

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. ICC-01/05-01/13 OA 3

Date: 11 July 2014

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO,
AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO,
FIDÈLE BABALA WANDU AND NARCISSE ARIDO**

Public document

Judgment

on the appeal of Mr Fidèle Babala Wandu against the decision of Pre-Trial Chamber II of 14 March 2014 entitled “Decision on the ‘Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’”

No: ICC-01/05-01/13 OA 3

1/46



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
Ms Helen Brady

Counsel for the Defence
Mr Jean-Pierre Kilenda Kakengi Basila

REGISTRY

Registrar
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Fidèle Babala Wandu against the decision of Pre-Trial Chamber II entitled “Decision on the ‘Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’” of 14 March 2014 (ICC-01/05-01/13-258),

After deliberation,

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

Delivers the following

JUDGMENT

The “Decision on the ‘Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’” is confirmed. The appeal is dismissed.

REASONS

I. KEY FINDINGS

1. The Appeals Chamber emphasises that offences under article 70 of the Statute, while certainly serious in nature, cannot be considered to be as grave as the core crimes under article 5 of the Statute, being genocide, crimes against humanity, war crimes, and the crime of aggression, which are described in that provision to be “the most serious crimes of concern to the international community as a whole”.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

2. On 19 November 2013, the Prosecutor filed the “Prosecution’s Application for Warrant of Arrest”¹ (hereinafter: “Application for Warrants of Arrest”), seeking a warrant of the arrest of, *inter alia*, Mr Fidèle Babala Wandu (hereinafter: “Mr Babala”).²

¹ ICC-01/05-01/13-19-Conf.

² Application for Warrants of Arrest, para. 1.

3. On 20 November 2013, Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”) issued the “Warrant of arrest for Jean-Pierre BEMBA GOMBO, Aimé KILOLO MUSAMBA, Jean-Jacques MANGENDA KABONGO, Fidèle BABALA WANDU and Narcisse ARIDO”³ (hereinafter: “Arrest Warrant Decision”).

4. Following his surrender to the Court, Mr Babala first appeared before the Pre-Trial Chamber on 27 November 2013.⁴ He has been in detention at the Court since.

5. On 12 December 2013, Mr Babala filed the “Corrigendum de la Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu”⁵ (hereinafter: “Application for Interim Release”), requesting, *inter alia*, that the Pre-Trial Chamber: (i) find that the conditions underpinning article 58(1) are not met in relation to the detention of Mr Babala; (ii) accept Mr Babala’s undertaking to appear at future hearings as required; and (iii) order Mr Babala’s release with any conditions found appropriate by the Pre-Trial Chamber.⁶

6. On 13 December 2013, the Pre-Trial Chamber, its functions being exercised by Judge Cuno Tarfusser acting as single judge,⁷ rendered the “Decisions [*sic*] requesting observations on the ‘Requête urgente de la défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’”⁸ (hereinafter: “Decision Requesting Observations”), inviting the views of the Prosecutor and the authorities of the Kingdom of the Netherlands and the Democratic Republic of the Congo (hereinafter: “DRC”) on Mr Babala’s Application for Interim Release, by Friday 3 January 2014.⁹

7. On 10 January 2014, the Registrar filed the “Report of the Registry on the ‘Decisions [*sic*] requesting observations on the ‘Requête urgente de la défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’”¹⁰

³ ICC-01/05-01/13-1-US-Exp-tENG. A redacted version of the French original Warrant of Arrest (ICC-01/05-01/13-1-US-Exp) was filed on 28 November 2013 as ICC-01/05-01/13-1-Red2.

⁴ See Decision setting the date for the first appearance of Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba and Fidèle Babala, and on issues relating to the publicity of the proceedings”, 25 November 2013, ICC-01/05-01/13-11; Transcript of 27 November 2013, ICC-01/05-01/13-T-1-ENG (CT WT), p. 4, lines 7-9, p. 5, lines 9-11.

⁵ Registered on 13 December 2013, ICC-01/05-01/13-38-Corr.

⁶ Application for Interim Release, pp. 19-20.

⁷ See Transcript of 27 November 2013, ICC-01/05-01/13-T-1-ENG (CT WT), p. 3, line 22, to p. 4, line 2.

⁸ ICC-01/05-01/13-40.

⁹ Decision Requesting Observations, p. 4.

¹⁰ ICC-01/05-01/13-78.



(hereinafter: “First Registry Report”), which contained observations from the Ministry of Justice and Human Rights of the DRC, dated 9 January 2014¹¹ (hereinafter: “DRC Authorities’ Observations of 9 January 2014”).

8. On 18 February 2014, the Registrar filed the “Second Report of the Registry on the ‘Decisions [*sic*] requesting observations on the ‘Requête urgente de la défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’”¹² (hereinafter: “Second Registry Report”), which contained observations from the Parquet Général of the DRC, dated 17 February 2014,¹³ (hereinafter: “Parquet Général’s Observations of 17 February 2014”).

9. On 14 March 2014, the Pre-Trial Chamber rendered the “Decision on the ‘Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’”¹⁴ (hereinafter: “Impugned Decision”), rejecting the Application for Interim Release.¹⁵

B. Proceedings before the Appeals Chamber

10. On 19 March 2014, Mr Babala filed the “Appeal against the Decision on the ‘Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu.’ (ICC-01/05-01/13-258)”¹⁶ (hereinafter: “Document in Support of the Appeal”).

11. On 24 March 2014, the Prosecutor filed the “Prosecution opposition to the Babala Defence’s appeal against his provisional detention”¹⁷ (hereinafter: “Response to the Document in Support of the Appeal”).

12. On 27 March 2014, Mr Babala filed the “Demande de réplique à « Prosecution opposition to the Babala Defence’s appeal against his provisional detention » (ICC-01/05-01/13-289)”,¹⁸ requesting leave to make further submissions before the Appeals

¹¹ See First Registry Report, para. 6; Annex 6 to First Registry Report, ICC-01/05-01/13-78-Conf-Anx6.

¹² ICC-01/05-01/13-206.

¹³ Second Registry Report, p. 4; Annex I to Second Registry Report, ICC-01/05-01/13-206-Conf-AnxI.

¹⁴ ICC-01/05-01/13-258.

¹⁵ Impugned Decision, p. 17.

¹⁶ ICC-01/05-01/13-276-tENG (OA 3).

¹⁷ ICC-01/05-01/13-289 (OA 3).

¹⁸ ICC-01/05-01/13-297 (OA 3).

Chamber (hereinafter: “Request for Leave to Reply”). The Request for Leave to Reply was rejected by the Appeals Chamber on 15 April 2014.¹⁹

III. PRELIMINARY ISSUE

13. The Prosecutor submits that the Document in Support of the Appeal of 22 pages violates regulation 37 (1) of the Regulations of the Court.²⁰

14. Regulation 37 (1) provides that the maximum pages of a document should not exceed 20 pages. The Appeals Chamber notes that both the original French version as well as the English version of the Document in Support of the Appeal are 22 pages long, and thus the Document in Support of the Appeal does exceed the page limit. However, Mr Babala did not request an extension of the page limit for the Document in Support of the Appeal, nor advance any argument showing exceptional circumstances for such extension pursuant to regulation 37 (2) of the Regulations of the Court. Consequently, the Appeals Chamber finds that Mr Babala has not demonstrated exceptional circumstances justifying an extension of the page limit.

15. Regulation 29 (1) of the Regulations of the Court stipulates that “[i]n the event of non-compliance of a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice”. In the circumstances of this case, the Appeals Chamber considers that it is in the interests of justice to accept Mr Babala’s Document in Support of the Appeal.²¹ Ordering its re-filing would have the consequence of unduly delaying the proceedings, which the Appeals Chamber does not consider appropriate, given that this is an appeal on interim release. This said, Mr Babala is reminded of the importance of complying with the requirements for the format and page limits of documents filed with the Court as stipulated in the

¹⁹ “Decision on Mr Fidèle Babala Wandu's request for leave to reply to the ‘Prosecution opposition to the Babala Defence's appeal against his provisional detention’”, ICC-01/05-01/13-342, para. 8.

²⁰ Response to the Document in Support of the Appeal, para. 1.

²¹ *See, e.g., Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings”, 14 December 2012, ICC-01/04-01/06-2953 (A A2 A3 OA 21), para 21.

Regulations of the Court. Breaches of these requirements in the future may result in, *inter alia*, rejection of documents filed.²²

IV. MERITS

16. Mr Babala presents three grounds of appeal. Under his first ground of appeal, he challenges the Pre-Trial Chamber's finding under article 58 (1) (a) of the Statute.²³ Under his second ground of appeal, Mr Babala submits that the Pre-Trial Chamber erred in finding that the conditions under article 58 (1) (b) of the Statute were fulfilled.²⁴ With respect to his third ground of appeal, Mr Babala argues that the Pre-Trial Chamber erred by not taking into account changed circumstances pursuant to article 60 (3) of the Statute, in denying his request for a hearing under rule 118 (3) of the Rules of Procedure and Evidence and by not considering conditions for release.²⁵

17. Before turning to Mr Babala's grounds of appeal, the Appeals Chamber notes that he is charged with offences against the administration of justice, which fall under a special regime set out in article 70 of the Statute and rules 162 to 169 of the Rules of Procedure and Evidence. Notwithstanding these specific provisions, rule 163 (1) of the Rules of Procedure and Evidence stipulates that "[u]nless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169, the Statute and the Rules shall apply *mutatis mutandis* to the Court's investigation, prosecution and punishment of offences defined in article 70".²⁶ Accordingly, the Appeals Chamber finds that articles 58 and 60 of the Statute are applicable to offences charged under article 70 of the Statute, and thus to the present appeal.

²² See *Prosecutor v. Bosco Ntaganda*, "Judgment on the appeal of Mr Bosco Ntaganda against the decision of the Pre-Trial Chamber II of 18 November 2013 entitled 'Decision on the Defence's Application for Interim Release'", 5 March 2014, ICC-01/04-02/06-271-Red (OA) (hereinafter: "*Ntaganda OA Judgment*"), para. 16; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'", 16 December 2013, ICC-02/11-01/11-572 (OA 5), para. 13.

²³ Document in Support of the Appeal, paras 24-42, 60-64.

²⁴ Document in Support of the Appeal, paras 44-59, 65-66.

²⁵ Document in Support of the Appeal, paras 67-74.

²⁶ Rule 163 (2) of the Rules of Procedure and Evidence provides that "[t]he provisions of Part 2 [regarding the Court's jurisdiction, admissibility and applicable law], and any rules thereunder, shall not apply, with the exception of article 21". Rule 163 (3) of the Rules of Procedure and Evidence provides that "[t]he provisions of Part 10 [regarding enforcement] and any rules thereunder, shall not apply, with the exception of articles 103, 107, 109 and 111". Rule 165 (2) of the Rules of Procedure and Evidence pertaining to investigation, prosecution and trial stipulates that "[a]rticles 53 and 59, and any rules thereunder, shall not apply". With respect to the sanctions applicable, rule 166 (2) of the Rules of Procedure and Evidence provides that with the exception of article 77 (2) (b), the provisions of article 77 and related rules shall not apply.

A. 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”.²⁷

19. The Appeals Chamber has explained its approach to factual errors in respect of decisions on interim release as follows:

The Appeals Chamber has held that a Pre-Trial or Trial Chamber commits such an error if it misappreciates facts, disregards relevant facts or takes into account facts extraneous to the *sub judice* issues. In this regard, the Appeals Chamber has underlined that the appraisal of evidence lies, in the first place, with the relevant Chamber. In determining whether the Trial Chamber has misappreciated facts in a decision on interim release, the Appeals Chamber will “defer or accord a margin of appreciation both to the inferences [the Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention”. Therefore, the Appeals Chamber “will interfere only in the case of a clear error, namely where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it”.²⁸ [Footnotes omitted.]

20. In relation to alleged errors of law, the Appeals Chamber has previously held that it will not defer to the Trial (or Pre-Trial) Chamber’s legal interpretation, but

²⁷ *Ntaganda OA Judgment*, para. 29; *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, citing *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-Red (OA 2) (hereinafter: “*Bemba OA 2 Judgment*”), para. 62.

²⁸ *Ntaganda OA Judgment*, para. 31, citing *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled ‘Decision on the defence’s 28 December 2011 “Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo”””, 5 March 2012, ICC-01/05-01/08-2151-Red (OA 10), para. 16. See also *Prosecutor v. Laurent Koudou Gbagbo*, “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 (OA) (hereinafter: “*Gbagbo OA Judgment*”), para. 51.



“will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law”.²⁹

21. In the *Mbarushimana OA Judgment*, the Appeals Chamber noted that the appellant’s mere disagreement with the conclusions that the Pre-Trial Chamber drew from the available facts or the weight it accorded to particular factors is not enough to establish a clear error.³⁰

22. It is also recalled that “an appellant is obliged not only 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.

B. First ground of appeal

1. Relevant part of the Impugned Decision

23. In the Impugned Decision, the Pre-Trial Chamber stated that it agreed with the submissions of Mr Babala that the reasons justifying detention must be exhaustive and interpreted strictly.³² The Pre-Trial Chamber noted, however, that while it is exceptional, detention shall “unfailingly apply, when the relevant statutory requirements are satisfied”.³³ It noted the Appeals Chamber’s ruling that decisions taken under article 60 (2) of the Statute are not discretionary, but rather, “[d]epending upon whether or not the conditions of article 58(1) of the Statute continue to be met, the detained person shall be continued to be detained or shall be released”.³⁴

²⁹ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled ‘Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation’”, 17 February 2012, ICC-02/05-03/09-295 (OA 2), para. 20 (in relation to errors of law generally).

³⁰ *Mbarushimana OA Judgment*, paras 21, 31.

³¹ *Ntaganda OA Judgment*, para. 32; *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, citing *Prosecutor v. Joseph Kony et al.*, “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009”, 16 September 2009, ICC-02/04-01/05-408 (OA 3) (hereinafter: “*Kony et al. OA 3 Judgment*”), para. 48.

³² Impugned Decision, para. 3

³³ Impugned Decision, para. 3.

³⁴ Impugned Decision, para. 3, referring to *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision



24. The Pre-Trial Chamber also noted that in referring to “‘article 58, paragraph 1’, article 60(2) of the Statute seems to require the Pre-Trial Chamber to proceed anew to an assessment of both the existence of reasonable grounds to believe that the crimes alleged by the Prosecutor have been committed by the arrested person (article 58(1)(a)[]) and of the existence of one or more of the risks listed under article 58(1)(b)”.³⁵ Notwithstanding, it queried “to what extent a Pre-Trial Chamber (namely, the same Pre-Trial Chamber who has issued the warrant of arrest) can be meaningfully called upon reassessing the existence of reasonable grounds to believe that a crime has been committed in the context of an application for interim release” under article 58 (1) (a) of the Statute.³⁶ The Pre-Trial Chamber further noted that the practice of most Chambers in the Court in making decisions on interim release “seems, most appropriately, to have rather focussed on the determination as to whether one or more of the risks listed under letter b of article 58 paragraph 1 still exist”.³⁷

25. However, in the Impugned Decision, the Pre-Trial Chamber stated that it would nonetheless “assess the persisting existence of reasonable grounds to believe” that Mr Babala had committed the crimes alleged.³⁸

26. In so doing, the Pre-Trial Chamber held that, on the basis of the material attached to the Application for Warrants of Arrest, reasonable grounds exist to believe that Mr Babala:

in accordance with Jean-Pierre Bemba's [hereinafter: “Mr Bemba”] instructions ... directly or indirectly disbursed sums of money to Defence witnesses and/or members of their families’, as well as to Aimé Kilolo [hereinafter: “Mr Kilolo”] and Jean-Jacques Mangenda [hereinafter: “Mr Mangenda”]; ii) ‘frequently called Defence witnesses, specifically at time periods coinciding with money transfers to the same witnesses, and took part in several privileged conference calls with [Mr] Bemba and [Mr] Kilolo’; iii) acted ‘as an intermediary’ in the transmission of the Accused's instructions to members of his family; iv) used ‘a coded language to discuss financial matters with the Accused.’³⁹

sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, 13 February 2007, ICC-01/04-01/06-824 (OA 7) (hereinafter: “*Lubanga OA 7 Judgment*”), para. 134.

³⁵ See Impugned Decision, para. 5.

³⁶ See Impugned Decision, para. 5.

³⁷ See Impugned Decision, para. 5.

³⁸ See Impugned Decision, para. 5.

³⁹ Impugned Decision, para. 6.

27. The Pre-Trial Chamber referred to the body of evidence it relied upon to conclude that reasonable grounds existed, notably the annexes to the Application for Warrants of Arrest,⁴⁰ and the second report submitted by the Independent Counsel on 14 November 2013⁴¹ (hereinafter: “Report of the Independent Counsel”).⁴² The Pre-Trial Chamber noted that none of this material contained in the Application for Warrants of Arrest or in the Report of the Independent Counsel was addressed by Mr Babala in his application for interim release.⁴³ Rather, the Pre-Trial Chamber took note of Mr Babala’s statement that he was ‘awaiting disclosure of the evidence in the Prosecutor’s possession so as to be able to challenge it on legal and factual grounds, and to prove his innocence’.⁴⁴

28. The Pre-Trial Chamber noted that the only argument submitted by Mr Babala pertaining to article 58 (1) (a) of the Statute was that he ought not be charged with falsifying documents under article 70 (1) (b) of the Statute “in the absence of, or before, a decision of that Chamber determining that such documents were indeed falsified”.⁴⁵ The Pre-Trial Chamber found that this argument was premised on an “undue overlapping of the standards of proof respectively applying at the stage of the issuance of a warrant of arrest under article 58 and at the time of the judgment, and is therefore misplaced”.⁴⁶ It argued that “[a]ll that is required at the article 58 stage” is that the Pre-Trial Chamber is satisfied that reasonable grounds exist to believe that “conducts [*sic*] suitable to amount to the falsification of documents have occurred and that such conducts [*sic*] may be linked to the person whose arrest (or summons) is sought by the Prosecutor”, and accordingly, dismissed Mr Babala’s argument.⁴⁷

29. The Pre-Trial Chamber found that, “under these circumstances”, it was “still fully persuaded” that, based on an “*ex novo*” assessment of the information and materials before it, reasonable grounds continued to exist that Mr Babala committed

⁴⁰ See Impugned Decision, paras 7-9.

⁴¹ Deuxième rapport du Conseil Indépendant (période du 23 août au 16 octobre 2013)”, registered on 15 November 2013, ICC-01/05-66-Conf-Exp. A confidential redacted version of the report was filed on 16 December 2013 as ICC-01/05-66-Conf-Red.

⁴² See Impugned Decision, paras 10-14.

⁴³ Impugned Decision, para. 10.

⁴⁴ Impugned Decision, para. 10, referring to Application for Interim Release, para. 19.

⁴⁵ Impugned Decision, para. 11.

⁴⁶ Impugned Decision, para. 12.

⁴⁷ Impugned Decision, para. 12.

the crimes alleged by the Prosecutor “and that, therefore, the requirements under [a]rticle 58(1)(a) of the Statute continue to be satisfied”.⁴⁸

2. Mr Babala’s submissions before the Appeals Chamber

30. Mr Babala raises three broad arguments under his first ground of appeal, namely that the Pre-Trial Chamber erred on the basis that: (i) the material underpinning the grounds of detention is insufficient;⁴⁹ (ii) the grounds of detention themselves are insufficient;⁵⁰ and (iii) whilst disregarding article 58 (1) in its entirety, the Pre-Trial Chamber erred regarding the burden of proof, “the fundamental principles of legality [...] fairness, presumption of innocence and exceptionality of detention”.⁵¹

(a) Alleged insufficiency of material underpinning grounds of detention

31. Mr Babala argues that the Pre-Trial Chamber’s “satisfaction” that there existed “reasonable grounds to believe” that he committed the crimes alleged must be “underpinned by tangible information verified by the [Pre-Trial Chamber]”.⁵² He argues that, contrary to this principle, the entirety of the grounds put forward by the Pre-Trial Chamber for his continued detention in the Impugned Decision are “incongruent” as they are (i) founded solely on the material in the Application for Warrants of Arrest, and (ii) not clearly stated.⁵³

32. Mr Babala argues that the Pre-Trial Chamber did not “undertake a critical and considered scrutiny of the material” underpinning its findings under article 58 (1) (a) of the Statute in relation to his continued detention.⁵⁴ He argues that this is due, in part, to the Prosecutor’s failure to investigate both exonerating and incriminating circumstances, as is required by article 54 (1) (a) of the Statute.⁵⁵ He argues that, in seizing the Pre-Trial Chamber of a “unilateral, confidential, *ex-parte* application”, the Prosecutor disregarded the adversarial principle which would have allowed her to

⁴⁸ Impugned Decision, para. 13.

⁴⁹ See Document in Support of the Appeal, paras 27-32.

⁵⁰ See Document in Support of the Appeal, paras 33-43.

⁵¹ Document in Support of the Appeal, paras 51-52, 60. See also Document in Support of the Appeal, paras 61-64. While the issues at paragraphs 51-52, 60-64 are raised under Mr Babala’s second ground of appeal, the Appeals Chamber will address them under Mr Babala’s first ground of appeal given that they relate to article 58 (1) (a) of the Statute.

⁵² Document in Support of the Appeal, para. 43.

⁵³ Document in Support of the Appeal, para. 26.

⁵⁴ Document in Support of the Appeal, para. 27.

⁵⁵ Document in Support of the Appeal, para. 27. See also Document in Support of the Appeal, paras 50, 72.

gather information shedding light on Mr Babala's "precise standing and actual nature of his contact with the members of Mr [...] Bemba's defence team and with Mr Bemba himself".⁵⁶ He avers that, had the Prosecutor interviewed him, she would have become aware that his relationship with Mr Bemba is "undoubtedly a political bond and a friendship", and that the money transfers Mr Babala was involved in were "for the purpose of the investigations in the [case of the *Prosecutor v. Jean-Pierre Bemba Gombo* (hereinafter: "*Bemba Case*")] and for that purpose alone".⁵⁷

33. Mr Babala argues that the Prosecutor has disclosed no evidence that he sent money to witnesses "to corruptly influence them and to allow the Defence to tender false or forged evidence in the [*Bemba Case*]",⁵⁸ nor any documents containing Mr Babala's telephone conversations with "Defence Counsel in the [*Bemba*] Case or the Accused [Mr Bemba] himself and the witnesses regarding the content of *viva voce* evidence before Trial Chamber III".⁵⁹ He avers that, had he been interviewed, the Prosecutor would have become aware that he had no knowledge of any strategy engaged in corruptly influencing witnesses, and that no evidence disclosed to date adverts to any such knowledge on his part.⁶⁰

34. Mr Babala also argues that the Arrest Warrant Decision was rendered one day after the Application for Warrants of Arrest, and questions whether the Pre-Trial Chamber therefore had sufficient opportunity to analyse the evidence prior to its issuance.⁶¹

(b) Alleged insufficiency of grounds of detention

35. Mr Babala argues that, in the Impugned Decision, the Pre-Trial Chamber violates the principle of legality enshrined in article 22 of the Statute, by casting Mr Babala's alleged conduct as criminal despite the fact the alleged conduct does not constitute a crime within the Court's jurisdiction.⁶²

⁵⁶ Document in Support of the Appeal, para. 29. *See also* Document in Support of the Appeal, para. 28.

⁵⁷ Document in Support of the Appeal, para. 29.

⁵⁸ Document in Support of the Appeal, para. 30. *See also* Document in Support of the Appeal, para. 53.

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

⁶⁰ Document in Support of the Appeal, para. 31.

⁶¹ Document in Support of the Appeal, para. 32.

⁶² Document in Support of the Appeal, paras 35-36.



36. In this connection, he argues that the Pre-Trial Chamber provides no details of his alleged violations in acting as an intermediary in the transmission of Mr Bemba's instructions to members of his family, nor does it "state the legal provision which [Mr Babala] allegedly violated" in doing so.⁶³ Mr Babala argues that, similarly, the Pre-Trial Chamber's findings in relation to his use of coded language in conversations with Mr Bemba about financial matters do not "specify the codes or the criminality of their content", but rather rely upon the conclusion of the Independent Counsel that such codes existed, "even though their precise content was never put to the Defence or the Appellant".⁶⁴

37. In relation to the table of money transfers alleged to have been carried out by Mr Babala to Mr Bemba, Mr Kilolo and Mr Narcisse Arido (hereinafter: "Mr Arido"), Mr Babala argues that the Pre-Trial Chamber "does not show how the transfers *per se* constitute crimes, since [he] has not denied transferring money both for [... Mr Bemba]'s personal needs at the detention centre and those of his defence team".⁶⁵

38. Mr Babala argues further that the Pre-Trial Chamber's findings about his role in the Movement for the Liberation of the Congo (hereinafter: "MLC") are insufficient to ground his continued detention as "[h]is role in his political party is inherently constitutional".⁶⁶ He avers that it is not logical to connect Mr Babala's political activities with the crimes of corruptly influencing witnesses and forging documents, and that "[p]olitical opposition in the DRC and the wider world does not incur the threat of sanction under the Rome Statute".⁶⁷ Mr Babala avers that such a connection risks "politicisation of international criminal justice [... which] is the hallmark of totalitarian regimes to whose ranks the [...] Court does not belong".⁶⁸

**(c) Alleged errors relating to the burden of proof,
presumption of innocence and fairness of the proceedings**

39. Mr Babala argues that during his initial appearance before the Court on 27 November 2013 when the Pre-Trial Chamber explained to the suspects that "the Prosecution was duty-bound to establish their responsibility beyond reasonable

⁶³ Document in Support of the Appeal, paras 33-34.

⁶⁴ Document in Support of the Appeal, para. 37.

⁶⁵ Document in Support of the Appeal, para. 38.

⁶⁶ Document in Support of the Appeal, para. 40. *See also* Document in Support of the Appeal, para. 39.

⁶⁷ Document in Support of the Appeal, para. 41.

⁶⁸ Document in Support of the Appeal, para. 42.

doubt”, it referenced a higher burden of proof than that required at the pre-trial stage.⁶⁹ According to Mr Babala, the pre-trial burden of proof does not preclude the Pre-Trial Chamber to verify the truth of the allegations against him, and that, even under a lower “reasonable grounds” standard, the Pre-Trial Chamber was “duty-bound” to examine the accuracy of the facts attributed to Mr Babala.⁷⁰

40. Mr Babala submits further that “whilst disregarding article 58(1) in its entirety, the Impugned Decision violates the fundamental principles of legality [...] fairness, presumption of innocence and exceptionality of detention”.⁷¹ He avers that by relying solely on the material presented in the Application for Warrants of Arrest, the Pre-Trial Chamber failed to accord Mr Babala the opportunity “to refute this material and put his side across” which as a result placed him at a disadvantage as the “[Pre-Trial Chamber and Prosecution are one]”.⁷² Mr Babala adds that by according “unreserved support for the incriminating material alone” the Pre-Trial Chamber violated his presumption of innocence as it should have examined the incriminating as well as the exonerating evidence in order to establish the truth.⁷³

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

41. The Prosecutor submits overall that Mr Babala’s submissions regarding article 58 (1) (a) of the Statute constitute mere disagreement with the Pre-Trial Chamber’s findings in that regard and should therefore be dismissed.⁷⁴ She avers that the reasoning in relation to such findings is sufficiently detailed, “with close attention paid to the underlying evidence”.⁷⁵

⁶⁹ Document in Support of the Appeal, paras 51-52, referring to Transcript of 27 November 2013, ICC-01/05-01/13-T-1-FRA (ET WT), p. 12, lines 3-28. *See also* Transcript of 27 November 2013, ICC-01/05-01/13-T-1-ENG (CT WT), p. 13, line 16, to page 14, line 19.

⁷⁰ Document in Support of the Appeal, para. 52,

⁷¹ Document in Support of the Appeal, para. 60. *See also* Document in Support of the Appeal, paras 61-63.

⁷² Document in Support of the Appeal, para. 61.

⁷³ Document in Support of the Appeal, para. 62. Mr Babala argues further that the Pre-Trial Chamber violated the exceptionality of detention as enshrined in the “*United Nations Standard Minimum Rules for Non-Custodial Measures*” which are applicable before the Court by virtue of article 21 (1) (b) of the Statute. *See* Document in Support of the Appeal, paras 63-64, referring to point 6 of the “Resolution of the United Nations General Assembly 45/110 of 14 December 1990”.

⁷⁴ Response to the Document in Support of the Appeal, para. 2.

⁷⁵ Response to the Document in Support of the Appeal, para. 2.



(a) Alleged insufficiency of material underpinning grounds of detention

42. The Prosecutor argues that Mr Babala's contention that the Pre-Trial Chamber did not carry out a "serious" assessment of the evidence is without merit.⁷⁶ The Prosecutor emphasises that three paragraphs in the Impugned Decision are devoted to reviewing the evidence supporting the Pre-Trial Chamber's findings.⁷⁷ The Prosecutor submits that Mr Babala's "broad and general arguments" regarding the conduct of the Prosecutor's investigation and evidence as well as the validity of the warrant of arrest are "unsupported and amount to mere disagreement with the [Impugned] Decision".⁷⁸ She submits further that the Appeals Chamber will not 'interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion'.⁷⁹

(b) Alleged insufficiency of grounds of detention

43. The Prosecutor avers that Mr Babala's submission that the Pre-Trial Chamber's findings lack reasoning is similarly unsupported.⁸⁰ She submits that Mr Babala's challenges to allegations of acting as an intermediary, his involvement in money transfers to Mr Bemba and his defence team, and his use of coded communication, fail to establish any errors, or in which way they materially affected the Impugned Decision.⁸¹ The Prosecutor argues that the findings in the Impugned Decision regarding Mr Babala's alleged conduct are confirmed in the Arrest Warrant Decision as forming part "of a common plan to commit offences against the administration of justice", and that the Pre-Trial Chamber therefore did not err in relying upon them.⁸² The Prosecutor maintains that Mr Babala's "characterisation of his alleged criminal behaviour as legitimate political activity" and his contention regarding the international criminal justice being politicised have no relevance for the Appeals Chamber's determination of his appeal.⁸³

⁷⁶ Response to the Document in Support of the Appeal, para. 3.

⁷⁷ Response to the Document in Support of the Appeal, para. 3.

⁷⁸ Response to the Document in Support of the Appeal, para. 4.

⁷⁹ Response to the Document in Support of the Appeal, para. 4, referring to *Mbarushimana OA Judgment*, para. 17.

⁸⁰ Response to the Document in Support of the Appeal, para. 5.

⁸¹ Response to the Document in Support of the Appeal, para. 5.

⁸² Response to the Document in Support of the Appeal, para. 6.

⁸³ Response to the Document in Support of the Appeal, para. 6.

(c) Alleged errors relating to the burden of proof, presumption of innocence and fairness of the proceedings

44. The Prosecutor does not address Mr Babala's arguments in relation to the evidentiary standard, nor the alleged violation of presumption of innocence and related due process considerations, save for referring to paragraph 61 of the Document in Support of the Appeal (which pertains to Mr Babala's purported inability to challenge the material relied upon in the Impugned Decision) as "an attempt to re-litigate issues before the Appeals Chamber without showing [an] appealable error".⁸⁴

4. Determination by the Appeals Chamber

(a) Alleged insufficiency of material underpinning grounds of detention

45. The Appeals Chamber notes that Mr Babala's contention that the Pre-Trial Chamber erred in its uncritical acceptance of the material annexed to the Application for Warrants of Arrest is advanced in the context of three arguments: (i) that the Pre-Trial Chamber's findings are "founded solely on the material brought by the Prosecutor in her application for the warrant of arrest";⁸⁵ (ii) that the material in question was obtained through investigations of the Prosecutor who, "in contravention of article 54(1)(a) of the Statute, investigated only incriminating circumstances",⁸⁶ which seems to be based on the fact that the Prosecutor never questioned Mr Babala in relation to the offences he is alleged to have committed,⁸⁷ and (iii) that the fact that the Arrest Warrant Decision was rendered just one day after the Application for Warrants of Arrest "preclude[d] its proper analysis".⁸⁸

46. In relation to Mr Babala's first argument that the grounds advanced by the Pre-Trial Chamber are "incongruent [...] in that they are founded solely on the material brought by the Prosecutor in her application for the warrant of arrest",⁸⁹ the Appeals Chamber recalls that, in the *Gbagbo OA Judgment* it held that, "in a decision under article 60 (2) of the Statute, a Pre-Trial Chamber may refer to the decision on the warrant of arrest, without this affecting the *de novo* character of the Pre-Trial

⁸⁴ Response to the Document in Support of the Appeal, para. 1.

⁸⁵ Document in Support of the Appeal, para. 26.

⁸⁶ Document in Support of the Appeal, para. 27.

⁸⁷ Document in Support of the Appeal, paras 28, 29, 31.

⁸⁸ Document in Support of the Appeal, para. 32.

⁸⁹ Document in Support of the Appeal, para. 26.

Chamber's decision".⁹⁰ Accordingly, the Appeals Chamber considers that the Pre-Trial Chamber, in the instant case, was at liberty to rely on the materials underpinning the Arrest Warrant Decision, as assessed *de novo*. Such reliance, in and of itself, does not imply an uncritical acceptance, on the part of the Pre-Trial Chamber, of such materials to support its finding under article 58 (1) (a) of the Statute.

47. Regarding Mr Babala's second argument, the Appeals Chamber notes that article 54 (1) (a) of the Statute requires the Prosecutor to investigate exonerating and incriminating circumstances equally, which is essential to her truth-seeking function. However, Mr Babala fails to establish *how* the Prosecutor failed to fulfil this requirement, and how the Pre-Trial Chamber erred in relying on the evidence presented by the Prosecutor to find "reasonable grounds to believe" that Mr Babala committed the offences alleged. Mr Babala appears to argue that the fact that the Prosecutor did not interview him in relation to the offences means that she therefore failed to examine any exonerating factors in relation to his alleged conduct. However, the Appeals Chamber finds such an argument to be mere speculation, and it is therefore dismissed.

48. The Appeals Chamber finds that Mr Babala's related argument that, by seizing the Pre-Trial Chamber with "a unilateral, confidential, *ex-parte* application, the Prosecutor acted in disregard of the adversarial principle [...] which would have allowed her to glean much reliable information" in relation to Mr Babala's contact with Mr Bemba and his defence team,⁹¹ must also fail. The Appeals Chamber does not consider that the fact that the arrest warrant was applied for on an *ex parte* basis means that the Prosecutor failed to investigate incriminating and exonerating circumstances equally. Such an argument amounts, again, to a mere supposition, and is not cognisant of the fact that applications for arrest warrants under article 58 of the Statute are generally made on an *ex parte* basis; indeed, the Statute does not provide a role for the subject of an arrest warrant at the application stage. Mr Babala's argument on this point is therefore dismissed.

⁹⁰ *Gbagbo OA Judgment*, para. 27.

⁹¹ Document in support of the Appeal, para. 29.



49. In similar vein, Mr Babala's argument that the Pre-Trial Chamber did not have sufficient opportunity to properly analyse the Application for Warrants of Arrest before granting it⁹² is dismissed as unfounded and speculative.

50. In any event, the Appeals Chamber notes that, in order to support its conclusion that the conditions of article 58 (1) (a) were fulfilled, the Pre-Trial Chamber referred to the specific evidence it relied upon as assessed anew for the purposes of taking its decision under article 60 (2) of the Statute.⁹³ Indeed, while the Pre-Trial Chamber voiced its doubts in relation to the utility of reviewing "*ex novo*" whether "reasonable grounds to believe" continue to exist that Mr Babala committed the crimes for which he was charged, it stated that it would "nevertheless specifically refer to some of the materials relied upon in issuing the warrant (as well as their contents), all of which have been reconsidered and assessed *ex novo* for the purposes of this decision".⁹⁴ The Appeals Chamber notes that these specific materials included:

a) translated excerpts of phone calls [*sic*] intercepts between [Mr] Babala and [Mr] Bemba, where Mr Babala asks and receives instructions about money sums and their transfer, including from [Mr] Bemba to himself and to [Mr] Kilolo, in the course of which codes are used and references to testimonies in the [*Bemba*] Case are made; b) tables containing amounts of money transferred by [Mr] Babala to persons including [Mr] Mangenda, [Mr] Kilolo and [Mr] Arido; c) various items showing [Mr] Babala's role within the [MLC]. [Footnotes omitted.]⁹⁵

51. The Appeals Chamber notes further that the Pre-Trial Chamber also relied upon the Report of the Independent Counsel, which indicated that the alleged scheme was implemented through intermediaries, one of whom had the designation of "07" indicating Mr Babala, "as well as including transcripts of telephone calls between Mr Bemba, Mr Kilolo and/or Mr Mangenda in the course of which several references to Mr Babala appeared in connection with the ordering or execution of money transfers".⁹⁶

52. The Pre-Trial Chamber therefore clearly articulated the evidence it relied upon to support "reasonable grounds to believe" that offences against the administration of

⁹² Document in support of the Appeal, para. 32.

⁹³ See Impugned Decision, paras 6-8, 13.

⁹⁴ See Impugned Decision, para. 4.

⁹⁵ Impugned Decision, para. 7.

⁹⁶ Impugned Decision, para. 8.

justice had been committed by Mr Babala, and referred in a specific manner to the evidence in support of the allegations referred to above. The Appeals Chamber therefore finds no clear error that demonstrates the Pre-Trial Chamber's alleged lack of "critical and considered scrutiny" of the material underpinning article 58 (1) (a) of the Statute.

(b) Alleged insufficiency of grounds of detention

53. The Appeals Chamber finds that Mr Babala's argument that the grounds advanced by the Pre-Trial Chamber to justify its findings are "insufficient" must also fail. Mr Babala argues that the Pre-Trial Chamber did not sufficiently specify the crimes he is alleged to have committed, and thereby breached the principle of legality for finding "reasonable grounds to believe" that he engaged in conduct which "does not constitute a crime within the jurisdiction of the ICC".⁹⁷

54. The Appeals Chamber notes that, with the exception of two references to article 70 (1) (b) of the Statute,⁹⁸ the Impugned Decision does not state the statutory provisions Mr Babala is alleged to have breached, or the nature of the criminal scheme alleged by the Prosecutor. The Appeals Chamber finds it would have been preferable for the Pre-Trial Chamber to have done so in the Impugned Decision itself. However, in making its findings under article 58 (1) (a) of the Statute in relation to Mr Babala, the Pre-Trial Chamber clearly stated its reliance on an "*ex novo*" assessment of the materials in support of the Arrest Warrant Decision, which expound further on the nature of the criminal scheme, Mr Babala's involvement therein, and of the sub-paragraphs of article 70 of the Statute under which he is charged.⁹⁹ For example, in relation to the telephone calls and payments alleged to have been made by Mr Babala, the criminal nature of which he disputes,¹⁰⁰ it was stated in the Application for Warrants of Arrest that "[t]hese calls and payments together demonstrate that BABALA, directly and indirectly through NGINAMAU, corruptly influenced Defence witnesses in exchange for false testimony and false documents on behalf of BEMBA."¹⁰¹ Therefore, the alleged criminal nature of the scheme, and

⁹⁷ Document in Support of the Appeal, para. 36.

⁹⁸ Impugned Decision, paras 11-12.

⁹⁹ See Arrest Warrant Decision, p. 5, para. 13.

¹⁰⁰ See Document in Support of the Appeal, para. 38.

¹⁰¹ Application for Warrants of Arrest, para. 70. See also Application for Warrants of Arrest, paras 71-85.

concomitant evidence, is evident in documents referred to in the Impugned Decision, and which were made available to Mr Babala on 27 November 2013,¹⁰² despite not being further elaborated upon in the Impugned Decision.

55. In relation to Mr Babala's contention that the Pre-Trial Chamber breached the principle of legality, the Appeals Chamber finds that, in so arguing, Mr Babala misconceives article 22 of the Statute, which refers to criminal responsibility arising from "the conduct in question". Offences against the administration of justice and indeed other crimes under the Statute, will often entail conduct that is not necessarily "criminal" on its face. However, if, when viewed in the specific circumstances of the case, reasonable grounds exist to believe that such conduct occurred in the furtherance of an offence or crime under the Statute, then the principle of legality is not breached. Accordingly, the Appeals Chamber finds that Mr Babala's argument misstates article 22 of the Statute, and is accordingly dismissed.

56. Finally, the Appeals Chamber finds Mr Babala's argument that the Pre-Trial Chamber's findings in relation to his role in the MLC risks "politicisation of international criminal justice"¹⁰³ to be mere speculation, and is therefore dismissed.

**(c) Alleged errors relating to the burden of proof,
presumption of innocence and fairness of the proceedings**

57. The Appeals Chamber will now turn to Mr Babala's argument that the Pre-Trial Chamber referred to a higher burden of proof during his initial appearance before the Court than that required at the pre-trial stage, and ought to have examined the accuracy of the facts attributed to Mr Babala with reference to this higher standard.¹⁰⁴ The Appeals Chamber finds that, in so arguing, Mr Babala erroneously attributes the evidentiary burden at trial to that at the pre-trial stage of proceedings. In this connection, the relevant standard underpinning article 58 (1) (a) of the Statute is the least onerous in terms of the progressively higher evidentiary thresholds required for confirmation of charges under article 61 (7) of the Statute or for conviction under article 66 (3) of the Statute.

¹⁰² See Impugned Decision, para. 7.

¹⁰³ See Document in Support of the Appeal, paras 39-42.

¹⁰⁴ Document in Support of the Appeal, para. 52.

58. The Appeals Chamber finds that the Pre-Trial Chamber, in reading Mr Babala's rights at his first appearance, was merely articulating Mr Babala's right, pursuant to article 60 (1) of the Statute, not to be found guilty unless the crimes alleged were proven "beyond reasonable doubt".¹⁰⁵ The Appeals Chamber further finds that there is no statutory requirement for the Pre-Trial Chamber to assess the material before it at the present stage of proceedings beyond any standard than that articulated in article 58 (1) (a) of the Statute, being that there exist "reasonable grounds to believe" he committed the crimes alleged.¹⁰⁶ Therefore, the Appeals Chamber finds that Mr Babala's argument that the Pre-Trial Chamber is "duty-bound to ascertain [the evidence's] factual accuracy" or to actually verify the "truth of the offences ascribed to the Appellant" to be legally incorrect.¹⁰⁷ Mr Babala's argument is, accordingly, dismissed.

59. In relation to Mr Babala's argument that the Pre-Trial Chamber "does violence to the fair trial requirement" by relying solely on the material attached to the Application for Warrants of Arrest,¹⁰⁸ the Appeals Chamber recalls that, "in a decision under article 60 (2) of the Statute, a Pre-Trial Chamber may refer to the decision on the warrant of arrest, without this affecting the *de novo* character of the Pre-Trial Chamber's decision".¹⁰⁹ Accordingly, the Pre-Trial Chamber in the instant case did not err in referring to the materials underpinning the Arrest Warrant Decision to support its findings under article 58 (1) (a) of the Statute, on the basis that it twice stated that these had been assessed in a *de novo* manner.¹¹⁰

60. The Appeals Chamber notes that Mr Babala argues that the Pre-Trial Chamber violates the fairness of the proceedings by relying solely on incriminating material presented by the Prosecutor and, in doing so, it "has not in return afforded the

¹⁰⁵ See Transcript of 27 November 2013, ICC-01/05-01/13-T-1-ENG (CT WT), p. 4, lines 12-13, p. 13, line 22, to p. 14, line 19.

¹⁰⁶ The Appeals Chamber notes that this standard is applicable to article 58 (1) (a) of the Statute only. By contrast, "[w]hat may justify arrest (and, in this context, continued detention) under article 58 (1) (b) of the Statute is that it must 'appear' to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence". See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, ICC 01/04-01/07-572 (OA 4) (hereinafter: "*Ngudjolo OA 4 Judgment*"), para. 21.

¹⁰⁷ See Document in Support of the Appeal, para. 52.

¹⁰⁸ Document in Support of the Appeal, paras 26, 61.

¹⁰⁹ *Gbagbo OA Judgment*, para. 27.

¹¹⁰ Impugned Decision, paras 4, 13.

Appellant the opportunity to refute this material and to put his side across”.¹¹¹ In this connection, the Appeals Chamber recalls its holding in the *Bemba OA Judgment* that:

in order to ensure both equality of arms and an adversarial procedure, the defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness of detention, bearing in mind the circumstances of the case. Ideally, the arrested person should have all such information at the time of his or her initial appearance before the Court. This would allow the person to challenge his or her detention as soon as he or she is in detention at the Court and in circumstances in which he or she is appraised of the material on which the arrest warrant was based.¹¹²

61. The Appeals Chamber notes that the materials annexed to the Application for Warrants of Arrest were disclosed to Mr Babala on 27 November 2013,¹¹³ the day of his first appearance before the Pre-Trial Chamber.¹¹⁴ Thus, Mr Babala had the opportunity to assess and, through the Application for Interim Release, challenge this material relied upon by the Pre-Trial Chamber insofar as they are alleged to support “reasonable grounds to believe” that he committed the offences for which he is charged.

62. However, the Appeals Chamber notes that the Report of the Independent Counsel, which was also relied upon in the Arrest Warrant Decision,¹¹⁵ although not annexed thereto, was only disclosed to Mr Babala on 16 December 2013, some weeks after his first appearance before the Pre-Trial Chamber on 27 November 2013, and four days *after* he filed his Application for Interim Release, thus precluding Mr Babala from considering it for the purposes of his application pursuant to article 60 (2) of the Statute. While the Appeals Chamber has previously held that “the need to safeguard ongoing investigations”¹¹⁶ may be a consideration in relation to the timing of disclosure of material underpinning an arrest warrant, it notes that this was

¹¹¹ Document in Support of the Appeal, paras 61-62.

¹¹² *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. 32.

¹¹³ See Impugned Decision, para. 7. See also Document in Support of the Appeal, para. 25.

¹¹⁴ Transcript of 27 November 2013, ICC-01/05-01/13-T-1-ENG (CT WT), p. 4, lines 7-9, p. 5, lines 9-11.

¹¹⁵ Arrest Warrant Decision, para. 5.

¹¹⁶ *Bemba OA Judgment*, para. 33.

not the reason articulated for this later disclosure of the Report of the Independent Counsel.¹¹⁷

63. The Appeals Chamber emphasises the need for timely disclosure in relation to article 58 proceedings and therefore notes with concern the timing of the disclosure of the Report of the Independent Counsel. However, in the instant case, it considers that Mr Babala did have access to ample material underpinning the Application for Warrants of Arrest referred to in the Impugned Decision, including transcripts of non-privileged telephone calls relating to the transfers of sums of money¹¹⁸ which refer to the designation of Mr Babala as “07”¹¹⁹ (which the Impugned Decision notes in the context of the Report of the Independent Counsel).¹²⁰ Mr Babala also had access to the tables outlining money transfers¹²¹ and those pertaining to his role in the MLC,¹²² all of which were relied upon by the Pre-Trial Chamber in finding “reasonable grounds to believe” that Mr Babala committed the crimes for which he is charged.

64. On the basis that Mr Babala had access to this evidence upon his first appearance before the Pre-Trial Chamber, the Appeals Chamber is satisfied that he was in possession of the majority of the material on which the Application for Warrants of Arrest was based, and thus had sufficient opportunity to challenge it in his Application for Interim Release. He merely elected not to do so. Notwithstanding, Mr Babala stated his intention to await “disclosure of the evidence in the Prosecutor’s possession so as to be able to challenge it on legal and factual grounds, and to prove

¹¹⁷ See “Decision on protective measures and on the filing of confidential redacted versions of documents in the record”, dated 12 December 2013 and registered on 13 December 2013, ICC-01/05-01/13-39-Conf, pp. 5-6.

¹¹⁸ See annex I.1. to Application for Warrants of Arrest, ICC-01/05-01/13-19-Conf-AnxI.1: Excerpt of 6 February 2013, p. 1; Excerpt of 12 February 2013, p. 14; Excerpt of 20 November 2012, p. 11; Excerpt of 19 January 2013, p. 17; Excerpt of 28 September 2012, p. 7; Excerpt of 25 May 2012, p. 2; Excerpt of 7 September 2012, p. 3; Excerpt of 13 September 2012, p. 4; Excerpt of 16 October 2012, p. 8; Excerpt of 13 November 2012, p. 9; Excerpt of 14 November 2012, p. 10; Excerpt of 22 November 2012, p. 11; Excerpt of 12 December 2012, p. 12; Excerpt of 15 September 2012, p. 6.

¹¹⁹ See annex I.1. to Application for Warrants of Arrest, ICC-01/05-01/13-19-Conf-AnxI.1, pp. 2, 5, 7-8, 10, 14, 18. See also Impugned Decision, para. 17.

¹²⁰ Impugned Decision, para. 8.

¹²¹ See annexes B.2., C.2. to Application for Warrants of Arrest, ICC-01/05-01/13-19-Conf-AnxB.2.; ICC-01/05-01/13-19-Conf-AnxC.2. See also Document in Support of the Appeal, para. 25.

¹²² See annexes K.1., K.6. to Application for Warrants of Arrest, ICC-01/05-01/13-19-Conf-AnxK.1.; ICC-01/05-01/13-19-Conf-AnxK.6. See also Document in Support of the Appeal, para. 25.

his innocence”.¹²³ Accordingly, under such circumstances, the Appeals Chamber can discern no clear error on the part of the Pre-Trial Chamber in this regard.

65. In relation to Mr Babala’s broad arguments that the Pre-Trial Chamber violated the “fundamental principles of [...] presumption of innocence and the exceptionality of detention”,¹²⁴ the Appeals Chamber notes that, under the heading “General principles”, the Pre-Trial Chamber recalled the exceptional nature of detention in the Impugned Decision.¹²⁵ The Pre-Trial Chamber then noted that, where the relevant statutory requirements are satisfied, “the presumption of innocence does not *per se* prevent detention”.¹²⁶ The Appeals Chamber finds that, in so finding, the Pre-Trial Chamber was guided by the correct legal standard in making its decision under article 60 (2) of the Statute.

66. The Appeals Chamber has previously recognised that “[t]he provisions of the Statute relevant to detention, like every provision of it, must be interpreted and applied in accordance with ‘internationally recognised human rights’”.¹²⁷ The exceptionality of detention, as an “internationally recognised human right” under article 21 (3) of the Statute, is therefore relevant to the interpretation of articles 58 (1) and 60 (2) of the Statute. However, the thrust of such decisions is the concrete assessment of whether “reasonable grounds to believe” the suspect committed the alleged crimes continues to exist and that the requirements under article 58 (1) (b) of the Statute are met. Therefore, if the conditions underpinning article 58 (1) are satisfied, detention of a suspect will be justifiable and consonant with internationally recognised human rights principles. The Appeals Chamber also notes that article 60 (4) of the Statute provides that “[t]he Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions”.

¹²³ Application for Interim Release, para. 19.

¹²⁴ Document in Support of the Appeal, paras 60, 63-64.

¹²⁵ Impugned Decision, p. 5.

¹²⁶ Impugned Decision, para. 3.

¹²⁷ *Ngudjolo OA 4 Judgment*, para. 15, referring to *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006”, 14 December 2006, ICC-01/04-01/06-772 (OA 4), para. 36.

67. The Appeals Chamber therefore finds that the Pre-Trial Chamber did not violate the presumption of innocence and exceptionality of detention, or any concomitant due process rights. Mr Babala's arguments on this point are, accordingly, dismissed.

68. Accordingly, the Appeals Chamber dismisses Mr Babala's second ground of appeal.

C. Second ground of appeal

69. Mr Babala submits that the Pre-Trial Chamber erred in finding that the conditions set out in article 58 (1) (b) of the Statute were met and justified his continued detention.¹²⁸ The Appeals Chamber will address Mr Babala's submissions pertaining to each condition in turn.

1. Relevant part of the Impugned Decision

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

70. With respect to whether the detention appears necessary to ensure Mr Babala's appearance at trial, the Pre-Trial Chamber found in the Impugned Decision that "the personality of a suspect is not one of the reasons on the basis of which the Chamber can or should determine whether detention is necessary".¹²⁹ In that regard, it held that "[p]ersonal circumstances of education, professional or social status [...] are *per se* neutral and inconclusive in respect of the need to assess the existence of flight risk".¹³⁰ The Pre-Trial Chamber further stated that Mr Babala's personal undertaking to refrain from absconding from the Court proceedings, "is not and cannot be *per se* decisive but should rather be assessed and appreciated in light of all other relevant factors".¹³¹ It added that the "prejudices allegedly entailed" by Mr Babala following his detention were "not a factor relevant for the purposes of the determination under article 60(2) of the Statute".¹³²

¹²⁸ Document in Support of the Appeal, paras 57-66. Mr Babala's contentions, at paragraphs 50 and 72 of the Document in Support of the Appeal, on the Pre-Trial Chamber's failure to examine his background and personal circumstances which would have shown that he did not commit the offences charged against him and the Prosecutor's failure to fulfil her obligation under article 54 (1) (a) of the Statute will be addressed with his arguments raising similar issues under his first ground of appeal.

¹²⁹ Impugned Decision, para. 16.

¹³⁰ Impugned Decision, para. 16.

¹³¹ Impugned Decision, para. 20.

¹³² Impugned Decision, para. 23.

71. As to the gravity of the offences, the Pre-Trial Chamber also noted that “offences against the administration of justice are of the utmost gravity, even more so when proceedings relating to crimes as grave as those within the jurisdiction of the Court are at stake”.¹³³ It held that the commission of such offences is so serious as it not only disrupts the “fair and efficient functioning” of the present case, but “undermine[s] public trust in the administration of justice and the judiciary”, a factor that is exacerbated when committed by “highly educated individuals”.¹³⁴

72. The Pre-Trial Chamber further recalled its finding in the Arrest Warrant Decision that, as a parliamentarian in the DRC, Mr Babala had extended contacts at the national and international levels and could “travel freely, including to non-States parties”.¹³⁵ The Pre-Trial Chamber further noted the advanced stage of the disclosure process in the present proceedings as a factor “that might also be relevant in weighing the likelihood of the personal appearance or of the risk of flight”.¹³⁶ Furthermore, the Pre-Trial Chamber did not find relevant Mr Babala’s comparisons of his case, which he argued involved “‘less serious’ crimes than those charged” to that of other cases before the Court in which summonses to appear had been issued, on the basis that he ought to have received similar treatment.¹³⁷ The Pre-Trial Chamber recalled that, unlike the crimes allegedly charged in these cases, “all of which referred to events and scenarios which were concluded”, the present case concerned “behaviours allegedly aimed at disrupting the course of justice in respect of a trial the outcome of which is still open; and where the impact of these proceedings on it is yet to be determined and, at this stage, unknown”.¹³⁸

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

73. With regard to whether detention appeared necessary to ensure that Mr Babala does not obstruct or endanger the investigation or the Court proceedings, the Pre-Trial Chamber considered that the material attached to the Application for Warrants of Arrest and the Report of the Independent Counsel¹³⁹ supported that Mr Babala was

¹³³ Impugned Decision, para. 16.

¹³⁴ Impugned Decision, para. 16.

¹³⁵ Impugned Decision, para. 17.

¹³⁶ Impugned Decision, para. 19.

¹³⁷ Impugned Decision, para. 21.

¹³⁸ Impugned Decision, para. 22.

¹³⁹ The Appeals Chamber notes that the Pre-Trial Chamber relied only on the Report of the Independent Counsel (*see* Impugned Decision, paras 8-10, 13, 17, 26). Thus, the Pre-Trial Chamber’s

the “person through which various transfers of money to other suspects in this case [...] were made upon orders of [Mr] Bemba” and that these transfers were also “discussed together with and in the context of comments on developments on the trial of the [Bemba Case]”.¹⁴⁰ The Pre-Trial Chamber was satisfied that these objective elements represent ‘tangible evidence’¹⁴¹ “suitable to ground [its] assessment of the persisting existence of a risk that obstruction or endangerment of the proceedings does exist, both in respect of this case and of the [Bemba] Case”.¹⁴² It further noted Mr Babala’s personal commitment that he will not obstruct or endanger the investigation or the proceedings but found that it “cannot by any standard be considered as suitable or *per se* sufficient to annul them” and specified that “detention might be necessary with a view to ensuring that the person does not obstruct or endanger not only the investigation, but also the ‘court proceedings’”.¹⁴³ The Pre-Trial Chamber noted that the alleged offences “appear[ed] to have been at least partly committed in spite of the fact that one of the suspects was already in the custody of the detention unit of the Court, and by means of an abuse of the communication system set up within it”.¹⁴⁴

74. Furthermore, the Pre-Trial Chamber noted the Parquet Général’s Observations of 17 February 2014 and Mr Babala’s request to have these observations dismissed on the grounds of their ‘tardiness’ and substance.¹⁴⁵ With regard to the alleged late filing of these observations, the Pre-Trial Chamber found that the “ongoing nature of the assessment of the persisting existence of the reasons warranting detention makes it possible that a State may wish to supplement, or otherwise amend, its initial response”.¹⁴⁶ The Pre-Trial Chamber further found that it was not its role to “decide whether observations sent to the Court in compliance with a request for cooperation emanate from a State entity or body actually vested with the authority to formulate them, even less to inquire into the motives or reasons which might support or explain their content”.¹⁴⁷ It considered that “the Court addresses all its requests for

reference to the “reports” by the Independent Counsel at paragraph 25 of the Impugned Decision appears to be a typographical error.

¹⁴⁰ Impugned Decision, para. 25.

¹⁴¹ The Impugned Decision uses the French term “preuves tangibles”. See Impugned decision, para. 26.

¹⁴² Impugned Decision, para. 26.

¹⁴³ Impugned Decision, para. 26.

¹⁴⁴ Impugned Decision, para. 27.

¹⁴⁵ Impugned Decision, para. 29.

¹⁴⁶ Impugned Decision, para. 29.

¹⁴⁷ Impugned Decision, para. 29.

cooperation to the ‘competent authorities’ of the relevant State, who also enjoy full discretion in deciding to what extent they wish to support their position by way of reasoning”.¹⁴⁸ The Pre-Trial Chamber then concluded that it would “refrain from addressing” Mr Babala’s arguments in that regard and had to “defer to the assessment made by the DRC State authorities in respect of the risks entailed by [Mr] Babala’s possible release on their territory, and of their wish that such release be prevented”.¹⁴⁹

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

75. In relation to whether detention appeared necessary to prevent Mr Babala from continuing with the commission of offences under article 70 of the Statute, the Pre-Trial Chamber found that the reopening of the *Bemba* Case could not be excluded.¹⁵⁰ It referred to the case of the *Prosecutor v. Germain Katanga* (hereinafter: “*Katanga* Case”), in which the case was indeed re-opened.¹⁵¹ It further considered that the risk of the commission of future and related crimes “might also be committed by the suspect in respect of [the current] proceedings”.¹⁵² The Pre-Trial Chamber noted Mr Babala’s contention as to the possibility that “some pieces of evidence which are indeed in the hands of the relevant authorities and as such beyond the suspects’ reach”; however, it was of the view that at this stage of the proceedings, it could not be excluded “that action be taken in respect of other evidentiary items which might be outstanding and also, as said, in respect of items relating to [the current] proceedings”.¹⁵³

2. Mr Babala’s submissions before the Appeals Chamber

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

76. Mr Babala submits that the Pre-Trial Chamber’s findings with regard to his personal circumstances (such as education, professional and social status), the gravity of the offences against the administration of justice and the number of contacts he had as a parliamentarian in DRC amount to “conjecture” which “does not in principle befit a judge who respects the rights of the defence or [...] the fairness of the

¹⁴⁸ Impugned Decision, para. 29.

¹⁴⁹ Impugned Decision, para. 30.

¹⁵⁰ Impugned Decision, para. 32.

¹⁵¹ Impugned Decision, para. 32.

¹⁵² Impugned Decision, para. 32.

¹⁵³ Impugned Decision, para. 32.

proceedings”.¹⁵⁴ Mr Babala adds that the Pre-Trial Chamber failed to identify the contacts he has as a parliamentarian in DRC.¹⁵⁵

77. Mr Babala alleges further that he does not have any supporters who could help him to evade justice.¹⁵⁶ He maintains that “there have been no public rallies in his support or any threats to anyone as a result of his detention in The Hague”.¹⁵⁷

78. Mr Babala avers that the “jurisprudence of the Court [regarding the issuance of warrants of arrest and summonses to appear] is both disparate and particularly stringent towards prosecuted persons at the DRC” compared to accused persons in cases such as the *Prosecutor v. Bahar Idriss Abu Garda*, the *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and the *Prosecutor v. Uhuru Muigai Kenyatta*, in which summonses to appear were used instead of warrants of arrest.¹⁵⁸ He adds that “[t]here is no logical explanation” for his continued detention for lesser offences as he poses no risks of flight, of obstructing the proceedings or continuing to commit further crimes.¹⁵⁹

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

79. Mr Babala notes that the Pre-Trial Chamber was satisfied based on ‘tangible evidence’ that he may obstruct the proceedings based on allegations of his involvement in money transfers.¹⁶⁰ He argues, however, that the Pre-Trial Chamber failed to give reasons for its “mistrust” of Mr Babala’s “solemn undertaking” that he will not obstruct the proceedings.¹⁶¹

80. Mr Babala further contends that the Pre-Trial Chamber erred in considering the Parquet Général’s Observations of 17 February 2014, as these were “frivolous and fallacious” and merely “aimed at isolating and stifling [him as] a political

¹⁵⁴ Document in Support of the Appeal, paras 44-45.

¹⁵⁵ Document in Support of the Appeal, paras 44-45.

¹⁵⁶ Document in Support of the Appeal, para. 54, referring to Impugned Decision, para. 18.

¹⁵⁷ Document in Support of the Appeal, para. 54.

¹⁵⁸ Document in Support of the Appeal, para. 65. The Appeals Chamber notes that Mr Babala raises this argument under the third limb of article 58 (1) (b) of the Statute submitting that it relates to all three limbs. However, the Appeals Chamber finds more appropriate to address Mr Babala’s argument under the first limb of article 58 (1) (b) of the Statute as it pertains to the Pre-Trial Chamber’s finding under article 58 (1) (b) (i) of the Statute.

¹⁵⁹ Document in Support of the Appeal, para. 65.

¹⁶⁰ Document in Support of the Appeal, para. 55.

¹⁶¹ Document in Support of the Appeal, para. 56. *See also* Document in Support of the Appeal, para. 65.



opponent”.¹⁶² He adds that these observations are “baseless” when weighed against the “clear social and political circumstances” that would militate “in favour of rescinding” the warrant of arrest against him.¹⁶³

81. Finally, Mr Babala submits that the Pre-Trial Chamber “should dismiss the [Parquet Général’s Observations of 17 February 2014], firstly as they were out of time, and secondly as they are incompatible” with the earlier DRC Authorities’ Observations of 9 January 2014.¹⁶⁴ Mr Babala argues that the Pre-Trial Chamber erred in accepting the later views of the Parquet Général’s Observations of 17 February 2014 that negatively impacted upon Mr Babala’s prospect for interim release in the DRC and failed to “ground [its] decision” why it “dismissed” the earlier DRC Authorities’ Observations of 9 January 2014.¹⁶⁵ He adds that the Parquet Général’s Observations of 17 February 2014 did not “in any way supersede” the DRC Authorities’ Observations of 9 January 2014.¹⁶⁶

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

82. Mr Babala submits that he could not commit further crimes as the “presentation of the [*Bemba Case*] is completed” and therefore “no further witnesses should appear and no uncontested material may be tendered”.¹⁶⁷ He adds that since he does not know the identity of his accusers, he cannot retaliate against them.¹⁶⁸

¹⁶² Document in Support of the Appeal, paras 47, 49. The Appeals Chamber notes that Mr Babala’s arguments regarding the Parquet Général’s Observations of 17 February 2014 are raised under the third limb of article 58 (1) (b) of the Statute. However, the Appeals Chamber finds more appropriate to address Mr Babala’s argument under the second limb of article 58 (1) (b) of the Statute as it pertains to the Pre-Trial Chamber’s findings under article 58 (1) (b) (ii) of the Statute, which are then rehearsed in the Impugned Decision in relation to the third limb of article 58 (1) (b) of the Statute. The Impugned Decision states in that regard “the observations contained in paragraph C.2 above [regarding article 58 (1) (b) (ii) of the Statute] [...] are also of relevance for the purposes of assessing the third element listed under article 58(1)(b) of the Statute”. See Impugned Decision, para. 31.

¹⁶³ Document in Support of the Appeal, paras 47-48.

¹⁶⁴ Document in Support of the Appeal, para. 58.

¹⁶⁵ Document in Support of the Appeal, paras 18, 57-58.

¹⁶⁶ Document in Support of the Appeal, para. 58.

¹⁶⁷ Document in Support of the Appeal, paras 59, 66.

¹⁶⁸ Document in Support of the Appeal, para. 66.

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

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

83. The Prosecutor avers that Mr Babala fails to demonstrate an error in the Pre-Trial Chamber's finding on the possibility that he uses his contacts to abscond.¹⁶⁹ According to the Prosecutor, the Pre-Trial Chamber "properly found [...] the 'possibility, not the inevitability, of a future occurrence'" which is supported by concrete evidence that Mr Babala may abscond.¹⁷⁰ The Prosecutor argues that Mr Babala's approach that the Pre-Trial Chamber reasoned "by hypothesising" when concluding on Mr Babala's future actions must be dismissed as it is "not supported by the evidence and, [...] improperly re-litigates the [Impugned] Decision".¹⁷¹

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

84. The Prosecutor submits that Mr Babala simply repeats his argument regarding his personal guarantee and does not establish an error by the Pre-Trial Chamber's finding on the risk of him obstructing or endangering the court proceedings.¹⁷² The Prosecutor further recalls that the Pre-Trial Chamber's approach is consistent with that adopted by other Chambers of this Court.¹⁷³

85. The Prosecutor further argues that Mr Babala fails to "characteris[e] the error or defin[e] the scope of its objection" against the Pre-Trial Chamber's reliance on the observations of the Parquet Général's Observations of 17 February 2014¹⁷⁴ regarding Mr Babala's interim release.¹⁷⁵ The Prosecutor contends that the Pre-Trial Chamber expressly addressed the issue of the late receipt of these observations and Mr Babala does not seem to "challenge [their] inclusion exclusively on that basis".¹⁷⁶ The Prosecutor adds that Mr Babala's argument is inconsistent because he himself relies

¹⁶⁹ Response to the Document in Support of the Appeal, para. 8.

¹⁷⁰ Response to the Document in Support of the Appeal, para. 8.

¹⁷¹ Response to the Document in Support of the Appeal, para. 9.

¹⁷² Response to the Document in Support of the Appeal, para. 10.

¹⁷³ Response to the Document in Support of the Appeal, para. 10, referring to *Bemba OA 2 Judgment*, para. 10; *The Prosecutor v. Jean-Pierre Bemba Gombo*, "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", 14 August 2009, ICC-01/05-01/08-475, para. 82.

¹⁷⁴ The Appeals Chamber notes that in relation of the Parquet Général's Observations of 17 February 2014, the Prosecutor erroneously refers to 17 January 2014 instead of 17 February 2014. See Response to the Document in Support of the Appeal, para. 11, referring to annex I of the Second Registry Report, ICC-01/05-01/13-206-Conf-AnxI.

¹⁷⁵ Response to the Document in Support of the Appeal, para. 11.

¹⁷⁶ Response to the Document in Support of the Appeal, para. 12.

on the DRC Authorities' Observations of 9 January 2014¹⁷⁷ filed after the deadline of 3 January 2014.¹⁷⁸ She further maintains that the Pre-Trial Chamber "did not expressly refer to the [DRC Authorities' Observations of 9 January 2014] because it was not relevant to [its] assessment of risk under [a]rticle 58(1)(b)(iii)" and in any event this observation "merely confirms Mr Babala's ability to return to the DRC 'if his Application for Interim Release was granted'".¹⁷⁹ The Prosecutor avers further that the Pre-Trial Chamber was correct to address the Parquet Général's Observations of 17 February 2014 instead of the DRC Authorities' Observations of 9 January 2014 for the purpose of establishing "a credible risk".¹⁸⁰

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

86. The Prosecutor submits that, in arguing that "the continued commission of crimes was impossible" and "the existence of an alleged procedural bias against [him]", Mr Babala is attempting to re-litigate issues addressed and rejected by the Pre-Trial Chamber without alleging an error in the Pre-Trial Chamber's findings.¹⁸¹

4. Determination by the Appeals Chamber

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

87. With regard to Mr Babala's argument contesting the Pre-Trial Chamber's findings on his personal circumstances (namely, education, professional and social status) and the gravity of the offences,¹⁸² the Appeals Chamber finds that Mr Babala has failed to substantiate any material error that would affect the Pre-Trial Chamber's findings. In that regard, he merely argues that these findings amount to "conjecture" which "does not in principle befit a judge who respects the rights of the defence or [...] the fairness of the proceedings".¹⁸³ The Appeals Chamber recalls that "an appellant 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

¹⁷⁷ When referring to the DRC Authorities' Observations of 9 January 2014, the Appeals Chamber notes that the Prosecutor erroneously refers to 8 January 2014 instead of 9 January 2014. *See* Response to the Document in Support of the Appeal, para. 12, referring to annex 6 of the First Registry Report, ICC-01/05-01/13-78-Conf-Anx6.

¹⁷⁸ Response to the Document in Support of the Appeal, para. 12.

¹⁷⁹ Response to the Document in Support of the Appeal, para. 13.

¹⁸⁰ Response to the Document in Support of the Appeal, para. 13.

¹⁸¹ Response to the Document in Support of the Appeal, para. 14.

¹⁸² Document in Support of the Appeal, paras 44-45.

¹⁸³ Document in Support of the Appeal, para. 45.

decision”.¹⁸⁴ Consequently, the Appeals Chamber dismisses Mr Babala’s arguments *in limine* without fully considering their merits.

88. Nevertheless, the Appeals Chamber is concerned by the Pre-Trial Chamber’s description of offences against the administration of justice as being “of the utmost gravity”.¹⁸⁵ The Appeals Chamber emphasises that offences under article 70 of the Statute, while certainly serious in nature, cannot be considered to be as grave as the core crimes under article 5 of the Statute, being genocide, crimes against humanity, war crimes, and the crime of aggression, which are described in that provision to be “the most serious crimes of concern to the international community as a whole”. The language used by the Pre-Trial Chamber in describing the offences for which Mr Babala was charged to be “of the utmost gravity” is therefore problematic, as it may give the impression that the Pre-Trial Chamber accorded undue weight to the seriousness of the alleged offences in assessing the risk under article 58 (1) (b) (i) of the Statute.

89. This notwithstanding, the Appeals Chamber notes that the Pre-Trial Chamber’s observation in relation to the gravity of the offences allegedly committed by Mr Babala is supported by two reasons: (i) that offences against the administration of justice “threaten or disrupt the overall fair and efficient functioning of the justice in the specific case to which they refer”; and (ii) that such offences “ultimately undermine the public trust in the administration of justice and the judiciary, most notably when they are committed by highly educated individuals”.¹⁸⁶ These reasons support the logic that the commission of offences against the administration of justice, as a discrete category, may have specific and serious ramifications on the present case as well as on the administration of justice more broadly. Therefore, given the reasons put forward by the Pre-Trial Chamber for its observations, which are specific to offences under article 70 of the Statute, the Appeals Chamber does not consider that the Pre-Trial Chamber actually sought to equate such offences with those under article 5 of the Statute, despite the language it used. Accordingly, the Appeals Chamber does not find any error in this regard.

¹⁸⁴ *Bemba OA 3 Judgment*, para. 102, citing *Kony et al. OA 3 Judgment*, para. 48.

¹⁸⁵ *See Impugned Decision*, para. 16.

¹⁸⁶ *Impugned Decision*, para. 16.

90. With respect to Mr Babala's contention that the Pre-Trial Chamber failed to identify the contacts he has as a parliamentarian in the DRC, the Appeals Chamber notes that the Pre-Trial Chamber recalled its finding in the Arrest Warrant Decision that Mr Babala was a DRC parliamentarian, which provided him with "numerous contacts, including at the international level, and is able to travel freely, including to non-State parties".¹⁸⁷ When making this finding on Mr Babala's political contacts, the Pre-Trial Chamber explicitly referred to Mr Babala's role in the MLC party, Congolese press articles and to specific translated excerpts of phone call intercepts as its evidentiary basis to establish the existence of the said "contacts".¹⁸⁸ The Appeals Chamber notes that this evidence which was included in the Application for Warrants of Arrest was disclosed to Mr Babala on 27 November 2013. Thus, he was in possession of the materials referenced by the Pre-Trial Chamber.¹⁸⁹ The Appeals Chamber further observes in particular that the excerpts of phone call intercepts refer to individuals and groups of individuals connected to Mr Babala, and finds that it was sufficiently detailed to justify the Pre-Trial Chamber's conclusion regarding the existence of the said contacts.¹⁹⁰ The Appeals Chamber notes further that Mr Babala does not challenge this specific evidence. Accordingly, the Appeals Chamber can discern no clear error in the Pre-Trial Chamber's approach.

91. As for Mr Babala's submission that he does not have any supporters who could help him to evade justice,¹⁹¹ the Appeals Chamber notes that the Pre-Trial Chamber referred to the Court's jurisprudence that the "existence of a network of supporters behind a suspect to be a relevant factor in the determination of the existence of a risk of flight".¹⁹² While the Pre-Trial Chamber appears not to have made a specific finding in relation to the existence of Mr Babala's "network of supporters" *per se*,¹⁹³ the Appeals Chamber notes that the Pre-Trial Chamber's finding is immediately preceded

¹⁸⁷ Impugned Decision, para. 17. *See also* Arrest Warrant Decision, para. 22.

¹⁸⁸ *See* Impugned Decision, para. 17, referring to annexes I.1., K.7. to Application for Warrants of Arrest: ICC-01/05-01/13-67-Conf-AnxI.1, ICC-01/05-01/13-67-Conf-AnxK.7. *See also* Impugned Decision, para. 7, referring to annexes K.1., K.6. to Application for Warrants of Arrest: ICC-01/05-67-Conf-AnxK.1, ICC-01/05-67-Conf-AnxK.6.

¹⁸⁹ Impugned Decision, para. 7. *See also* Document in Support of the Appeal, para. 5.

¹⁹⁰ *See* annex I.1 to Application of Warrants for Arrest, ICC-01/05-67-Conf-AnxI.1: Excerpt of 6 February 2013, p. 1; Excerpt of 7 September 2012, p. 3; Excerpt of 13 September 2012, p. 4; Excerpt of 15 September 2012, pp. 5-6; Excerpt of 14 November 2012, p. 10.

¹⁹¹ Document in Support of the Appeal, para. 54.

¹⁹² Impugned Decision, para. 18.

¹⁹³ Impugned Decision, para. 18.

by its conclusion regarding Mr Babala's 'numerous contacts, including at an international level' as a parliamentarian in the DRC.¹⁹⁴ The Appeals Chamber considers that to be what the Pre-Trial Chamber was referring to in order to establish the existence of such a "network". Given the evidentiary basis upon which the Pre-Trial Chamber relied for its finding regarding Mr Babala's contacts, the Appeals Chamber can discern no clear error on the part of the Pre-Trial Chamber in finding the existence of a network in its assessment of risk under article 58 (1) (b) (i) of the Statute. Accordingly, Mr Babala's argument is dismissed.

92. Furthermore, in relation to Mr Babala's submission as to comparisons between his case with that of other accused's cases before the Court and that "[t]here is no logical explanation" for his continued detention for lesser offences,¹⁹⁵ the Appeals Chamber finds that, again, Mr Babala merely repeats submissions raised before the Pre-Trial Chamber and fails to advance any arguments that would demonstrate a clear error in the Pre-Trial Chamber's finding.¹⁹⁶ Moreover, the Appeals Chamber finds that the determination of whether the conditions of article 58 (1) (b) of the Statute are fulfilled is established on a case-by-case basis, and therefore comparisons with other cases will not be determinative of the risk assessment under article 58 (1) (b) (ii) of the Statute in the case at hand. Accordingly, Mr Babala's argument is dismissed.

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

93. With respect to Mr Babala's contention regarding the Pre-Trial Chamber's failure to give reasons for its "mistrust" of Mr Babala's personal undertaking that he will not obstruct the proceedings,¹⁹⁷ the Appeals Chamber notes that he does not substantiate his claim. In fact, contrary to Mr Babala's contention, the Appeals Chamber finds that the Pre-Trial Chamber adequately considered Mr Babala's personal undertaking. In that regard, it weighed this factor against the evidence showing his alleged involvement in transfers of money to other suspects in the present case, which occurred as a result of orders by Mr Bemba, and that these transfers were

¹⁹⁴ See Impugned Decision, para. 17.

¹⁹⁵ Document in Support of the Appeal, para. 65.

¹⁹⁶ See Application for Interim Release, paras 29-34; Impugned Decision, paras 21-22.

¹⁹⁷ Document in Support of the Appeal, para. 56. See also Document in Support of the Appeal, para. 65.

also discussed in connection with developments of the trial in the *Bemba Case*,¹⁹⁸ and found Mr Babala's personal undertaking insufficient to mitigate these factors.

94. In rejecting Mr Babala's personal undertaking, the Pre-Trial Chamber further considered that the alleged offences "appear[ed] to have been at least partly committed in spite of the fact that one of the suspects was already in the custody of the detention unit of the Court, and by means of an abuse of the communication system set up within it".¹⁹⁹ Bearing in mind the standard of review stated above, the Appeals Chamber cannot discern a clear error in the Pre-Trial Chamber's finding in this regard. Accordingly, Mr Babala's argument is dismissed.

95. Turning to Mr Babala's argument that the Pre-Trial Chamber erred in considering the Parquet Général's Observations of 17 February 2014 as these were "aimed at isolating and stifling [him as a] political opponent",²⁰⁰ the Appeals Chamber finds this argument to be speculative and unsubstantiated.

96. With respect to Mr Babala's contention that the Parquet Général's Observations of 17 February 2014 should have been dismissed because of their late filing,²⁰¹ the Appeals Chamber recalls that the Pre-Trial Chamber ordered the authorities of the DRC to file their observations by 3 January 2014.²⁰² The First Registry Report indicated that upon a request from the DRC for an extension of the deadline for filing the said observation, the Pre-Trial Chamber extended the deadline to 9 January 2014,²⁰³ rendering the DRC authorities' Observation of 9 January 2014 timely.²⁰⁴ In terms of the timeliness of the Parquet Général's Observations of 17 February 2014, the Appeals Chamber notes that the Pre-Trial Chamber accepted the late filing of these observations on the ground that the "ongoing nature of the assessment of the persisting existence of the reasons warranting detention makes it possible that a State may wish to supplement, or otherwise amend, its initial response".²⁰⁵ The Appeals Chamber finds that it was within the Pre-Trial Chamber's discretion to set deadlines

¹⁹⁸ Impugned Decision, para. 25.

¹⁹⁹ Impugned Decision, para. 27.

²⁰⁰ Document in Support of the Appeal, paras 48-49.

²⁰¹ Document in Support of the Appeal, para. 58.

²⁰² Decision Requesting Observations, p. 7.

²⁰³ First Registry Report, p. 4.

²⁰⁴ The Appeals Chamber notes however that it appears that a formal decision was never issued on this issue.

²⁰⁵ Impugned Decision, para. 29.

for the filing of submissions to guide its decision-making regarding Mr Babala's detention and to accept the submissions that were received after the expiration of the deadline. Accordingly, the Appeals Chamber dismisses Mr Babala's argument.

97. Furthermore, the Appeals Chamber is not persuaded by Mr Babala's contention that the Pre-Trial Chamber erred in relying on the Parquet Général's Observations of 17 February 2014, on the basis of their incompatibility with the previous DRC Authorities' Observations of 9 January 2014, without providing reasons for doing so.²⁰⁶

98. The Appeals Chamber considers that the Parquet Général's Observations of 17 February 2014 complemented the DRC Authorities' Observations of 9 January 2014. In that regard, it notes that the DRC Authorities' Observations of 9 January 2014 merely indicated that the DRC would defer to the Court's appreciation of Mr Babala's Application for Interim Release and that, being a Congolese citizen, he could return to his country if released.²⁰⁷ The DRC Authorities' Observations of 9 January 2014 do not address the consequences that Mr Babala's return to the DRC might have. The Parquet Général's Observations of 17 February 2014 do not state that Mr Babala cannot return to the DRC. Instead, they point out the difficulties the DRC authorities would be facing if Mr Babala were to return to the DRC.²⁰⁸ Further, the Parquet Général's Observations of 17 February 2014 refer to the DRC authorities' Observations of 9 January 2014, and therefore the Appeals Chamber considers it was not unreasonable for the Pre-Trial Chamber to rely upon the former.²⁰⁹ In these circumstances, the Appeals Chamber finds it was reasonable for the Pre-Trial Chamber not to refer to the DRC Authorities' Observations of 9 January 2014 and to consider the Parquet Général's Observations of 17 February 2014 when assessing whether Mr Babala's continued detention appeared necessary under article 58 (1) (b) (ii) of the Statute. Therefore, the Appeals Chamber discerns no clear error in the Pre-Trial Chamber's reliance upon the Parquet Général's Observations of 17 February 2014, and accordingly dismisses Mr Babala's argument.

²⁰⁶ Document in support of the Appeal, paras 18, 58.

²⁰⁷ First Registry Report, paras 5-6; Second Registry Report, p. 4.

²⁰⁸ See Annex I to Second Registry Report, ICC-01/05-01/13-206-Conf-AnxI.

²⁰⁹ See Annex I to Second Registry Report, ICC-01/05-01/13-206-Conf-AnxI.

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

99. With respect to Mr Babala's contention that he could not commit further crimes because the disclosure of evidence in the *Bemba* Case is completed and since he does not know the identity of any potential accusers, he cannot retaliate against them, the Appeals Chamber notes that, in so arguing, Mr Babala merely reiterates arguments put forward before the Pre-Trial Chamber, and fails to specify a further error on the part of the Pre-Trial Chamber arising from the Impugned Decision.²¹⁰ The Appeals Chamber therefore dismisses Mr Babala's arguments.

D. Third ground of appeal

100. Mr Babala argues that the Pre-Trial Chamber erred: (i) by not taking into account changed circumstances pursuant to article 60 (3) of the Statute; (ii) in denying his request for a hearing; and (iii) by denying his request for release on the basis of his failure to present specific conditions for release.²¹¹ The Appeals Chamber will address Mr Babala's arguments in turn.

1. Relevant part of the Impugned Decision

(a) Alleged failure to consider changed circumstances

101. The Pre-Trial Chamber noted that Mr Babala's contention that it was "materially impossible" for [him] to commit the alleged crimes, given that the testimonies of the witnesses in the [*Bemba*] Case have been completed and that final submissions are now due by the parties".²¹² It observed in that regard that the *Bemba* Case could be reopened as was done in the case of the *Katanga* Case, and the risks of Mr Babala committing "future and related crimes" might also occur in the current proceedings.²¹³ It further noted Mr Babala's contention that although there may be "some pieces of evidence which are indeed in the hands of the relevant authorities and as such beyond the suspects' reach," it was of the view that "it cannot at this stage be excluded that action be taken in respect of other evidentiary items which might be

²¹⁰ See Application for Interim Release, paras 53-54; Impugned Decision, para. 32.

²¹¹ Document in Support of the Appeal, paras 67-74.

²¹² Impugned Decision, para. 32.

²¹³ Impugned Decision, para. 32.

outstanding and also, as said, in respect of items relating to [the current] proceedings”.²¹⁴

(b) Alleged error regarding denial to convene a hearing pursuant to rule 118 (3) of the Rules of Procedure and Evidence

102. The Pre-Trial Chamber declined to convene a hearing under rule 118 (3) of the Rules of Procedure and Evidence on the ground that “the abundance of the material available to [Mr Babala], a great amount of which has been referred to in [the Impugned Decision], makes it not necessary or appropriate to hold a hearing at this stage for the purposes of the determination of [Mr] Babala’s request for interim release”.²¹⁵

(c) Alleged error regarding failure to submit specific conditions of release

103. The Pre-Trial Chamber noted that Mr Babala did not advance “specific proposal for release subject to conditions, as an alternative to his detention” and merely indicated that, “should his request be granted ‘[he will go back to his country, the DRC, to reside with his family in his house]’”.²¹⁶ It further observed that, in his personal undertaking, Mr Babala generally referred to his commitment to respect all conditions attached to his interim release upon his return to the DRC without providing further information with respect to these conditions.²¹⁷ The Pre-Trial Chamber concluded by recalling the Appeals Chamber’s holding that “where no proposals for conditional release have been submitted and none are self-evident, ‘the Pre-Trial Chamber’s discretion is unfettered’”.²¹⁸

2. Mr Babala’s submissions before the Appeals Chamber

(a) Alleged failure to consider changed circumstances

104. Mr Babala cites article 60 (3) of the Statute and argues that the Pre-Trial Chamber erred in failing to take into account changed circumstances.²¹⁹ Mr Babala argues that the change in Mr Bemba’s lead counsel means that he no longer has

²¹⁴ Impugned Decision, para. 32.

²¹⁵ Impugned Decision, para. 39.

²¹⁶ Impugned Decision, para. 34.

²¹⁷ Impugned Decision, para. 34.

²¹⁸ Impugned Decision, para. 35, referring to *Gbagbo OA Judgment*, para. 79.

²¹⁹ Document in Support of the Appeal, paras 67-71.

contacts in close connection with the *Bemba* Case.²²⁰ In that regard, he submits that the Pre-Trial Chamber's finding regarding the possible reopening of the *Bemba* Case is "extremely hypothetical and amounts to pure conjecture bordering on subjectivity which the Appeals Chamber should not countenance".²²¹

(b) Alleged error regarding denial to convene a hearing pursuant to rule 118 (3) of the Rules of Procedure and Evidence

105. Mr Babala contends that the Pre-Trial Chamber erred in rejecting his request for a hearing under rule 119 (3) of the Rules of Procedure and Evidence²²² as this would have been an opportunity for him to provide "the necessary information" regarding his alleged involvement "in a process to corruptly influence witnesses or to falsify or present evidence which is false or forged".²²³

(c) Alleged error regarding failure to submit specific conditions of release

106. Mr Babala submits that the Pre-Trial Chamber erred using his own failure to submit a specific proposal for conditional release "as a pretext to deny him release" whereas the Pre-Trial Chamber "is empowered to prescribe, modify and revoke" any conditions.²²⁴

3. The Prosecutor's submissions before the Appeals Chamber

(a) Alleged failure to consider changed circumstances

107. The Prosecutor submits that the Pre-Trial Chamber "correctly assessed any change in circumstances since [Mr] Babala's arrest".²²⁵ The Prosecutor argues that Mr Babala's claim that his ability "to continue the commission of crimes in the *Bemba* [C]ase was severed" on 6 December 2013 is an improper attempt to re-litigate the Impugned Decision.²²⁶ In that regard, she avers that the Pre-Trial Chamber addressed his claim by observing that "future and related crimes [...] might also be

²²⁰ Document in Support of the Appeal, paras 67, 71.

²²¹ Document in Support of the Appeal, para. 71.

²²² The Appeals Chamber notes that Mr Babala erroneously refers to rule 119 (3) of the Rules of Procedure and Evidence instead of rule 118 (3) of the Rules of Procedure and Evidence. See Document in Support of the Appeal, para. 72.

²²³ Document in Support of the Appeal, para. 72.

²²⁴ Document in Support of the Appeal, paras 73-74.

²²⁵ Response to the Document in Support of the Appeal, p. 8.

²²⁶ Response to the Document in Support of the Appeal, para. 16.



committed by the suspect in respect of *these* proceedings'.²²⁷ The Prosecutor underscores that the Pre-Trial Chamber further noted that Mr Babala's restricted contact with Mr Bemba's defence team "does not preclude him committing [a]rticle 70 crimes" as he managed to "circumvent the Registry's communication monitoring system".²²⁸

(b) Alleged error regarding denial to convene a hearing pursuant to rule 118 (3) of the Rules of Procedure and Evidence

108. The Prosecutor argues that Mr Babala's reliance on rule 119 (3) of the Rules of Procedure and Evidence is irrelevant as this provision relates to conditional release procedure.²²⁹

(c) Alleged error regarding failure to submit specific conditions of release

109. The Prosecutor submits that since the Pre-Trial Chamber "did not entertain conditional release due to lack of State support", Mr Babala's claim amounts to a disagreement with the Pre-Trial Chamber's conclusion without demonstrating an appealable error, given that the Pre-Trial Chamber "assessed and rejected any change in circumstances since [Mr] Babala's arrest".²³⁰

4. Determination by the Appeals Chamber

(a) Alleged failure to consider changed circumstances

110. The Appeals Chamber finds that Mr Babala's contention regarding the Pre-Trial Chamber's failure to take into account changed circumstances pursuant to article 60 (3) of the Statute to be legally incorrect. Article 60 (3) of the Statute concerns the review of a prior decision on interim release under article 60 (2) of the Statute. Pursuant to article 60 (3) of the Statute, "the Pre-Trial Chamber may modify its ruling on release or detention if 'it is satisfied that changed circumstances so require'".²³¹

111. In the case at hand, the Impugned Decision concerns Mr Babala's request for release pursuant to article 60 (2) of the Statute. In this context, the Appeals Chamber

²²⁷ Response to the Document in Support of the Appeal, para. 16 (emphasis in original).

²²⁸ Response to the Document in Support of the Appeal, para. 16.

²²⁹ Response to the Document in Support of the Appeal, para. 17.

²³⁰ Response to the Document in Support of the Appeal, paras 15, 17.

²³¹ *Gbagbo OA Judgment*, para. 23.

recalls that “in reaching a decision under article 60 (2) of the Statute, the Pre-Trial Chamber has to ‘inquire anew into the existence of facts justifying detention’”.²³² Therefore, a decision pursuant to article 60 (2) of the Statute “is a decision *de novo*, in the course of which the Pre-Trial Chamber has to determine whether the conditions of article 58 (1) [of the Statute] are met”.²³³ The Appeals Chamber considers therefore that the Pre-Trial Chamber applied the correct legal regime set forth in article 60 (2) of the Statute, and accordingly Mr Babala’s argument regarding changed circumstances is dismissed.

(b) Alleged error regarding denial to convene a hearing pursuant to rule 118 (3) of the Rules of Procedure and Evidence

112. With respect to Mr Babala’s contention that the Pre-Trial Chamber erred in not holding a hearing on interim release, the Appeals Chamber first notes, as averred by the Prosecutor, that Mr Babala incorrectly refers to rule 119 (3) of the Rules of Procedure and Evidence which concerns the Pre-Trial Chamber’s obligation to seek the views of the parties and any relevant State and victims before imposing or amending any conditions restricting liberty.

113. The Appeals Chamber recalls the Pre-Trial Chamber’s finding that, in light of the material available to Mr Babala, it was not necessary or appropriate to hold a hearing.²³⁴ The Appeals Chamber notes that under rule 118 (3) of the Rules of Procedure and Evidence, which is the relevant provision, the Pre-Trial Chamber may hold a hearing, “at the request of the Prosecutor or the detained person or on its own initiative”, but is not obliged to do so. The Pre-Trial Chamber’s decision to decline the convening of a hearing was thus an exercise of its discretion on a procedural issue. In relation to procedural errors, the Appeals Chamber has considered in the *Kony OA 3 Judgment* such errors as those that occurred in the “proceedings leading up to” an impugned decision.²³⁵ In relation to discretionary decisions more broadly, the Appeals Chamber recalls that it “will not interfere with the Pre-Trial Chamber’s

²³² *Gbagbo OA Judgment*, para. 23.

²³³ *Gbagbo OA Judgment*, para. 23.

²³⁴ Impugned Decision, para. 39.

²³⁵ See *Kony et al. OA 3 Judgment*, para. 46. See also *Bemba OA 3 Judgment*, para. 101, in which the Appeals Chamber qualified an alleged error that occurred in the “preliminary proceedings” prior to the rendering of an impugned decision as procedural.



exercise of discretion” merely because it “might have made a different ruling”.²³⁶ The Appeals Chamber’s examination will be limited to establishing whether the Pre-Trial Chamber exercised its discretion incorrectly.²³⁷ In relation to the convening of hearings specifically, the Appeals Chamber has held that the decision to convene a hearing is discretionary rather than obligatory, and that the question on appeal is therefore limited to assessing whether or not failure to convene a hearing amounted to abuse of the Trial Chamber’s discretion.²³⁸

114. The Appeals Chamber considers that Mr Babala has not demonstrated that the Pre-Trial Chamber abused its discretion in deciding not to convene a hearing. Mr Babala’s contention that a hearing would have provided an opportunity for him to outline “the necessary information” regarding his alleged involvement “in a process to corruptly influence witnesses or to falsify or present evidence which is false or forged”²³⁹ is speculative and does not, in and of itself, disclose any error in the exercise of discretion. In that regard, the Appeals Chamber notes that the Application for Interim Release constituted an adequate opportunity for Mr Babala to make any such submissions in relation to these issues. Accordingly, Mr Babala’s argument is dismissed.

(c) Alleged error regarding failure to submit specific conditions of release

115. The Appeals Chamber finds that Mr Babala’s submission that the Pre-Trial Chamber erred in finding that he had failed to advance conditions for release, and therefore used his omission “as a pretext to deny him release”²⁴⁰ on this basis, to be without merit. The Appeals Chamber recalls the Pre-Trial Chamber’s finding that in the absence of specific proposals for conditional release submitted by Mr Babala, it had discretion to consider conditional release.²⁴¹ The Appeals Chamber notes that the

²³⁶ *Kony et al. OA 3 Judgment*, para. 79.

²³⁷ *See, e. g. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled ‘Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings’”, 12 July 2010, ICC-01/04-01/07-2259 (OA 10), para. 34.

²³⁸ *Prosecutor v. Muthaura et al.*, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, 30 August 2011, ICC-01/09-02/11-274 (OA), para. 108.

²³⁹ Document in Support of the Appeal, para. 72.

²⁴⁰ Document in Support of the Appeal, para. 74.

²⁴¹ Impugned Decision, para. 35.



Pre-Trial Chamber's conclusion is based on the Appeals Chamber's holding in the *Gbagbo OA Judgment* that "where no such proposals for conditional release are presented and none are self-evident the Pre-Trial Chamber's discretion to consider conditional release is unfettered".²⁴²

116. In the relevant part of the *Gbagbo OA Judgment*, the Appeals Chamber stated:

[...] if one or more of the risks listed in article 58 (1) (b) of the Statute are present – as in the case at hand – the Pre-Trial Chamber nevertheless has discretion to consider conditional release. In this regard[,] the Appeals Chamber observes that the Pre-Trial Chamber's discretion to consider conditional release must be exercised judiciously and with full cognizance of the fact that a person's personal liberty is at stake. Thus, in circumstances where a State has offered to accept a detained person and to enforce conditions, it is incumbent upon the Pre-Trial Chamber to consider conditional release. On the other hand, where no such proposals for conditional release are presented and none are self-evident the Pre-Trial Chamber's discretion to consider conditional release is unfettered.²⁴³

117. As to the case at hand, the Appeals Chamber recalls that the Pre-Trial Chamber was satisfied that the conditions set forth in article 58 (1) of the Statute were fulfilled. The Appeals Chamber observes also that Mr Babala provided a general statement regarding his release to the DRC and his commitment to respect all conditions without elaborating these further.²⁴⁴ No State had expressly offered to accept him and to enforce conditions.²⁴⁵ In these circumstances, the Pre-Trial Chamber was not duty-bound to consider conditional release. Rather, it was within its discretion not to consider conditional release. The Appeals Chamber finds that the Pre-Trial Chamber did not abuse its discretion in that regard, and therefore, it can discern no clear error in the Pre-Trial Chamber's finding regarding the absence of specific proposals for conditional release submitted by Mr Babala. Accordingly, Mr Babala's argument is dismissed.

²⁴² Impugned Decision, para. 35, referring to *Gbagbo OA Judgment*, para. 79.

²⁴³ *Gbagbo OA Judgment*, para. 79.

²⁴⁴ See "Transmission de l'Engagement sur l'honneur de Monsieur Fidèle BABALA WANDU relativement à sa demande de mise en liberté provisoire", 25 February 2014, ICC-01/05-01/13-222-Conf; Application for Interim Release, para. 63, p. 20. See also, Impugned Decision, para. 34.

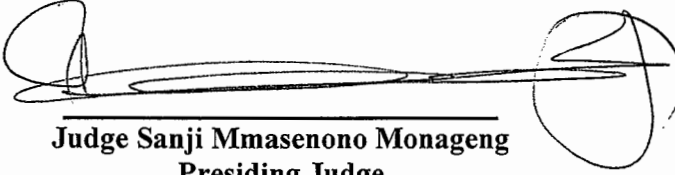
²⁴⁵ See Impugned Decision, para. 37. See also Impugned Decision, paras 28, 30; Second Registry Report, Annex I.

V. APPROPRIATE RELIEF

118. On an appeal pursuant to article 82 (1) (d) 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 no appealable errors have been identified.

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

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



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 11th day of July 2014

At The Hague, The Netherlands

Dissenting Opinion of Judge Erkki Kourula

1. I agree with the Majority's findings at paragraphs 45-50 and 53-64 of the Judgment that the first ground of the appeal must be dismissed, and that there is no error in the finding of the Pre-Trial Chamber that the conditions of article 58 (1) (a) of the Statute continue to be met, being the existence of "reasonable grounds to believe" that Mr Babala committed the offences for which he has been charged. I also agree with the Majority's conclusion in relation to the third ground of appeal, at paragraphs 110-117.

2. With respect to article 58 (1) (b) of the Statute, I agree with the Majority's observations at paragraph 88 of the Judgment that the Pre-Trial Chamber's description of offences against the administration of justice as those "of the utmost gravity" is highly concerning, and that offences under article 70 of the Statute, while undeniably serious, cannot be considered to be as grave as the core crimes under article 5 of the Statute.

3. However, while the Majority considered the Pre-Trial Chamber's treatment of the gravity of the offences to be a discrete issue, in my view, this critically impacted upon the Pre-Trial Chamber's determination of whether the conditions under article 58 (1) (b) (i), (ii) and (iii) of the Statute continue to be met. In my opinion, the language used by the Pre-Trial Chamber in describing the offences for which Mr Babala was charged to be "of the utmost gravity" is an indication that it gave too much weight to the seriousness of the alleged offending in finding that the conditions under article 58 (1) (b) of the Statute continue to be met. This was compounded by the Pre-Trial Chamber's finding that the personal circumstances of Mr Babala, such as "education, professional or social status", were "*per se* neutral and inconclusive in respect of the need to assess the existence of flight risks", which I consider to mean that it gave little consideration to these factors. In my view, this is a further indication that the entire weighing exercise under article 58 (1) (b) of the Statute, conducted by the Pre-Trial Chamber, was tainted by its findings in relation to the gravity of the offences, and that it gave too much weight to factors favouring detention over those in favour of release. Indeed, I consider that Mr Babala's personal circumstances ought to have been given greater weight, given that the offences for which he has been charged are not at the higher end of the scale of seriousness.



4. Accordingly, I would have reversed the Impugned Decision and remanded the assessment of the grounds for detention under article 58 (1) (b) of the Statute, in their entirety, to the Pre-Trial Chamber.

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



Judge Erkki Kourula

Dated this 11th day of July 2014

At The Hague, The Netherlands

Dissenting Opinion of Judge Anita Ušacka

1. I respectfully dissent from the decision of the majority of the Appeals Chamber to confirm the Impugned Decision. For the reasons that follow, I am of the view that the Pre-Trial Chamber did not consider every part of the relevant applicable law (pursuant to article 21 (1) (a) of the Statute, in the first place, the Statute and the Rules of Procedure and Evidence) and therefore failed to properly interpret the legal framework for its decision when assessing Mr Babala's Request for Interim Release. This error taints the Impugned Decision as a whole. I would therefore reverse the Impugned Decision and remand the matter to the Pre-Trial Chamber for a new decision.

I. RELEVANT LEGAL FRAMEWORK AND CONTEXT

2. This is one of the first appeals¹ relating to proceedings in respect of offences against the administration of justice under article 70 of the Statute. For that reason, it is convenient to recall the legal framework in that regard.

3. Article 70 (1) (a) to (f) sets out the specific offences against the administration of justice over which the Court shall have jurisdiction. It is noteworthy that the 1994 Draft Statute of the International Law Commission² did not give the Court jurisdiction over such offences. Rather, its article 44 (2) provided for an obligation of the States Parties to extend their perjury laws to perjury committed before the Court. The International Law Commission noted that "[t]he statute does not include a provision making it a crime to give false testimony before the court. On balance the Commission thought that prosecutions for perjury should be brought before the national courts".³

4. This position changed in the further drafting process of the Rome Statute and it was agreed to give the Court, alongside States, jurisdiction over perjury etc.

¹ The other appeals raising the same questions are the appeals *Bemba et al.* OA 2 and OA 4.

² International Law Commission, *Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994)*, UN Doc. A/49/10 (hereinafter: "1994 Draft Statute"), pp. 20 *et seq.*

³ 1994 Draft Statute, p. 59.



committed in the proceedings before the Court.⁴ However, at the Rome Conference, no agreement could be reached as to the procedure to be applied by the Court in respect of the investigation and prosecution of offences against the administration of justice. In particular, there was a debate as to whether the procedure applicable to the investigation and prosecution of the “core crimes”, i.e. the genocide, crimes against humanity, war crimes and the crime of aggression, should also regulate the investigation and prosecution of offences against the administration of justice.⁵ For that reason, the decision as to the applicable procedure was left to be decided in the Rules of Procedure and Evidence.⁶

5. The Rules of Procedure and Evidence include a separate Chapter 9 on “Offences and misconduct against the Court”, the first section of which is devoted to “Offences against the administration of justice under article 70 of the Statute”.⁷ Rules 162 to 167 contain specific procedural provisions regarding the investigation and prosecution of such offences, which in many respects differ from those applicable to the investigation and prosecution of core crimes. It is only “[u]nless otherwise provided” that the procedural provisions in relation to core crimes also apply to offences against the administration of justice.⁸

6. The drafting process of article 70 of the Statute and the Rules of Procedure and Evidence demonstrates that offences against the administration of justice are not comparable to core crimes. Rather, the Court’s jurisdiction over such offences is distinct.⁹ Importantly, the gravity of offences against the administration of justice is in no way equivalent to the gravity of core crimes. The latter are, in the words of the Statute’s Preamble, among “the most serious crimes of concern to the international community as a whole”, amounting to “unimaginable atrocities that deeply shock the

⁴ See D.K. Piragoff, “Article 70 Offences against the administration of justice”, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edition), pp. 1337 *et seq.* (hereinafter: “Triffterer-Piragoff, Article 70”), at margin numbers 3-4.

⁵ Triffterer-Piragoff, Article 70, margin number 4.

⁶ See article 70 (2) of the Statute, which provides as follows: “The principles and procedures governing the Court’s exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.”

⁷ On the drafting of this Chapter see H. Friman, “Chapter 11 - Offences and misconduct against the Court”, in: R. S. Lee (ed.), *The International Criminal Court/Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 605 *et seq.* (hereinafter: “Friman”).

⁸ Rule 163 (1) of the Rules of Procedure and Evidence.

⁹ See Friman, p. 606.

conscience of humanity”.¹⁰ In contrast, while offences under article 70 of the Statute are undoubtedly directed against an important value – the proper and efficacious administration of international criminal justice – their gravity does not even come close to that of the core crimes.

7. The significant difference in gravity finds expression not least in the relevant provisions regarding the sentences that may be imposed. For core crimes the maximum sentence is 30 years of imprisonment, or life imprisonment “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person”.¹¹ In contrast, for offences under article 70, the maximum sentence is five years of imprisonment or a fine.¹² The difference in gravity also finds expression in the fact that, while there is no prescription period for core crimes,¹³ offences under article 70 of the Statute are subject to a period of limitation of merely five years.¹⁴

8. In this regard, the practice of the *ad hoc* international criminal tribunals and internationalised courts is also of relevance. It shows that the sanctions imposed for “contempt of court” (the equivalent of “offences against the administration of justice” at the International Criminal Tribunal for the former Yugoslavia (hereinafter: “ICTY”) and the International Criminal Tribunal for Rwanda) in comparable cases are often relatively lenient.¹⁵ For instance, in the *Tadić* case, in one of the first cases of contempt of court adjudicated before the ICTY, that tribunal imposed a fine of 15.000 Dutch Guilders against the former counsel of Mr Tadić,¹⁶ a decision that was confirmed on appeal.¹⁷ The former counsel was found to have put forward a case on appeal which he knew was false and to have manipulated witnesses; it is noteworthy that he was not placed in detention during the proceedings against him. At the Special

¹⁰ Preamble of the Statute, paras 4 and 2.

¹¹ Article 77 (1) of the Statute.

¹² Article 70 (3) of the Statute.

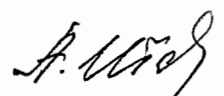
¹³ See article 29 of the Statute.

¹⁴ Rule 164 (2) of the Rules of Procedure and Evidence.

¹⁵ At the ICTY, the applicable punishment for “contempt of court” is set out in rule 77 of the Rules of Procedure and Evidence. This rule has undergone several changes. In its original version (IT/32, 14 March 1994), rule 77 (A) provided for imprisonment not exceeding six months or a fine not exceeding 10.000 US Dollars. Both the maximum term of imprisonment and the fine were subsequently augmented. In its current version (IT/32/Rev. 49, 22 May 2013), rule 77 (G) of the ICTY Rules of Procedure and Evidence provides for imprisonment not exceeding seven years or a fine not exceeding 100.000 Euros, or both.

¹⁶ ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber, “Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin”. 31 January 2000, IT-94-1-A-R77.

¹⁷ ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, “Appeal Judgement on Allegations of Contempt of Court Against Prior Counsel, Milan Vujin”, 27 February 2001, IT-94-1-A-AR77.



Court for Sierra Leone (hereinafter: “SCSL”), an internationalised jurisdiction, in the case of *Independent Counsel v. Hassan Papa Bangura, Samuel Kargbo, Santigie Borbor Kanu and Brima Bazzy Kamara*, relating to contempt of court for bribing witnesses or inducing them to recant testimony, the accused were sentenced to prison terms between eighteen months and two years; in relation to one of the accused, the sentence was suspended.¹⁸

9. Similarly, several national jurisdictions domesticating offences under article 70 of the Statute consider them to be only of moderate or low gravity, as expressed in the maximum sanction. In *Germany*, the relevant offences (perjury etc.) under general criminal law are also applicable if committed before an international court.¹⁹ Most of the relevant offences are classified as “Vergehen”, i.e. they are less serious offences carrying a minimum penalty of less than a year of imprisonment or a fine.²⁰ They are punishable by fines or imprisonment of, depending on the offence in question, a maximum of three to five years.²¹ Similarly, in *England and Wales*, the International Criminal Court Act 2001²² makes the relevant domestic offences applicable if committed before the Court.²³ With respect to perjury, the maximum prison sentence is two years.²⁴ In *The Netherlands*, domestic provisions on perjury were equally made applicable to cases of perjury before the Court.²⁵ The maximum sentence here is a term of imprisonment of no longer than six years.²⁶ The *Italian Criminal Code* includes separate provisions domesticating offences under article 70 of the Statute into Italian law, stipulating maximum prison sentences between three and six years.²⁷

¹⁸ Special Court for Sierra Leone, Trial Chamber II, “Sentencing Judgement in Contempt Proceedings”, 11 October 2012 (filed 16 October 2012), SCSL-11-02-T; available at:

<http://www.rscsl.org/Documents/Decisions/Contempt/2011-02/071/SCSL-11-02-T-071.pdf>

¹⁹ See section 162 (1) of the German Criminal Code; available at <http://www.gesetze-im-internet.de/stgb/>.

²⁰ See section 12 of the German Criminal Code.

²¹ Sections 153-154, 156, 160-161 of the German Criminal Code.

²² <http://www.legislation.gov.uk/ukpga/2001/17/contents> (hereinafter: “United Kingdom ICC Act”).

²³ See sections 54 and 61 of the United Kingdom ICC Act.

²⁴ See United Kingdom Perjury Act 1911, article 1 (1), available at

<http://www.legislation.gov.uk/ukpga/Geo5/1-2/6>.

²⁵ See The Netherlands, Acts Amending Provisions of the Penal Code, articles 200, 208A, 361, as referred to in G. Sluiter, “The Netherlands”, in: C. Kress et al. (eds), *The Rome Statute and Domestic Legal Orders: Constitutional Issues, Cooperation and Enforcement*, Volume II (Nomos Verlagsgesellschaft, 2005), pp. 203 *et seq.* at pp. 229-230.

²⁶ See article 207A of the Dutch Criminal Code; available at

http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelIX/Artikel207a/geldigheidsdatum_30-06-2014.

²⁷ See articles 368, 371-*bis*, 372, 374-*bis*, 377, 378 and 380 of the Italian Criminal Code; available at <http://www.altalex.com/index.php?idnot=36764>

In *Belgium*, the maximum sentence for offences against the administration of justice is six years of imprisonment.²⁸ While this is by no means meant to be an exhaustive comparative analysis, and while there are also jurisdictions that provide for higher maximum sentences for the domesticated article 70 offences,²⁹ the practices in Germany, England and Wales, The Netherlands, Italy and Belgium amply demonstrate that those domestic jurisdictions consider offences against the administration of justice not to be of the highest gravity.

10. The above may be summarised as follows: offences against the administration of justice are distinct from core crimes. While they are directed against an important value, they are significantly less serious than core crimes. Under the Rules of Procedure and Evidence, specific procedural rules apply to the investigation and prosecution of such offences, and the procedural rules applicable to core crimes apply only “[u]nless otherwise provided”.

II. THE APPROACH IN THE IMPUGNED DECISION

11. Against this background I shall now turn to the approach adopted in the Impugned Decision, which, for the reasons further elaborated below, failed to appreciate the distinct character of offences against the administration of justice.

12. At the outset, it is of note that the Pre-Trial Chamber failed to identify the full legal basis for the Impugned Decision. While the Pre-Trial Chamber referred to articles 58 (1) and 60 (2) of the Statute, it failed to mention, except in passing and indirectly in the section of the Impugned Decision dealing with article 58 (1) (a) of the Statute, that at issue were offences against the administration of justice under article 70 (1) of the Statute and not core crimes.³⁰ Critically, the Pre-Trial Chamber also

²⁸ See article 41 of the *Loi concernant la coopération avec la Cour pénale internationale et les tribunaux pénaux internationaux* of 29 March 2004 (entry into force: 1 April 2004), available at <http://www.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/4C99B5CC190A33DBC1256EF5004E807F/TEXT/Belgium%20-%20ICC%20Cooperation%20Law%2C%202004.pdf>

²⁹ See, for instance, Australia, where perjury before the Court carries a maximum prison sentence of ten years, other offences against the administration of justice carry penalties of imprisonment between five and ten years, see *International Criminal Court (Consequential Amendments) Act*, 2002, para. 268.102 *et seq.*, available at: <http://www.comlaw.gov.au/Details/C2004A00993>; and Canada, where the domesticated offences under article 70 of the Statute are punishable by maximum prison terms of up to fourteen years, see article 16-23 of the Crimes Against Humanity and War Crimes Act, available at: <http://laws-lois.justice.gc.ca/eng/acts/C-45.9/page-8.html#h-8>.

³⁰ Impugned Decision, paras 6, 7.

failed to refer to, and analyse, rule 163 (1) of the Rules of Procedure and Evidence, without which articles 58 (1) and 60 (2) of the Statute would not even be applicable to the case at hand. This omission is a clear indication that the Pre-Trial Chamber considered Mr Babala's Request for Interim Release just as any other request for interim release by a suspect who is alleged to be criminally responsible for core crimes.

13. This is also evidenced by the fact that the Pre-Trial Chamber relied, without any critical analysis, on previous decisions and judgments of the Court – including of the Appeals Chamber – that deal with interim release in the context of alleged core crimes. For instance, the Pre-Trial Chamber referred to, and relied on, judgments of the Appeals Chamber issued in the *Lubanga* case,³¹ the *Gbagbo* case,³² the *Bemba* case³³ and the *Katanga* case.³⁴ Yet the suspects in these cases were alleged to have committed crimes against humanity or war crimes – crimes that are, as set out above, in no way comparable to offences against the administration of justice, which Mr Babala is alleged to have committed. In addition, several of the suspects were already detained before being surrendered to the Court based on allegations of very serious crimes.

14. Most problematic in the Pre-Trial Chamber's approach is its uncritical reliance on previous judgments of the Court – made in the context of alleged core crimes – when discussing whether the continued detention of Mr Babala appeared necessary for any of the three reasons listed in article 58 (1) (b) of the Statute. For instance, as to the risk of the commission of future crimes, the Pre-Trial Chamber referred to a judgment by the Appeals Chamber in the *Gbagbo* case.³⁵ The Pre-Trial Chamber, however, did not consider whether the fact that in the *Gbagbo* case the “future crimes” at issue were core crimes had any impact on the transferability of the holdings of the Appeals Chamber to the case at hand.

³¹ See Impugned Decision, footnotes 15,16, 30, 43, referring to ICC-01/04-01/06-824, paras 124, 134, 136, 139.

³² See Impugned Decision, footnotes 11, 12, 16, 39, 40, 48, 51, referring to ICC-02/11-01/11-278-Red, paras 23, 26, 27, 49, 70, 79.

³³ See Impugned Decision, footnote 63, referring to ICC-01/05-01/08-323, para. 56.

³⁴ See Impugned Decision, footnotes 32, 43, referring to ICC-01/04-01/07-572, paras 21, 24.

³⁵ See Impugned Decision, para. 31, referring to ICC-02/11-01/11-278-Red, para. 70.

15. In relation to the risk of absconding, at paragraph 18 of the Impugned Decision, the Pre-Trial Chamber noted that “[b]oth the Appeals Chamber and the Pre-Trial Chambers of the Court have previously found the existence of a network of supporters behind a suspect to be a relevant factor in the determination of the existence of a risk of flight, because it might indeed facilitate absconding”.³⁶ In the same paragraph, the Pre-Trial Chamber recalled that it had recently found in the *Ntaganda* case that the availability of financial means through a network was a relevant factor in determining whether there was a flight risk. Similarly, the Pre-Trial Chamber referred to jurisprudence of the Appeals Chamber finding that the gravity of the crime the suspect is alleged to have committed and the likely duration of the potential sentence are relevant for the determination of whether there is a risk of absconding.³⁷ Yet the Pre-Trial Chamber failed to refer to the fact that the offences Mr Babala is alleged to have committed carry a significantly lower maximum sentence than core crimes. If the sentencing practice of the ICTY and SCSL is taken as a yardstick, it is likely that, even if Mr Babala were found guilty and convicted, the actual sentence imposed could remain significantly below the maximum penalty of five years.

16. For the above reasons, the principles developed and interpretations adopted in relation to articles 58 (1) and 60 (2) of the Statute in the context of alleged core crimes cannot simply be transferred to the context of alleged offences against the administration of justice. Rather, it has to be carefully assessed whether they are applicable in the specific circumstances of this case, or whether alternative principles and interpretations ought to be developed and adopted. This type of careful analysis is entirely lacking in the Impugned Decision, which contended itself with finding that it would decide Mr Babala’s “request for interim release in light of those principles which are now consolidated in the case-law of the Appeals Chamber of the Court and have constantly been upheld by this Chamber”.³⁸ This gives the impression that based its decision on an inappropriate and improper analogy.³⁹

³⁶ Footnote omitted.

³⁷ See Impugned Decision para. 22, referring to ICC-01/04-01/07-572, paras 21, 24; and ICC-01/04-01/06-824, para. 136.

³⁸ Impugned Decision, para. 1.

³⁹ See in this regard also article 22 of the Statute, which establishes the principle of legality and, at paragraph (2), specifically prohibits the extension of the definition of a crime by way of analogy.

17. Article 21 (2) of the Statute gives the Chambers of this Court the power to “apply principles and rules of law as interpreted in its previous decisions”. Yet this must not be done out of context and without a careful evaluation as to whether the previous jurisprudence regarding interim release of suspects alleged to have committed core crimes are actually comparable to the case at hand.⁴⁰

18. I also recall that, pursuant to article 21 (3) of the Statute, the Statute must be applied and interpreted “consistent with internationally recognized human rights”. The Impugned Decision rejected Mr Babala’s request to be released from pre-trial detention, thereby affecting his most fundamental right to personal liberty. When assessing questions of pre-trial detention, a Chamber is obliged to ensure that continued detention is actually justified and reasonable *in the circumstances of the case*. Factors that may be relevant to detention in cases of alleged core crimes may have less or no relevance if considered in the context of offences against the administration of justice. The overarching consideration must always be that continued detention is not unreasonable or leads to an arbitrary or disproportionate outcome.⁴¹

III. CONCLUSION

19. For the reasons set out above, I am of the view that the Pre-Trial Chamber failed to appreciate sufficiently that the matter at hand concerned allegations of offences against the administration of justice and not core crimes. By relying extensively on jurisprudence and the test developed in relation to core crimes, the Pre-Trial Chamber did not give sufficient consideration to the fact that offences against the administration of justice are in no way comparable to core crimes, and that this necessarily impacts on the analysis as to whether continued detention is justified. In addition, the Pre-Trial Chamber’s approach bears the inherent risk of undue reliance

⁴⁰ In this regard, see *Prosecutor v. Laurent Gbagbo*, “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, pp. 37 *et seq.*, “Dissenting Opinion of Judge Anita Ušacka” (hereinafter: “Gbagbo Dissenting Opinion”), para. 13, emphasising that “where a detention decision is at issue that requires a risk analysis based on the facts before the Chamber, this risk analysis may not only be based on abstract factors, but must be supported by concrete evidence and relate specifically to the circumstances of the person who was arrested.”

⁴¹ See, for example, European Court of Human Rights, *Khodorkovskiy v. Russia*, “Judgment”, 31 May 2011, application no. 5829/04, para. 136; see also *Ladent v. Poland*, “Judgment”, 18 March 2008, application no. 11036/03, paras 55-56.

on abstract factors and formulistic language, as opposed to a proper assessment of the concrete circumstances of the case.⁴²

20. In my view, this error of the Pre-Trial Chamber taints the entire Impugned Decision. It is therefore unnecessary to address the further and more detailed arguments raised in Mr Babala's Document in Support of the Appeal. As the Pre-Trial Chamber did not consider every part of the relevant applicable law and therefore failed to properly interpret the legal framework for its decision, it could well be that the conclusion it reached was erroneous and that Mr Babala should have been released. However, the present appeal is not the opportune occasion to consider the merits of Mr Babala's Request for Interim Release. Rather, the Pre-Trial Chamber should reconsider the matter. For that reason, I would reverse the Impugned Decision and remand the matter to the Pre-Trial Chamber for a new decision on Mr Babala's Request for Interim Release.

21. Finally, I would like to recall my separate concurring opinion to the recent decision of the Plenary of Judges on the application for the disqualification of Judge Cuno Tarfusser from the present case.⁴³ At footnote 11, I stated as follows:

It is noted that for the purposes of considering the Waiver Application, the Presidency was composed of three Judges of the Appeals Chamber, Judges Song, Monageng and Kuenyehia, which could be problematic for the purpose of future related appeals.

22. I note that in their capacity of being members of the Presidency, these three Judges have issued three decisions that are related to the present case.⁴⁴ In light of this

⁴² See Gbagbo Dissenting Opinion, para. 39.

⁴³ "Decision of the Plenary of Judges on the Defence Applications for Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*", dated 20 June 2014 and registered on 23 June 2014, ICC-01/05-01/13-511-Anx, paras 45-49.

⁴⁴ See *Situation in the Central African Republic*, "Decision on the urgent application of the Single Judge of Pre-Trial Chamber II of 19 November 2013 for the waiver of the immunity of lead defence counsel and the case manager for the defence in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*", 20 November 2013, ICC-01/05-68; ICC-01/05-70-US-Exp (note that no public version of that decision is presently available); and *Prosecutor v. Jean-Pierre Bemba et al.*, "Decision on the 'Defence Request for the Automatic Temporary Suspension of the Single Judge Pending Decision on Defence Submission ICC-01/05-01/13-372'", 19 May 2014, ICC-01/05-01/13-407.



fact, I regret that my colleagues did not request to be recused from sitting on the present appeal.⁴⁵

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



Judge Anita Ušacka

Dated this 11th day of July 2014

At The Hague, The Netherlands

⁴⁵ See article 41 (2) (a) of the Statute, which reads in relevant part as follows: “A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court [...]”.