”.²⁰⁴ Therefore, it follows that it would need to be established that “changed circumstances” existed in relation to Mr Gbagbo’s financial

¹⁹⁹ Prosecutor’s Response to the Document in Support of the Appeal, para. 52.

²⁰⁰ Prosecutor’s Response to the Document in Support of the Appeal, para. 53.

²⁰¹ Prosecutor’s Response to the Document in Support of the Appeal, para. 53, referring to the *Gbagbo* OA Judgment, para. 56.

²⁰² Prosecutor’s Response to the Document in Support of the Appeal, para. 53, referring to Impugned Decision, para. 47, footnote, 62.

²⁰³ Prosecutor’s Response to the Document in Support of the Appeal, para. 54.

²⁰⁴ *Bemba* OA 4 Judgment, para. 53.

situation in order to support an argument that an error of law was occasioned due to lack of reasoning.

95. Mr Gbagbo initially appears to argue (albeit not explicitly) that “changed circumstances” exist in light of new facts he presents in relation to there being only two bank accounts belonging to Mr Gbagbo, both of which have been previously identified as frozen,²⁰⁵ insofar as “it remains that proof has been provided that **no ‘other accounts’ exist** and that the Pre-Trial Chamber ignored this fact”.²⁰⁶ However, Mr Gbagbo then argues, somewhat incongruously, that the non-existence of other accounts is impossible to prove,²⁰⁷ and that he cannot therefore establish changed circumstances to warrant a review of the Pre-Trial Chamber’s detention ruling on this issue.

96. The Appeals Chamber finds that there was no clear error in the Pre-Trial Chamber’s conclusion that the previous findings in relation to “other accounts” remained valid. While the Pre-Trial Chamber is required to “weigh the Prosecutor’s submissions against the submissions, if any, of the detained person” in this regard,²⁰⁸ on appeal the burden is on Mr Gbagbo to clearly set out the Pre-Trial Chamber’s error and “to indicate, with sufficient precision, how this error would have materially affected the impugned decision” in order to trigger the Appeals Chamber’s review power.²⁰⁹ The Appeals Chamber finds that Mr Gbagbo has not advanced any arguments that point to the existence of changed circumstances, or to an error of law based on a lack of reasoning. For this reason, and in the absence of any further information coming to light since the Decision of 13 July 2012 regarding unfrozen bank accounts, the Appeals Chamber dismisses Mr Gbagbo’s seventh ground of appeal.

²⁰⁵ Document in Support of the Appeal, para. 75.

²⁰⁶ Document in Support of the Appeal, para. 75.

²⁰⁷ Document in Support of the Appeal, para. 77.

²⁰⁸ *Bemba* OA 4 Judgment, para. 52.

²⁰⁹ Prosecutor’s Response to the Document in Support of the Appeal, para. 17, referring to, *inter alia*, *Bemba* OA 3 Judgment, para. 102.

G. Eighth Ground of Appeal

97. Mr Gbagbo's eighth ground of appeal is that the Pre-Trial Chamber committed an error of fact in considering that a pro-Gbagbo support network exists.²¹⁰

1. *Relevant part of the Impugned Decision*

98. In examining whether "changed circumstances" existed pursuant to article 60 (3) in the context of article 58 (1) (b) in the Impugned Decision, the Pre-Trial Chamber noted its previous findings of the risks under article 58 (1) (b) (i)-(iii) associated with the existence of a "large and well-organised network of political supporters of Mr Gbagbo" as articulated in the Decisions of 13 July 2012 and 12 November 2012 and subsequent article 60 (3) reviews (see Second Ground of Appeal above). In assessing the current situation in relation to the pro-Gbagbo network, the Pre-Trial Chamber relied upon the findings of the Final Report,²¹¹ holding that it provided "sufficiently detailed information which can be relied upon for the purpose of determining, in line with article 58(1)(b) of the Statute, whether '[t]he arrest of the person appears necessary'".²¹²

2. *Mr Gbagbo's submissions before the Appeals Chamber*

99. Mr Gbagbo argues that the Pre-Trial Chamber based the existence of a pro-Gbagbo network on the findings of the Mid-Term Report,²¹³ referring to paragraph 41 of the Impugned Decision, which actually refers to their consideration of the *Final Report*. Mr Gbagbo then argues that he has demonstrated that the findings of both reports are unfounded.²¹⁴ He gives as an example that one of the few items of evidence listed in the Final Report is the minutes of a meeting of a group of exiled Ivorians "who wished to call upon the assistance of Miss California to increase international public awareness of their cause", and that the said minutes show that the group has no resources.²¹⁵ Mr Gbagbo concludes that the Pre-Trial Chamber erred in fact in relying on unsubstantiated assertions to support the existence of a network.²¹⁶

²¹⁰ Document in Support of the Appeal, p. 20.

²¹¹ Impugned Decision, paras 40-42, referring to Final Report, para. 19.

²¹² Impugned Decision, para. 42.

²¹³ Document in Support of the Appeal, para. 80, referring to Impugned Decision, para. 41.

²¹⁴ Document in Support of the Appeal, para. 81.

²¹⁵ Document in Support of the Appeal, para. 84, referring to Final Report, Annex 6.

²¹⁶ Document in Support of the Appeal, para. 85.

3. *The Prosecutor's submissions before the Appeals Chamber*

100. The Prosecutor disputes the allegation that the Pre-Trial Chamber relied on the Mid-Term Report in the Impugned Decision, noting that the Pre-Trial Chamber concluded on the basis of an analysis of the *Final Report* that no changed circumstances existed regarding the network of supporters in relation to its previous findings on the issue.²¹⁷ The Prosecutor argues that Mr Gbagbo has not demonstrated any factual error, and “merely rehashes the arguments explicitly rejected by the Chamber”,²¹⁸ failing to show the Pre-Trial Chamber’s conclusion was unreasonable. She submits that Mr Gbagbo has even lifted *verbatim* certain paragraphs from his 3 July 2013 Submissions.²¹⁹ She notes that the Impugned Decision regarded Mr Gbagbo’s disputation of the conclusions in the *Final Report* as “unfounded” to be merely “‘evidence for the same facts’ which ‘does not ... constitute a changed circumstance’”.²²⁰

4. *Observations of the Victims*

101. The Victims do not make any observations specifically relating to this ground of appeal.

5. *Determination by the Appeals Chamber*

102. The Appeals Chamber dismisses Mr Gbagbo’s eighth ground of appeal as it rehearses many of the same arguments in relation to his second ground of appeal and erroneously refers to the Mid-Term Report as the source of the Impugned Decision’s findings in relation to the ongoing existence of a pro-Gbagbo network. In fact, the findings in the Impugned Decision in relation to the existence of a pro-Gbagbo network were stated to be based on the evidence before it that, as of the issuance of the *Final Report*, “[t]hese groups have the capacity to conduct military operations with weapons and related materiel obtained in violation of the sanctions regime and to recruit combatants, inside and outside Côte d’Ivoire”.²²¹

²¹⁷ Prosecutor’s Response to the Document in Support of the Appeal, para. 56, referring to Impugned Decision, para. 41.

²¹⁸ Prosecutor’s Response to the Document in Support of the Appeal, para. 57.

²¹⁹ Prosecutor’s Response to the Document in Support of the Appeal, para. 57, referring to Mr Gbagbo’s Submissions of 3 July 2013, para. 86.

²²⁰ Prosecutor’s Response to the Document in Support of the Appeal, para. 58, referring to Impugned Decision, para. 40.

²²¹ Impugned Decision, para. 41.



103. Therefore, the Appeals Chamber finds that the Pre-Trial Chamber was not unreasonable in its reliance on the findings of the Final Report. In the absence of the identification of a clear error, and to the extent that an “appellant’s mere disagreement with the conclusions that the Pre-Trial Chamber drew from the available facts or the weight accorded to particular factors is not enough to establish a clear error”,²²² the Appeals Chamber considers that the Pre-Trial Chamber did not err in finding that there remains a network of pro-Gbagbo supporters.

H. Ninth Ground of Appeal

104. Mr Gbagbo’s ninth ground of appeal is that the Pre-Trial Chamber committed an error of law by not taking into account Mr Gbagbo’s health in its assessment of whether his continued detention remained necessary for any of the reasons set out in article 58 (1) (b) of the Statute.²²³

1. *Relevant procedural context and part of the Impugned Decision*

105. In Mr Gbagbo’s Submissions of 3 July 2013, he argued that, with the effluxion of time, the effects of detention on his health made any improvement unlikely and that there was a risk his condition would deteriorate.²²⁴ Relying on the medical reports of the experts commissioned by the Pre-Trial Chamber on 2 November 2012, Mr Gbagbo submitted that his condition cannot be treated in prison.²²⁵ In addition, he averred that since the Decision of 18 January 2013, the Registry has failed to make any proposal concerning his treatment and this must be understood as an indication that treatment cannot take place in detention.²²⁶ Thus, in Mr Gbagbo’s view the effects of incarceration for over two years, coupled with the impossibility of providing appropriate treatment, constituted changed circumstances to which the Pre-Trial Chamber should advert.²²⁷

106. In the Impugned Decision the Pre-Trial Chamber held that the “Defence’s submissions [were] limited to repeating arguments which were previously heard by the Chamber, and do not raise any new circumstance. Nevertheless, the Chamber,

²²² *Mbarushimana* OA Judgment, paras 21, 31.

²²³ Document in Support of the Appeal, p. 21.

²²⁴ Mr Gbagbo’s Submissions of 3 July 2013, para. 99.

²²⁵ Mr Gbagbo’s Submissions of 3 July 2013, para. 100.

²²⁶ Mr Gbagbo’s Submissions of 3 July 2013, paras 103-104.

²²⁷ Mr Gbagbo’s Submissions of 3 July 2013, para. 105.

aware of the ongoing concerns in relation to the state of health of Mr Gbagbo, and the passage of time, will explore the possibility for conditional release, as also explained below”.²²⁸

2. *Mr Gbagbo’s submissions before the Appeals Chamber*

107. Mr Gbagbo contends on appeal that the passing of time itself constitutes a changed circumstance with regard to his health and that by ignoring this, the Pre-Trial Chamber refused to take reality into account, or to heed the warnings issued by experts.²²⁹ In his view, “[t]he evolving nature of the pathologies from which he is suffering constitutes a change in circumstances” in light of which the Pre-Trial Chamber was required to assess whether the conditions under article 58 (1) (b) of the Statute were still met.²³⁰

3. *The Prosecutor’s submissions before the Appeals Chamber*

108. The Prosecutor submits that Mr Gbagbo’s arguments in relation to the Impugned Decision constitute a mere disagreement with the Chamber’s conclusions about his health. In the absence of any change in circumstances, the Prosecutor argues that the Pre-Trial Chamber was under no obligation to revisit its previous findings and enter a *de novo* decision.²³¹ In addition, the Prosecutor submits that Mr Gbagbo merely “recasts the arguments contained in his original submission and fails to bring any evidence to support this claim outside its reference to expert reports, the content of which has already been assessed by the Chamber in its Decision of 12 November 2012”.²³²

4. *Observations of the Victims*

109. The Victims aver that Mr Gbagbo’s contentions regarding his deteriorating health with the passing of time are unsupported by any evidence and constitute mere disagreement with previous findings of the Pre-Trial Chamber which were never

²²⁸ Impugned Decision, para. 51.

²²⁹ Document in Support of the Appeal, paras 89-90.

²³⁰ Document in Support of the Appeal, para. 90.

²³¹ Prosecutor’s Response to the Document in Support of the Appeal, paras 60-61.

²³² Prosecutor’s Response to the Document in Support of the Appeal, para. 63 (footnotes omitted).

appealed by Mr Gbagbo. Accordingly, the Victims argue that this ground of appeal should be dismissed.²³³

5. *Determination by the Appeals Chamber*

110. The Appeals Chamber recalls that in the *Gbagbo* OA Judgment, it was held that “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”.²³⁴ Further to this determination by the Appeals Chamber, the Pre-Trial Chamber, in its Decision of 12 November 2012, considered whether the state of Mr Gbagbo’s health had any impact on the existence of the grounds for detention under article 58 (1) (b) of the Statute, and concluded that this was not the case.

111. The Appeals Chamber notes that in the present appeal, Mr Gbagbo alleges that the Pre-Trial Chamber erred in failing to consider that the effluxion of time itself and the evolving nature of Mr Gbagbo’s illness are in and of themselves changed circumstances that have an impact on the need for Mr Gbagbo’s detention.²³⁵ In this regard, it is recalled that the Pre-Trial Chamber, in the Impugned Decision, did not enter into a discussion of the substance of Mr Gbagbo’s arguments, but noted that they merely repeated previous submissions and failed to raise a “new circumstance”. The Appeals Chamber finds that there is no discernible error in the Pre-Trial Chamber’s treatment of these alleged changed circumstances. Mr Gbagbo’s reference to the reports of medical experts did not constitute new evidence as these were previously assessed by the Pre-Trial Chamber.²³⁶ Thus in the absence of any evidence to support his assertion that the passing of time and the evolving nature of his illness are changed circumstances, the Chamber cannot be faulted for rejecting Mr Gbagbo’s arguments as being merely repetitive. Mr Gbagbo simply did not present any evidence that would demonstrate that his health has further deteriorated and that this would have any impact on the existence of grounds for his continued detention under article 58 (1) (b) of the Statute.

²³³ Victims’ Observations, para. 38.

²³⁴ *Gbagbo* OA Judgment, para. 87.

²³⁵ Document in Support of the Appeal, paras 89-90.

²³⁶ See, ICC-02/11-01/11-T-6-Conf-ENG; ICC-02/11-01/11-T-7-Conf-ENG; Decision of 2 November 2012.

112. The Appeals Chamber has previously held that “[t]he Chamber does not have to enter findings on the circumstances already decided upon in the ruling on detention” and does not have to “entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions”.²³⁷ Accordingly, this ground of appeal is dismissed.

I. Tenth Ground of Appeal

113. Mr Gbagbo’s tenth ground of appeal is that the Pre-Trial Chamber committed an error of law in its examination of the requirements for conditional release.²³⁸

1. Relevant procedural context and part of the Impugned Decision

114. In Mr Gbagbo’s Submissions of 3 July 2013, he argued in the alternative for his conditional release on account of the irreversible consequences of detention on his health, the guarantees furnished by Mr Gbagbo as to his appearance should he be released, and the guarantees furnished by [REDACTED] to comply with any conditions set by the Pre-Trial Chamber.²³⁹

115. In the Impugned Decision, the Pre-Trial Chamber referred to its previous finding that the “risks associated with Mr Gbagbo’s release and knowledge by the outside world of such release can at present only be effectively managed in the Court’s detention centre” and noted that the “risks continue to exist”.²⁴⁰ However, the Pre-Trial Chamber considered it appropriate to explore whether the risks could be sufficiently mitigated to permit conditional release. The Pre-Trial Chamber found that, “at this point in time, no concrete option to release Mr Gbagbo under conditions that would sufficiently mitigate those risks, is known to the Chamber”, and thus conditional release was not to be granted.²⁴¹

2. Mr Gbagbo’s submissions before the Appeals Chamber

116. Mr Gbagbo contends that the Pre-Trial Chamber erred in not reasoning why guarantees, for example, those imposed by the Judges, would not minimise the risks

²³⁷ See *Bemba* OA 4 Judgment, para. 53.

²³⁸ Document in Support of the Appeal, p. 22.

²³⁹ Mr Gbagbo’s Submissions of 3 July 2012, paras 111-114.

²⁴⁰ Impugned Decision, para. 55, referring to Decision of 12 March 2013, para. 44.

²⁴¹ Impugned Decision, para. 55.

and justify conditional release.²⁴² In addition, Mr Gbagbo argues that “it was incumbent upon the Pre-Trial Chamber to explain, point by point, why the numerous security measures proposed by [REDACTED] would not mitigate these risks”.²⁴³ In the absence of such an explanation, Mr Gbagbo argues that “it leaves the way open for arbitrary decisions”.²⁴⁴ Finally, Mr Gbagbo argues that the Pre-Trial Chamber had a duty to request further information from the host state about the possible conditions of conditional release.²⁴⁵

3. *The Prosecutor’s submissions before the Appeals Chamber*

117. The Prosecutor submits that Mr Gbagbo’s arguments should be dismissed as they are lacking in merit. In her view, the Pre-Trial Chamber would have considered the conditions set out in rule 119 (1) of the Rules of Procedure and Evidence before concluding that no concrete option is known to the Chamber that would mitigate the risks against conditional release.²⁴⁶ Furthermore, the Prosecutor avers that in the period under review, no State had offered to receive Mr Gbagbo. [REDACTED] proposal was considered by the Pre-Trial Chamber in its Decisions of 13 July 2012 and 12 November 2012 and rejected as being insufficient to mitigate the risks.²⁴⁷ Thus in her view, it would be “unreasonable to assume that old guarantees offered at a point in time are still standing”.²⁴⁸

4. *Observations of the Victims*

118. The victims do not make any observations in relation to this ground of appeal.

5. *Determination by the Appeals Chamber*

119. In relation to Mr Gbagbo’s arguments that the Pre-Trial Chamber erred in not sufficiently reasoning its decision on conditional release, the Appeals Chamber recalls that the Pre-Trial Chamber’s finding on the risks associated with conditional release have remained unchanged since its Decision of 13 July 2012, a finding that was subsequently upheld on appeal.²⁴⁹ Furthermore, given that “the scope of review

²⁴² Document in Support of Appeal, para. 97.

²⁴³ Document in Support of Appeal, para. 98.

²⁴⁴ Document in Support of Appeal, para. 99.

²⁴⁵ Document in Support of Appeal, para. 100.

²⁴⁶ Prosecutor’s Response to the Document in Support of Appeal, para. 67.

²⁴⁷ Prosecutor’s Response to the Document in Support of Appeal, paras 67-69.

²⁴⁸ Prosecutor’s Response to the Document in Support of Appeal, para. 69.

²⁴⁹ *See Gbagbo OA Judgment*, para. 80.

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”,²⁵⁰ it is not unreasonable for the Pre-Trial Chamber to have refrained from providing additional reasoning when reviewing its finding on conditional release, given that no changed circumstances were found.

120. As for Mr Gbagbo’s arguments concerning the lack of reasoning when rejecting the proposal from [REDACTED] to host him should conditional release be granted, the Appeals Chamber finds that Mr Gbagbo’s arguments relate to submissions in relation to previous decisions of the Pre-Trial Chamber where findings on the [REDACTED] proposal were made, in particular the Decision of 13 July 2012, the Decision of 18 January 2013 and the Decision of 12 March 2013. The Appeals Chamber notes that for the period of detention under review, the Pre-Trial Chamber did not consider any proposal from [REDACTED] as no new proposal was presented. In the circumstances, the Appeals Chamber considers Mr Gbagbo’s arguments that attempt to re-litigate issues on appeal that were the subject of previous decisions of the Pre-Trial Chamber and which do not arise in the Impugned Decision to be inappropriate, and they are therefore rejected. It follows that Mr Gbagbo’s argument that the Pre-Trial Chamber had a duty to request further information from the potential host State about the possible conditions of conditional release should also be rejected since the Pre-Trial Chamber was not considering any proposal from [REDACTED] during the period in question.

121. In light of the foregoing, the Appeals Chamber finds that the Pre-Trial Chamber did not err, and this ground of appeal is dismissed.

V. APPROPRIATE RELIEF

122. 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 Erkki Kourula appends a separate opinion to this judgment.

²⁵⁰ See *Gbagbo* OA Judgment, para. 24.

Judge Anita Ušacka appends a dissenting opinion to this judgment.

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



Judge Akua Kuenyehia
Presiding Judge

Dated this 29th day of October 2013

At The Hague, The Netherlands

Separate Opinion of Judge Erkki Kourula

1. I agree with the Majority that grounds 1 and 3 to 10 of the appeal must be dismissed. However, I respectfully disagree with the reasoning under the second ground of appeal relating to the Pre-Trial Chamber's findings under article 58 (1) (b) (ii) and (iii) of the Statute.

2. As expressed in my Dissenting Opinion in the *Gbagbo* OA Judgment,¹ I agree with the Pre-Trial Chamber's findings under article 58 (1) (b) (i) of the Statute that Mr Gbagbo's detention appears necessary to ensure his appearance at trial. However, my concerns persist in relation to the insufficiency of the Pre-Trial Chamber's reasoning to support its initial 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 previously stated, I believe that in the absence of sufficient reasoning in the Decision of 13 July 2012, an assessment of "changed circumstances" in the current review of detention is problematic. In my view, this is reflected in the Pre-Trial Chamber's assessment of the grounds for detention under article 58 (1) (b) (ii) and (iii) of the Statute in paragraphs 38-44 of the Impugned Decision.

3. Given that the grounds for detention under article 58 (1) (b) of the Statute are in the alternative, I would have found that Mr Gbagbo's continued detention is justified under article 58 (1) (b) (i) alone, and not pursuant to article 58 (1) (b) (ii) or (iii) of the Statute.

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



Judge Erkki Kourula

Dated this 29th day of October 2013

At The Hague, The Netherlands

¹ See "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"', 26 October 2012, ICC-02/11-01/11-278-Red, p. 54.

Dissenting Opinion of Judge Anita Ušacka

1. I respectfully disagree with the decision of the majority to confirm the Impugned Decision. I find merit in Mr Gbagbo's first and second grounds of appeal on the basis that the Adjournment Decision, in my opinion, constituted changed circumstances that would have required the Pre-Trial Chamber to consider anew the basis of Mr Gbagbo's detention, as well as the reasonableness of the length of his detention. As I would have reversed the Impugned Decision, I would not have considered the third to tenth grounds of appeal.

2. This opinion is based on the following reasons.

A. The confirmation of charges

3. Article 61 of the Statute governs the process for the confirmation of the charges prior to trial. As noted in the Adjournment Decision,¹ under article 61 (7) of the Statute, the Pre-Trial Chamber has three options in determining "whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged". It may elect to *confirm* the charges for which there is sufficient evidence and commit the accused to trial (article 61 (7) (a)), *decline to confirm* the charges for which there is insufficient evidence (article 61 (7) (b)), or *adjourn the hearing* to request the Prosecutor to provide further evidence or conduct further investigation in relation to a particular charge (article 61 (7) (c) (i)), or amend a charge where the evidence submitted appears to establish a different crime within the jurisdiction of the Court (article 61 (7) (c) (ii)).

4. In the instant case, the Pre-Trial Chamber, by majority, did not consider that the evidence provided by the Prosecutor at the confirmation hearing met the standard of article 61 (7) of the Statute.² Therefore, it elected not to confirm the charges, meaning that the case did not automatically proceed to trial. In so finding, the Pre-Trial Chamber had two options as to how to proceed.

5. As a first option, the Pre-Trial Chamber could have declined to confirm the charges under article 61 (7) (b) of the Statute, in which case the warrant of arrest

¹ Adjournment Decision, para. 12.

² Adjournment Decision, para. 15.

would have ceased to have effect pursuant to article 61 (10) of the Statute, and Mr Gbagbo would have been released. The Prosecutor subsequently would have the choice whether to request anew the confirmation of the same charges or part of the charges, "if the request is supported by additional evidence", as provided for in article 61 (8) of the Statute. If she decided to request anew the confirmation of charges, the Prosecutor would also have to decide whether to request a new warrant of arrest or a summons to appear in respect of the person charged.

6. The second option was chosen by the Pre-Trial Chamber, i.e. to adjourn the confirmation hearing pursuant to article 61 (7) (c) (i) of the Statute, and to ask the Prosecutor to consider "[p]roviding further evidence or conducting further investigation with respect to a particular charge". The adjournment was ordered with respect to *all* charges laid, not only with respect to "a particular charge". Indeed, in the Adjournment Decision, the Pre-Trial Chamber sought further evidence with respect to many of the legal elements of the crimes charged.³

7. In order to allow the Prosecutor to do so, the Pre-Trial Chamber established a time frame, whereby the Prosecutor is required to submit afresh, *inter alia*, an Amended Document Containing the Charges and an amended list of evidence by 15 November 2013.⁴ Mr Gbagbo may submit his observations on the Prosecutor's evidence, disclose any evidence he wishes to present, and file an amended list of evidence by 16 December 2013.⁵ Final written submissions in response to those of the Prosecutor and Victims are required from Mr Gbagbo by 7 February 2014.⁶ Thereafter, the 60-day period for rendering the decision on the confirmation of charges "will start running anew as of the date of receipt of the last written submission".⁷ In the course of the proceedings, Mr Gbagbo has the right to object to and challenge the evidence. In addition, an oral hearing will be held if requested or found necessary by the Pre-Trial Chamber.⁸ This schedule set by the Pre-Trial Chamber follows the procedure for the confirmation of the charges as provided for in

³ Adjournment Decision, para. 44.

⁴ Adjournment Decision, p. 23.

⁵ Adjournment Decision, p. 24.

⁶ Adjournment Decision, p. 24.

⁷ Adjournment Decision, p. 24.

⁸ Adjournment Decision, para. 47.

article 61 of the Statute, rules 121 and 122 of the Rules of Procedure and Evidence and regulation 53 of the Regulations of the Court.

8. Therefore, in adjourning the confirmation hearing in relation to the charges, rather than declining to confirm the charges, the Pre-Trial Chamber essentially initiated a “second confirmation phase” with a specified timeframe that foresees that the proceedings will take at least an additional 10 months.⁹ This, in my view, is an extraordinary measure,¹⁰ as it affords the Prosecutor a second chance to conduct further investigation and to present evidence in relation to the entirety of the charges.

9. I note that the Court’s legal texts, more specifically article 61 of the Statute, do not directly address the consequences on the detention of the charged person of a decision to adjourn the confirmation hearing with respect to all of the charges. In my view, when the Pre-Trial Chamber elects to adjourn the confirmation of charges hearing in relation to “all charges”, as in the instant case, it must, at the very least, examine the concomitant impact that such an adjournment has upon the rights of the detained person.

B. The rights of the detained person

10. I note that the Adjournment Decision contains a section on the “Rights of the Defence”;¹¹ however, this section deals only with the right to be tried without undue delay as provided for in article 67 (1) (c) of the Statute. The question whether the

⁹ Calculated from the rendering of the Adjournment Decision (3 June 2013) to the end of the 60-day period required for the issuance of the decision on the confirmation of charges, which will begin to run from the date of receipt of the last written submission, due on 7 February 2014. *See* Adjournment Decision, p. 24.

¹⁰ As a side note, and although not at issue in this appeal, I would like to raise my view that there exists a doubt regarding the compliance of the Adjournment Decision with the Statute. It could be argued that an adjournment should only be ordered when there were concrete reasons that lead a Pre-Trial Chamber to the conclusion that further evidence was required with respect to a “particular charge”, and not generally with respect to *all* charges. The formulation of article 61 (7) (c) (i) of the Statute and the existence of rule 127 of the Rules of Procedure and Evidence confirm the assessment that an adjournment for all charges should, as a rule, not be imposed. Furthermore, adjourning for the purposes of article 61 (7) (c) (i) of the Statute with respect to all charges could give the impression of a weak case that the Pre-Trial Chamber might wish to “save”. In addition, where a case is, at least in part, not sufficiently strong, it should not, considering the purpose of the confirmation phase, be referred to the Trial Chamber. In this context, I refer to K. Shibahara, “Article 61”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article* (Nomos Verlagsgesellschaft, 1st ed., 1999), para. 34: “Even if the Pre-Trial Chamber declines to confirm the charges, based on paragraph 8, the Prosecutor can request confirmation again with additional evidence. Therefore, it is not recommended for the Pre-Trial Chamber to make decision (c) (i). It should rather decline to confirm the charges and leave the Prosecutor to decide whether to conduct further investigation”.

¹¹ Adjournment Decision, paras 38-43.



delay affected or would affect Mr Gbagbo's rights *as a detained person* was not addressed in the Adjournment Decision,¹² nor was it addressed in the Impugned Decision.¹³ In my view, this omission is problematic.

11. It is recalled that a detained person has certain rights that are woven into the fabric of the Statute via article 21 (3). Indeed, the Appeals Chamber has previously noted that "article 21 (3) of the Statute stipulates that the Statute must be interpreted and applied consistently with internationally recognised human rights",¹⁴ and has held this to be specifically applicable to detained persons in relation to applications for interim release.¹⁵ Article 9 (2) to (4) of the International Covenant on Civil and Political Rights, article 7 (4) to (6) of the American Convention on Human Rights, and Article 5 (Right to liberty and security) (2) to (4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "the European Convention") have been recognised by the Appeals Chamber as containing provisions applicable to the rights of detained persons.¹⁶

12. The European Convention specifically provides for the right of an accused person in detention to be tried within a reasonable period. Article 5 (3) states:

Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer

¹² I note that a number of cases of, *inter alia*, the European Court of Human Rights are cited by the Pre-Trial Chamber in footnote 55 of the Adjournment Decision. However, these cases are based on article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Right to a fair trial") rather than article 5 (the "Right to liberty and security"), and therefore do not address the issue of the right to be tried with undue delay specifically in relation to detained persons. The Pre-Trial Chamber does refer in the same footnote to the Human Rights Committee, General Comment No. 32, 23 August 2007, CCPR/C/GC/32, para. 35, which states, *inter alia*, that "In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible". However, the issue of the right of detained persons to be tried expeditiously is not addressed in the substance of the Adjournment Decision.

¹³ The Pre-Trial Chamber refers to "the passage of time" only in the context of Mr Gbagbo's state of health, when assessing the issue of conditional release – see Impugned Decision, para. 51.

¹⁴ *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008'", 21 October 2008, ICC-01/04-01/06-1486, para. 46.

¹⁵ See, for example, *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) (hereinafter: *Bemba* OA Judgment), para. 28; *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'" (hereinafter: "*Lubanga* OA 7 Judgment"), Separate Opinion of Judge Georgios M. Pikis, 13 February 2007, ICC-01/04-01/06-824 (OA 7).

¹⁶ See *Bemba* OA Judgment, para. 28.

authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.¹⁷

13. The jurisprudence of the European Court of Human Rights (hereafter: "ECtHR") in relation to this provision may thus be illuminating in the instant case, in which the "second confirmation phase" initiated by the Pre-Trial Chamber has resulted in an additional delay that will prolong Mr Gbagbo's pre-trial detention by at least 10 months. The ECtHR has held in relation to article 5 (3) that it is incumbent on national authorities to ensure that "the pre-trial detention of an accused person does not exceed a reasonable time".¹⁸ While what constitutes a "reasonable time" will depend on the particular circumstances of each case,¹⁹ the ECtHR has held that there is a clear obligation to undertake a fresh review of the grounds underpinning detention after a certain period of time. The mere prevalence of a suspicion that a person has committed an offence in the jurisdiction of the Court is not enough where the period of detention is unduly protracted:

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but with the lapse of time this no longer suffices and the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty.²⁰


14. Therefore, in making its decision on the confirmation of the charges against Mr Gbagbo, the Pre-Trial Chamber ought to have adverted to the reasonableness of the length of time that Mr Gbagbo had been in detention, given that the provisions of the Statute must be interpreted in a manner consistent with these principles by virtue of article 21 (3) of the Statute. Indeed, this obligation is reflected in the Rome Statute itself. For example, under article 61 (1) of the Statute, the Pre-Trial Chamber has an obligation to hold a confirmation hearing "within a reasonable time" after a person appears before the Court. Furthermore, article 60 (4) of the Statute obligates on the Pre-Trial Chamber to "ensure that a person is not detained for an unreasonable period

¹⁷ See *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, as amended by Protocols No. 11 and No. 14, 213 United Nations Treaty Series 970.

¹⁸ ECtHR, Grand Chamber, *McKay v. The United Kingdom*, "Judgment", 3 October 2006, application no. 543/03, para. 43.

¹⁹ ECtHR, Grand Chamber, *McKay v. The United Kingdom*, "Judgment", 3 October 2006, application no. 543/03, para. 45.

²⁰ ECtHR, Grand Chamber, *McKay v. The United Kingdom*, "Judgment", 3 October 2006, application no. 543/03, para. 44.



prior to trial”, albeit due to “inexcusable delay by the Prosecutor”. While article 60 (4) of the Statute casts an obligation on the Pre-Trial Chamber to ensure that an accused is not detained for an unreasonable period prior to trial only in the case of delay occasioned by the Prosecutor,²¹ in my view, article 21 (3) of the Statute casts a broader obligation on the Pre-Trial Chamber to ensure the reasonableness of the period of pre-trial detention, including when deciding whether to adjourn the confirmation hearing or to decline to confirm the charges.

15. Given that Mr Gbagbo was transferred to the Court at the end of 2011, almost two years ago, concern about his rights as a detained person ought to be overwhelmingly pressing.

16. Indeed, these rights are crucial to an understanding of the purpose of article 61 of the Statute as a whole. A confirmation hearing serves as a “pre-trial ‘filter’ to ensure that the charges concern criminal acts falling within the Court’s jurisdiction and that only those soundly based on the evidence go to trial.”²² In addition, “the Pre-Trial Chamber should not refer a weak case to the Trial Chamber, since this would infringe the rights of the accused”.²³ The rights of the charged person, including those of the detained person, also ought to be at the forefront of the entire confirmation process. Consequently, they also need to be taken into account by a Pre-Trial Chamber when confronted with the question whether to adjourn a confirmation hearing as a whole.

C. The existence of “changed circumstances”

17. Having addressed these issues, I turn now to considerations stemming from the Impugned Decision itself. Article 60 (3) of the Statute provides that the Pre-Trial

²¹ See Separate Opinion of Judge Georghios M. Pikis, *Lubanga* OA 7 Judgment, para. 22, who held that warnings against undue delay such as those contained in article 60 (4) of the Statute must be interpreted in light of international human rights jurisprudence “bearing on the timeliness of the conduct of judicial proceedings. Ensuring that a person is tried within a reasonable time is a paramount duty of the Court. Delay in the proceedings cannot be at the expense of the detainee”; see also K. Khan, Article 60, para. 18, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article*, (Verlag C.H. Beck, second edition, 2008): “It will not matter to accused persons whether their detention for an “unreasonable period” is the fault of the Prosecutor, the judges, the Registry or any other third party. All the organs of the Court should be clearly prohibited from unnecessary, never mind inexcusable delays, and paragraph 4 suffers from the defect of only focusing on inexcusable delay on the part of the Prosecutor” ().

²² H. Friman, et al., “Charges”, in G. Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013), p. 379, at p. 399.

²³ G. de Beco, “The Confirmation of Charges before the International Criminal Court: Evaluation and First Application”, 7 *International Criminal Law Review* (2007), p. 469, at p. 481.

Chamber may modify its ruling on detention “if it is satisfied that changed circumstances so require”. The Appeals Chamber has noted that “changed circumstances” have been found to exist where there is a “change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary”.²⁴ Where no changed circumstances are found to exist, “the Chamber is not required to further review the ruling on release or detention”.²⁵ Recalling that the existence of “changed circumstances” is assessed in relation to the first decision on interim release,²⁶ which in the present case was rendered on 13 July 2012, the question is whether the circumstances prevailing on this date have changed because of the Adjournment Decision.

18. The circumstances prevailing on 13 July 2012 changed for Mr Gbagbo when the Adjournment Decision was rendered. My reasons for this conclusion are twofold. Firstly, when interpreted in conjunction with article 21 (3) of the Statute, which incorporates the right of detained persons to be tried within a reasonable time, in my view, a far-reaching decision that prolongs pre-trial detention such as the Adjournment Decision ought to constitute “changed circumstances” for the purposes of article 60 (3) of the Statute. Mr Gbagbo now appears to be in the same place in July 2013 as he was in the summer of 2012, that is, at the stage before a document containing the charges had been filed, disclosure had taken place, oral and written submissions had been heard by the Pre-Trial Chamber, and finally, a decision under article 61 (7) of the Statute had been issued. The decision of the Pre-Trial Chamber to initiate a “second confirmation phase” and thus prolong Mr Gbagbo’s pre-trial detention is, in my view, a changed circumstance warranting the assessment of the factors underpinning article 58 (1) (b) *de novo*.

19. The second reason supporting the existence of “changed circumstances” in light of the rendering of the Adjournment Decision, was that, between 13 July 2012 and 3 June 2013, a confirmation hearing was held and the Pre-Trial Chamber scrutinized the

²⁴ *Bemba* OA 2 Judgment, para. 60.

²⁵ *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’”, ICC-01/05-01/08-2151-Red (OA 10), 5 March 2012, para. 1.

²⁶ *Lubanga* OA 7 Judgment, para. 94.

entire evidentiary basis to assess whether the evidence met the threshold of article 61 (7) of the Statute. It was found to have fallen below this threshold. In light of this, the Adjourment Decision directly puts in doubt whether the lower evidentiary threshold of article 58 (1) (a) of the Statute is still met, because the Pre-Trial Chamber adjourned the confirmation hearing with respect to *all* charges and requested further evidence with respect to *all* charges, when applying the evidentiary standard of article 61 (7) of the Statute.

20. It is the obligation of the Court to keep in detention only persons in respect of whom the prerequisites of article 58 (1) (a) and (b) of the Statute are met. If, at any given time, the prerequisites are not fulfilled, a detained person needs to be released. This is why the legal texts require the Pre-Trial Chamber to review periodically the detention that requires a Pre-Trial Chamber to newly assess those prerequisites if there are “changed circumstances”. Where there is doubt about the evidentiary basis as a whole, these doubts necessarily extend to a lower evidentiary threshold. Therefore, where a decision pursuant to article 61 (7) (c) (i) of the Statute leads to an adjournment of the confirmation hearing in respect of *all* charges, the Pre-Trial Chamber ought to recognise this as “changed circumstances” in reviewing the detention of the accused, and advert specifically to the factors underpinning the detention of the detained person in a *de novo* manner.

21. A *de novo* review of detention places an obligation upon the Pre-Trial Chamber to comprehensively assess the currency and integrity of each of the factors underpinning detention. The rights of the detained person ought to be at the forefront of this process. Accordingly, the Pre-Trial Chamber must look at the factors underpinning detention in a detailed manner, and make a sufficiently reasoned ruling on whether it continues to find detention necessary under article 58 (1) of the Statute, or whether, in fact, the detained person ought to be released. In this connection, I reiterate my previous concerns, as outlined in my Dissenting Opinion in the *Gbagbo* OA Judgment, regarding the requirement for Chambers of this Court to indicate with sufficient clarity the grounds upon which they base their decisions,²⁷ particularly decisions that impact upon a charged person’s right to liberty.

²⁷ See *Gbagbo* OA Judgment, Dissenting Opinion of Judge Anita Ušacka, paras 8-14.



D. Conclusion

22. In sum, the Adjournment Decision established “changed circumstances”, and the Pre-Trial Chamber erred in finding that it did not. On this basis, I would have reversed the Impugned Decision and remanded the matter for fresh consideration that would have involved a *de novo* review of article 58 (1) (a) and (b) of the Statute. I would therefore have granted the first and second grounds of appeal.

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



Judge Anita Ušacka

Dated this 29th day of October 2013

At The Hague, The Netherlands