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No. ICC-02/11-01/15 OA10

Date: 19 July 2017

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public

Judgment

**on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of
10 March 2017 entitled "Decision on Mr Gbagbo's Detention"**

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 Laurent Gbagbo
Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Legal Representatives of Victims
Ms Paolina Massidda

Counsel for Charles Blé Goudé
Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled “Decision on Mr Gbagbo’s Detention” of 10 March 2017 (ICC-02/11-01/15-846),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

- 1) The “Decision on Mr Gbagbo’s Detention” is reversed.
- 2) Trial Chamber I is directed to carry out a new review as to whether Mr Laurent Gbagbo should continue to be detained or should be released, with or without conditions.

REASONS

I. KEY FINDINGS

1. Examples in international jurisprudence show that advanced age may be considered as a factor potentially in support of release, also alongside other factors, including, for example, ill health. Without aiming to exhaustively set out the circumstances in which age may be considered in the context of interim release, the Appeals Chamber considers that it is generally more appropriate for age to be considered in such a manner rather than as a factor that could evidence a motivation to abscond.

2. Taking into account the fact that a person denies responsibility for the charges he faces, as a factor favouring detention, would clearly place detained persons in a paradoxical situation. They could either decide to maintain that they are innocent – which could then be taken into account as a factor favouring detention – or accept responsibility for the crimes they are charged with – which in all likelihood could also be taken into account as a factor favouring detention. The Appeals Chamber considers

that no one should be forced to accept responsibility in order to achieve interim release.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial and Trial Chamber

3. On 23 November 2011, Pre-Trial Chamber III issued the “Warrant of Arrest For Laurent Koudou Gbagbo”¹ and, on 30 November 2011, it rendered the “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo”.² Following his surrender to the Court on 30 November 2011, Mr Laurent Gbagbo (“Mr Gbagbo”) first appeared before Pre-Trial Chamber III on 5 December 2011.³ He has been in detention at the Court since.

4. On 27 April 2012, Mr Gbagbo filed an application for interim release⁴ which Pre-Trial Chamber I (“Pre-Trial Chamber”) rejected on 13 July 2012.⁵ On 26 October 2012, the Appeals Chamber, by majority, Judge Anita Ušacka and Judge Erkki Kourula dissenting, dismissed Mr Gbagbo’s appeal against that decision⁶ (“*Gbagbo* OA Judgment”).

5. On 12 November 2012, the Pre-Trial Chamber issued its first decision reviewing Mr Gbagbo’s detention pursuant to article 60 (3) of the Statute and in which it ruled that Mr Gbagbo should remain in detention.⁷

¹ [ICC-02/11-01/11-1](#). This document was originally filed under seal *ex parte* but was reclassified as public pursuant to Pre-Trial Chamber III’s “Decision to Unseal the Warrant of Arrest against Mr Laurent Koudou Gbagbo”, 29 November 2011, ICC-02/11-01/11-6-Conf.

² ICC-02/11-01/11-9-Conf; a public redacted version was registered on 20 December 2011 ([ICC-02/11-01/11-9-Red](#)).

³ Transcript of 5 December 2011, [ICC-02/11-01/11-T-1-ENG \(ET WT\)](#).

⁴ “Defence Application for the Interim Release of President Gbagbo”, ICC-02/11-01/11-105-Conf-tENG; a confidential redacted version was filed on 7 May 2012 (ICC-02/11-01/11-105-Conf-Red-tENG), and a corrigendum was filed on 23 May 2012 (ICC-02/11-01/11-105-Conf-Red-Corr-tENG).

⁵ “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”, ICC-02/11-01/11-180-Conf; a public redacted version was registered on 16 July 2012 ([ICC-02/11-01/11-180-Red](#)) (“Decision on Application for Interim Release”).

⁶ “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’”, ICC-02/11-01/11-278-Conf (OA); a public redacted version was filed on the same day ([ICC-02/11-01/11-278-Red](#) (OA)).

⁷ “Decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute”, [ICC-02/11-01/11-291](#) (“First Decision on the Review of Detention”).

6. On 18 January 2013, the Pre-Trial Chamber issued the “Decision on the request for the conditional release of Laurent Gbagbo and on his medical treatment”, rejecting Mr Gbagbo’s request for conditional release.⁸

7. On 12 March 2013,⁹ 11 July 2013,¹⁰ 11 November 2013,¹¹ 12 March 2014¹² and 11 July 2014,¹³ the Pre-Trial Chamber rendered decisions pursuant to article 60 (3) of the Statute on the review of Mr Gbagbo’s detention. In each decision, the Pre-Trial Chamber decided that Mr Gbagbo should remain in detention.

8. On 12 June 2014, the Pre-Trial Chamber issued a decision confirming charges against Mr Gbagbo.¹⁴ On 11 November 2014¹⁵ and 11 March 2015,¹⁶ Trial Chamber I (“Trial Chamber”) rendered decisions pursuant to article 60 (3) of the Statute on the review of Mr Gbagbo’s detention. In both decisions the Trial Chamber decided that Mr Gbagbo should remain in detention.

9. On 8 July 2015, the Trial Chamber rendered another decision, pursuant to article 60 (3) of the Statute, again deciding that Mr Gbagbo should remain in

⁸ ICC-02/11-01/11-362-Conf; a public redacted version was registered on the same day ([ICC-02/11-01/11-362-Red](#)).

⁹ “Second decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute”, ICC-02/11-01/11-417-Conf; a public redacted version was registered on the same day ([ICC-02/11-01/11-417-Red](#)).

¹⁰ “Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute”, registered on 12 July 2013, [ICC-02/11-01/11-454](#) (“Third Decision on the Review of Detention”). The Appeals Chamber, by majority, Judge Anita Ušacka dissenting, dismissed Mr Gbagbo’s appeal against the decision in its “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled ‘Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute’”, 29 October 2013, ICC-02/11-01/11-548-Conf (OA4) (“*Gbagbo* OA4 Judgment”); a public redacted version was registered on the same day ([ICC-02/11-01/11-548-Red](#) (OA4)).

¹¹ “Fourth decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute”, [ICC-02/11-01/11-558](#).

¹² “Fifth decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute”, [ICC-02/11-01/11-633](#).

¹³ “Sixth decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute”, [ICC-02/11-01/11-668](#).

¹⁴ “Decision on the confirmation of charges against Laurent Gbagbo”, ICC-02/11-01/11-656-Conf; a public redacted version was registered on the same day ([ICC-02/11-01/11-656-Red](#)).

¹⁵ “Seventh decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute”, ICC-02/11-01/11-718-Conf; a public redacted version was registered on the same day ([ICC-02/11-01/11-718-Red](#)).

¹⁶ “Eighth decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute”, [ICC-02/11-01/11-808](#).

detention,¹⁷ and the Appeals Chamber, on 8 September 2015, rejected an appeal by Mr Gbagbo against that decision.¹⁸ The Trial Chamber rendered the tenth decision on the review of Mr Gbagbo's detention on 2 November 2015¹⁹ ("Tenth Detention Review Decision").

10. On 27 November 2015, the Trial Chamber issued a decision in which it determined that Mr Gbagbo was fit to stand trial.²⁰ On 19 October 2016, Mr Gbagbo filed the "Requête de la Défense à la suite de la transmission par le Greffe d'un rapport médical concernant Laurent Gbagbo",²¹ which was rejected by the Trial Chamber on 6 December 2016²² ("Decision of 6 December 2016"). However, the Trial Chamber, in the same decision, invited the parties to file submissions for the purposes of article 60 (3) of the Statute concerning any new developments since the Tenth Detention Review Decision. [REDACTED]:

[REDACTED].²³

11. On 3 February 2017, the Prosecutor,²⁴ the victims participating in the proceedings ("Victims")²⁵ and Mr Gbagbo²⁶ ("Mr Gbagbo's Submissions of 3 February 2017") filed their submissions on interim release. On 10 March 2017, the Trial Chamber, by majority, Judge Cuno Tarfusser dissenting, issued the "Decision on

¹⁷ "Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute", ICC-02/11-01/15-127-Conf; a public redacted version was registered on the same day ([ICC-02/11-01/15-127-Red](#)).

¹⁸ "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled 'Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute'", [ICC-02/11-01/15-208](#) (OA6) ("*Gbagbo* OA6 Judgment").

¹⁹ "Tenth decision on the review of Mr Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute", [ICC-02/11-01/15-328](#).

²⁰ "Decision on the fitness of Laurent Gbagbo to stand trial", [ICC-02/11-01/15-349](#).

²¹ ICC-02/11-01/15-734-Conf ("Mr Gbagbo's Request of 19 October 2016").

²² "Decision on the '*Requête de la Défense à la suite de la transmission par le Greffe d'un rapport médical concernant Laurent Gbagbo*'", registered on 7 December 2016, ICC-02/11-01/15-770-Conf, p. 5.

²³ [REDACTED].

²⁴ "Prosecution's 11th submission for the purpose of article 60(3)", ICC-02/11-01/15-794-Conf.

²⁵ "Submissions for the purpose of article 60(3) of the Statute pursuant to Decision ICC-02/11-01/15-770-Conf", ICC-02/11-01/15-792-Conf.

²⁶ "Defence Submissions concerning the Conditions for Application of Articles 60(3) and 58(1)(b), submitted pursuant to the Chamber's Order of 6 December 2016", ICC-02/11-01/15-793-Conf-tENG; a public redacted version of the original French version was registered on 18 May 2017 ([ICC-02/11-01/15-793-Red](#)).

Mr Gbagbo’s Detention”²⁷ (“Impugned Decision”), deciding that Mr Gbagbo shall remain in detention.²⁸

B. Proceedings before the Appeals Chamber

12. On 20 March 2017, Mr Gbagbo filed the “Defence Notice of Appeal against Trial Chamber I’s ‘Decision on Mr Gbagbo’s Detention’ (ICC-02/11-01/15-846) to continue Laurent Gbagbo’s detention”²⁹ (“Notice of Appeal”). On the same day, Mr Gbagbo filed the “Document in support of the appeal against the ‘Decision on Mr Gbagbo’s Detention’ (ICC-02/11-01/15-846) of 10 March 2017”³⁰ (“Document in Support of the Appeal”).

13. On 27 March 2017, the Prosecutor³¹ and the Victims³² filed their responses to the Document in Support of the Appeal (“Prosecutor’s Response to the Document in Support of the Appeal” and “Victims’ Response to the Document in Support of the Appeal” respectively).

III. STANDARD OF REVIEW

14. With regard to the applicable standard of review, the Appeals Chamber recalls that,

[i]n 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”.³³ [Footnote omitted.]

15. In respect of errors of law, the Appeals Chamber recalls that it

²⁷ [ICC-02/11-01/15-846](#).

²⁸ [Impugned Decision](#), p. 12.

²⁹ ICC-02/11-01/15-858-Conf-tENG (OA10); a public redacted version of the original French version was registered on 18 May 2017 ([ICC-02/11-01/15-858-Red](#) (OA10)).

³⁰ ICC-02/11-01/15-857-Conf-tENG (OA10); a public redacted version of the original French version was registered on 18 May 2017 ([ICC-02/11-01/15-857-Red](#) (OA10)) and a public redacted version of the English translation was registered on 4 July 2017 ([ICC-02/11-01/15-857-Red-tENG](#) (OA10)).

³¹ “Response to Laurent Gbagbo’s appeal against the ‘Decision on Mr Gbagbo’s Detention’”, ICC-02/11-01/15-865-Conf (OA10); a public redacted version was registered on 16 June 2017 ([ICC-02/11-01/15-865-Red](#) (OA10)).

³² “Response to Mr Gbagbo’s document in support of the appeal against the ‘Decision on Mr Gbagbo’s Detention’ (ICC-02/11-01/15-857-Conf)”, ICC-02/11-01/15-864-Conf (OA10); a public redacted version was registered on 22 May 2017 ([ICC-02/11-01/15-864-Red](#) (OA10)).

³³ [Gbagbo OA4 Judgment](#), para. 18, with further references.

will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.³⁴

16. Regarding an alleged error of fact, the Appeals Chamber has held that its review is corrective and not *de novo*.³⁵ It has explained that “[i]t will therefore not interfere unless it is shown that the Pre-Trial or Trial Chamber committed a clear error, namely: misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts”.³⁶ As regards the “misappreciation of facts” the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion.³⁷ It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.³⁸ The Appeals Chamber

³⁴ Appeals Chamber, *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](#) (OA2), para. 20; Appeals Chamber, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, 21 May 2014, [ICC-01/11-01/11-547-Red](#) (OA4), para. 49; Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction”, 1 December 2014, [ICC-01/04-01/06-3121-Red](#) (A5) (“*Lubanga A5 Judgment*”), para. 18; Appeals Chamber, *Prosecutor v. Simone Gbagbo*, “Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled ‘Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo’”, 27 May 2015, [ICC-02/11-01/12-75-Red](#) (OA) (“*S. Gbagbo Admissibility Judgment*”) para. 40; Appeals Chamber, *Prosecutor v. Uhuru Muigai Kenyatta*, “Judgment on the Prosecutor’s appeal against Trial Chamber V(B)’s ‘Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’”, 19 August 2015, [ICC-01/09-02/11-1032](#) (OA5) (“*Kenyatta OA5 Judgment*”), para. 23.

³⁵ Appeals Chamber, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “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-01/09-01/11-307](#) (OA) (“*Ruto Admissibility Judgment*”), para. 56.

³⁶ [Ruto Admissibility Judgment](#), para. 56.

³⁷ Appeals Chamber, *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) (“*Mbarushimana OA Judgment*”), para. 17; Appeals Chamber, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “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) (“*Kenyatta Admissibility Judgment*”), para. 55; [S. Gbagbo Admissibility Judgment](#), para. 38.

³⁸ [Mbarushimana OA Judgment](#), para. 17; [Ruto Admissibility Judgment](#), para. 56; [Kenyatta Admissibility Judgment](#), para. 55; [Lubanga A5 Judgment](#), para. 21; Appeals Chamber, *Prosecutor v.*

applies a standard of reasonableness in assessing an alleged error of fact in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Trial Chamber's findings.³⁹

IV. MERITS

A. Preliminary issue – content of the Notice of Appeal

17. Both the Prosecutor and the Victims note that Mr Gbagbo's Notice of Appeal contains a lengthy procedural history. The Prosecutor submits that "any factual claims contained solely in the Defence's notice of appeal should be disregarded for the purpose of adjudicating the merits of this Appeal".⁴⁰ The Victims submit that Mr Gbagbo "disguise[s] substantive arguments under a procedural background heading"⁴¹ and that "substantive arguments raised and developed in [Mr Gbagbo's] Notice of Appeal must be disregarded".⁴²

18. Regulation 64 (1) of the Regulations of the Court lists the content of a notice of appeal to include: "(a) The name and number of the case or situation; (b) The title and date of the decision being appealed; (c) The specific provision of the Statute pursuant to which the appeal is filed; (d) The relief sought". No reference is made to a procedural history. Regulation 64 (2) of the Regulations of the Court, regulating the document in support of the appeal, similarly contains no reference to a procedural history. Indeed, these provisions are intended to regulate the minimum content requirements for both documents. Nevertheless, standard practice at the Court has been for any procedural history to an appeal to be included in the document in support of an appeal and not in the notice of appeal.

19. In contrast, in this appeal, the Notice of Appeal contains a lengthy procedural history, of approximately 18 pages, resulting in a 22 page document. While this may be unusual, it is not impermissible, as long as the document in question remains

Mathieu Ngudjolo Chui, "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'", 27 February 2015, [ICC-01/04-02/12-271 \(A\)](#), para. 22; [S. Gbagbo Admissibility Judgment](#), para. 38; [Kenya OA5 Judgment](#), para. 24.

³⁹ [Lubanga A5 Judgment](#), paras 22, 24, 27; [S. Gbagbo Admissibility Judgment](#), para. 39; [Kenya OA5 Judgment](#), para. 24.

⁴⁰ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 5.

⁴¹ [Victims' Response to the Document in Support of the Appeal](#), para. 15.

⁴² [Victims' Response to the Document in Support of the Appeal](#), para. 18.

within the 22 page limit,⁴³ and does not attempt to circumvent the same page limit (22 pages) for the document in support of the appeal which will follow,⁴⁴ by including arguments as to the merits of an appeal in the notice of appeal.⁴⁵ As explained by the Appeals Chamber, “[t]he arguments of a participant to an appeal must be fully contained within that participant’s filing in relation to that particular appeal [the document in support of the appeal]” and this document “must, in itself, enable the Appeals Chamber to understand the position of the participant on the appeal, without requiring reference to arguments made by that participant elsewhere”.⁴⁶

20. The Appeals Chamber notes that the Prosecutor does not specify which factual claims relevant to the *sub judice* issues are contained solely in the Notice of Appeal.⁴⁷ The Victims, apart from referring to certain paragraphs of the Notice of Appeal which contain a summary of proceedings and quote previous submissions,⁴⁸ also do not identify the substantive arguments, relevant to the *sub judice* issues, that have been “raised and developed in the Notice of Appeal”.⁴⁹ As stated above, it was not impermissible for Mr Gbagbo to include a procedural history in his notice of appeal and, in these circumstances, the Appeals Chamber sees no reason to disregard it or parts of it.

B. Grounds of appeal related primarily to findings on grounds for detention – grounds one, three, four and five

21. The Appeals Chamber notes that the first, third, fourth and fifth grounds of appeal relate primarily to the Trial Chamber’s finding that there were no changed circumstances in respect of the grounds for detention under article 58 (1) (b) (i) and (ii) of the Statute and that, as a result, Mr Gbagbo’s detention was necessary to ensure his appearance at trial and to ensure that he does not obstruct or endanger the court proceedings. In the view of the Appeals Chamber, it is appropriate to address these

⁴³ See regulations 36 and 37 of the Regulations of the Court.

⁴⁴ See regulations 36 and 37 of the Regulations of the Court.

⁴⁵ *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’”, 14 December 2006, [ICC-01/04-01/06-774](#) (OA6) (“*Lubanga OA6 Judgment*”), para. 29.

⁴⁶ [Lubanga OA6 Judgment](#), para. 29.

⁴⁷ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 5.

⁴⁸ [Victims’ Response to the Document in Support of the Appeal](#), footnotes 14-15.

⁴⁹ [Victims’ Response to the Document in Support of the Appeal](#), para. 18.

grounds of appeal first before turning to address the second ground of appeal related to the length of detention. In light of the Appeals Chamber’s conclusions on these grounds of appeal, which are set out below, it will not consider the sixth ground of appeal, which relates to the question of conditional release, and the fourth ground of appeal insofar as it relates to conditional release.

1. First and third grounds of appeal

22. As the first and third grounds of appeal are linked, the Appeals Chamber will address them together.

23. The first ground of appeal alleges that “the majority’s refusal to examine the Defence submissions constitutes an error of law”; the third ground of appeal alleges that “[t]he Chamber’s majority relie[d] on the alleged existence of a ‘network of supporters’ without ever advancing specific information that could verify the actual existence of such a network, thereby invalidating the impugned decision”.⁵⁰

(a) Relevant parts of the Impugned Decision

24. In the Impugned Decision, the Trial Chamber recalled

its previous decisions in which it has established that it is not required to “entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions”. The Chamber will thus not entertain arguments that have been raised previously, including before the Appeals Chamber, and that have been dismissed by judges as irrelevant to the assessment of Mr Gbagbo’s detention under Article 60(3) of the Statute. Accordingly, the Chamber shall not adjudicate the arguments as to the exceptional nature of detention or the general submissions arguing that the Prosecutor has failed to establish the ongoing existence of a pro-Gbagbo network.⁵¹ [Footnotes omitted.]

25. The Trial Chamber stated that it would then “turn to review whether there have been changed circumstances that would warrant a modification of its previous rulings on detention, namely vis-à-vis ‘Mr Gbagbo’s network of supporters’ and the ‘need for Mr Gbagbo to be detained to ensure his appearance at trial and to ensure that he does not obstruct or endanger the proceedings’” (footnote omitted).⁵² It stated:

⁵⁰ [Document in Support of the Appeal](#), p. 9.

⁵¹ [Impugned Decision](#), para. 12.

⁵² [Impugned Decision](#), para. 13.

Given the updated information provided by the parties in their submissions, as well as the information on the case record, the Chamber will determine whether the network is still operational and whether it could have the wherewithal to help Mr Gbagbo abscond or to obstruct the trial proceedings.⁵³ [Footnote omitted.]

26. With reference to a finding by the Appeals Chamber, the Trial Chamber

recall[ed] that the Appeals Chamber has found that while the existence of a political party that supports the detained person is a factor that is relevant to the determination of whether the continued detention appears necessary under Article 58(1)(b) of the Statute, there is no need for the Prosecutor to establish the criminality of Mr Gbagbo's network of supporters, but merely its ongoing existence, on the basis, *inter alia*, that such support could indeed facilitate absconding.⁵⁴ [Footnote omitted.]

27. The Trial Chamber determined that, "in the course of the trial proceedings, it has become apparent that Mr Gbagbo still enjoys the support of a large group of persons"; it noted that, "[o]n various occasions, court orders aimed at protecting witnesses at risk have been circumvented", which "ultimately led the Chamber to delay the transmission of hearings" and to "exclude[] one of these individuals (a purported member of this pro-Gbagbo network) from attending court hearings" (footnotes omitted).⁵⁵ The Trial Chamber further noted that, "in its submissions, the Prosecutor has provided additional information which also provides more up-to-date information of the network's activities in social media and other actions related to the trial of Mr Gbagbo".⁵⁶ The Trial Chamber stated:

Although there is no evidence before the Chamber that these groups or individuals have acted at the behest of Mr Gbagbo, there is little doubt concerning their willingness to assist him in any way possible. While there are no specific indications that his supporters are willing to break the law for Mr Gbagbo's sake, the Chamber cannot discount such a possibility. As the Appeals Chamber has clearly stated, detention may be warranted even without a high probability that the accused would actually abscond or obstruct the proceedings. The mere possibility that he or she might do so suffices.⁵⁷

⁵³ [Impugned Decision](#), para. 13.

⁵⁴ [Impugned Decision](#), para. 14.

⁵⁵ [Impugned Decision](#), para. 15.

⁵⁶ [Impugned Decision](#), para. 15.

⁵⁷ [Impugned Decision](#), para. 16.

28. Having then considered whether Mr Gbagbo would intend to abscond or obstruct the trial proceedings,⁵⁸ the Trial Chamber noted that it had “considered the submissions of the Defence of Mr Gbagbo, stating that circumstances have changed insofar as: (a) the pro-Gbagbo network includes respectable personalities; (b) criminal proceedings related to Simone Gbagbo have taken place publicly without any incidents; (c) the security situation in Cote [sic] d’Ivoire has improved; (d) exiled persons have returned to Cote [sic] d’Ivoire; and (e) the current instability is the result of activities of former pro-Ouattara rebels”.⁵⁹ In relation to the first submission, the Trial Chamber considered that “this observation is not persuasive as the Defence is not claiming that all Mr Gbagbo’s supporters fall into this category”.⁶⁰ In relation to the remaining submissions, the Trial Chamber considered that “these elements, while perhaps true, are not determinative to the current decision, as several scenarios can be envisaged in which Mr Gbagbo might attempt to abscond or obstruct the proceedings where these factors would not be relevant”.⁶¹ The Trial Chamber concluded that, “[h]aving reviewed the submissions and all material before it, [it] is satisfied that the circumstances have not changed to such an extent as to warrant Mr Gbagbo’s release”.⁶²

(b) Submissions of the parties and participants

(i) Mr Gbagbo’s submissions

29. In relation to the first ground of appeal, Mr Gbagbo avers that the Trial Chamber erred in law by failing to adjudicate his new submissions.⁶³ Mr Gbagbo submits that his arguments were not a repetition of previous arguments presented to the Trial Chamber, but supported the current non-existence of a pro-Gbagbo network of supporters.⁶⁴ In Mr Gbagbo’s view, the Trial Chamber precluded him from challenging the current justification for maintaining his detention.⁶⁵ Mr Gbagbo submits that, “[a]s the Prosecution has, since the beginning of the case, based its arguments for [his] continued detention on the alleged existence of an organized

⁵⁸ [Impugned Decision](#), para. 17.

⁵⁹ [Impugned Decision](#), para. 18.

⁶⁰ [Impugned Decision](#), para. 19.

⁶¹ [Impugned Decision](#), para. 19.

⁶² [Impugned Decision](#), para. 20.

⁶³ [Document in Support of the Appeal](#), para. 19.

⁶⁴ [Document in Support of the Appeal](#), para. 16.

⁶⁵ [Document in Support of the Appeal](#), para. 17.

network which it claims would be willing to help [him] abscond, the Defence is forced to undertake an analysis at each review to verify, using objective criteria, whether such a network exists at the time of the discussion”.⁶⁶

30. In relation to the third ground of appeal, Mr Gbagbo essentially challenges the finding as to the existence of a network and submits that he has been held in detention since 30 November 2011, “solely because the Bench considered that such a network exists”.⁶⁷ He argues that the Prosecutor has not specified what the pro-Gbagbo network of supporters comprises, “its structure, chain of command, objectives, membership criteria, modus operandi or financial resources”.⁶⁸ He submits that the Prosecutor has failed to provide specific details and also that on every occasion she has “put forward names, facts or figures, [her] statements have been belied by reality”.⁶⁹ Mr Gbagbo raises three arguments: first, that the Trial Chamber failed to provide any indication as to the structure and identity of the members of the pro-Gbagbo network of supporters;⁷⁰ second, that the Trial Chamber failed to adduce any information on the resources at the disposal of this network;⁷¹ and third, that the finding of the Trial Chamber that the members of the network intend to assist Mr Gbagbo in evading justice is baseless.⁷²

(ii) *Prosecutor’s response*

31. The Prosecutor submits that Mr Gbagbo’s first ground of appeal “does not correctly represent the [Impugned] Decision and should therefore be dismissed”.⁷³ According to the Prosecutor, the Trial Chamber “merely declined to entertain the Defence’s ‘*general submissions*’ arguing that the Prosecutor has failed to establish the ongoing existence of the pro-Gbagbo network’, because they repeated arguments that the [Trial] Chamber had already addressed in previous decisions, and therefore could not establish ‘changed circumstances’ pursuant to article 60(3)” (emphasis in original,

⁶⁶ [Document in Support of the Appeal](#), para. 18.

⁶⁷ [Document in Support of the Appeal](#), para. 24.

⁶⁸ [Document in Support of the Appeal](#), para. 25.

⁶⁹ [Document in Support of the Appeal](#), para. 26.

⁷⁰ [Document in Support of the Appeal](#), paras 27-33.

⁷¹ [Document in Support of the Appeal](#), paras 34-35.

⁷² [Document in Support of the Appeal](#), paras 36-41.

⁷³ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 6.

footnote omitted).⁷⁴ Furthermore, in the submission of the Prosecutor, “[t]he Defence further argues that the Majority [of the Trial Chamber] failed to consider the ‘past reality’ of the pro-Gbagbo network, but does not identify which additional arguments or facts it should have taken into consideration”.⁷⁵ In this regard, the Prosecutor avers that “this argument appears to misappreciate the scope of a review of a prior decision on detention under article 60(3)”, which only requires a Chamber to “consider whether there are ‘changed circumstances’”.⁷⁶

32. The Prosecutor submits that Mr Gbagbo’s third ground of appeal should be dismissed.⁷⁷ In the view of the Prosecutor, this ground of appeal “is nothing but a mere disagreement with the Trial Chamber’s previous findings on the existence of a pro-Gbagbo network”.⁷⁸ According to the Prosecutor, Mr Gbagbo “misappreciates the scope of the review of a prior decision on detention under article 60(3), which is not to make a new decision *ab initio* on detention [...] but merely to ascertain whether there are ‘changed circumstances’ that warrant modifying the prior ruling”.⁷⁹ She argues that Mr Gbagbo repeats arguments already disposed of in prior decisions and that these “repetitive arguments show no more than the Defence’s ongoing disagreement with those prior decisions”.⁸⁰ The Prosecutor further contends that, “[i]n any event, the Majority [of the Trial Chamber] correctly analysed whether there had been changed circumstances since its last article 60(3) decision – the Tenth [Detention Review] Decision – regarding the pro-Gbagbo network”.⁸¹

(iii) *Victims’ response*

33. The Victims submit that Mr Gbagbo’s first ground of appeal “should be dismissed”.⁸² In the view of the Victims, “the [Trial] Chamber analysed the Defence’s contentions concerning the pro-Gbagbo network”.⁸³ The Victims further argue that “[b]y simply copying and pasting the same arguments [that had been previously

⁷⁴ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 7.

⁷⁵ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 8.

⁷⁶ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 8.

⁷⁷ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 21.

⁷⁸ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 16.

⁷⁹ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 16.

⁸⁰ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 18.

⁸¹ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 19.

⁸² [Victims’ Response to the Document in Support of the Appeal](#), para. 20.

⁸³ [Victims’ Response to the Document in Support of the Appeal](#), para. 20.

dismissed by the Trial Chamber], the Defence could have only expected that they would be rejected again”.⁸⁴

34. The Victims submit that Mr Gbagbo’s third ground of appeal warrants summary dismissal on the basis that Mr Gbagbo repeats arguments previously considered by the Trial Chamber and the Appeals Chamber.⁸⁵ With regard to Mr Gbagbo’s assertion concerning the conclusion of the Trial Chamber that Mr Gbagbo’s supporters might be willing to break the law for his sake, the Victims contend that “the [Trial] Chamber carefully analysed all the relevant information”.⁸⁶ In relation to Mr Gbagbo’s argument “that the [Trial] Chamber erred by relying on speculations”, the Victims refer to the previous determination of the Appeals Chamber that “*the question revolves around the possibility, not the inevitability, of a future occurrence*”, and that “*it was not unreasonable for the Trial Chamber to find that a risk continued to exist that the network of pro-Gbagbo supporters may help Mr Gbagbo to abscond and/or obstruct or endanger the proceedings*” (emphasis in original, footnotes omitted).⁸⁷

(c) Determination by the Appeals Chamber

35. The Appeals Chamber notes that the Trial Chamber, having articulated jurisprudence related to how the review under article 60 (3) of the Statute should be carried out, stated that it would “not adjudicate [...] the general submissions [by Mr Gbagbo] arguing that the Prosecutor has failed to establish the ongoing existence of a pro-Gbagbo network”.⁸⁸ In doing so, it did not specify the submissions it considered to fall within this category. The Trial Chamber then went on to state that it would “determine whether the network is still operational and whether it could have the wherewithal to help Mr Gbagbo abscond or to obstruct the trial proceedings”.⁸⁹

36. The Appeals Chamber notes that, while Mr Gbagbo argues that the Trial Chamber erred in not considering his submissions as to the non-existence of a

⁸⁴ [Victims’ Response to the Document in Support of the Appeal](#), para. 21.

⁸⁵ [Victims’ Response to the Document in Support of the Appeal](#), paras 28, 31.

⁸⁶ [Victims’ Response to the Document in Support of the Appeal](#), para. 32.

⁸⁷ [Victims’ Response to the Document in Support of the Appeal](#), para. 33, quoting [Gbagbo OA6 Judgment](#), para. 77.

⁸⁸ [Impugned Decision](#), para. 12.

⁸⁹ [Impugned Decision](#), para. 13.

network,⁹⁰ he does not point to the specific “new submissions” that the Trial Chamber purportedly failed to address. The Appeals Chamber also notes that, having stated that it would not consider Mr Gbagbo’s “general submissions”, the Trial Chamber nevertheless went on to consider arguments by the Prosecutor and Mr Gbagbo as to whether the network was still operational. It did not need to address arguments that it found were repetitive of arguments disposed of in previous decisions. The Appeals Chamber therefore finds that Mr Gbagbo has not demonstrated that the Trial Chamber erred by not considering his arguments on the network. The Appeals Chamber observes that the Trial Chamber, in the Impugned Decision, recalled Mr Gbagbo’s specific arguments regarding the recent changes in the composition of his support network and the conditions in the Côte d’Ivoire.⁹¹ It then concluded that those arguments, “while perhaps true, are not determinative to the current decision, as several scenarios can be envisaged in which Mr Gbagbo might attempt to abscond or obstruct the proceedings where these factors would not be relevant”.⁹² Mr Gbagbo has not indicated why this determination was an error. In particular, he has not explained how those factors would have impacted on the specific findings made by the Trial Chamber in previous decisions as to the existence of the network and therefore would have amounted to a change in circumstances.

37. Turning to Mr Gbagbo’s arguments under the third ground of appeal, the Appeals Chamber notes that the decision being appealed is a decision taken pursuant to article 60 (3) of the Statute. This provision reads as follows:

The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

38. The Appeals Chamber has found that, in “carrying out a periodic review of a ruling on detention under article 60 (3) of the Statute [a Chamber] must satisfy itself that the conditions under article 58 (1) of the Statute, as required by article 60 (2) of

⁹⁰ [Document in Support of the Appeal](#), para. 16.

⁹¹ [Impugned Decision](#), para. 18.

⁹² [Impugned Decision](#), para. 19.

the Statute, continue to be met”.⁹³ This inquiry by the Chamber carrying out the review is not dependent only upon the new information provided by the parties, but is a review of the current circumstances as a whole which underpin detention. It is the Chamber’s obligation to look at those circumstances and be satisfied that continued detention is necessary.

39. In this regard, the Appeals Chamber has stated that a Chamber carrying out a periodic review of a ruling on detention under article 60 (3) of the Statute must “revert to the ruling on detention to determine whether there has been a change in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58 (1) of the Statute”.⁹⁴ The term “changed circumstances” has been defined as “a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary”.⁹⁵ What is crucial is that the Chamber is satisfied, at the time of the review decision, that grounds remain to detain. In this regard, a Chamber cannot simply refer to findings in prior decisions without being satisfied that the evidence or information underpinning those decisions still supports the findings made at the time of the review.

40. Mr Gbagbo argues that the Trial Chamber did not set out the structure and identity of the network and presents arguments as to the development of the

⁹³ [Gbagbo OA6 Judgment](#), para. 52, citing Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled ‘Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence’”, 19 November 2010, [ICC-01/05-01/08-1019](#) (OA4) (“*Bemba OA4 Judgment*”), para. 52.

⁹⁴ [Bemba OA4 Judgment](#), para. 52; Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled ‘Decision on Applications for Provisional Release’”, 19 August 2011, ICC-01/05-01/08-1626-Conf (OA7), para. 71; a public redacted version was registered on 12 September 2011 ([ICC-01/05-01/08-1626-Red](#) (OA7)); Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 2 September 2011 entitled ‘Decision on the “Demande de mise en liberté de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo”’, 9 September 2011, [ICC-01/05-01/08-1722](#) (OA8), para. 30. This document was originally filed confidentially but was reclassified as public pursuant to the “Order on the reclassification or filing of public redacted versions of certain documents”, 23 September 2011, ICC-01/05-01/08-1779-Conf (OA8).

⁹⁵ “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](#) (OA2) (“*Bemba OA2 Judgment*”), para. 60.

Prosecutor's position in this regard since the Trial Chamber's first decision on detention.⁹⁶ He also submits that the Impugned Decision contains no "discussion of the resources the supposed members of this pro-Gbagbo network might have".⁹⁷ The Appeals Chamber considers that Mr Gbagbo has not demonstrated an error. The Appeals Chamber notes that the original decision on detention, as well as the subsequent detention review decisions under article 60 (3) of the Statute, contain findings as to the organisation and resources of the pro-Gbagbo supporters and the resources available to Mr Gbagbo himself. For instance, it has been determined that there is a network of political supporters of Mr Gbagbo in the Côte d'Ivoire and that it has the capacity to conduct military operations and recruit combatants.⁹⁸ It has been concluded that this network has financial resources and fundraising capabilities,⁹⁹ that Mr Gbagbo also has political contacts outside of the Côte d'Ivoire¹⁰⁰ and that "certain assets belonging to Mr Gbagbo or his wife may have not been frozen to date [REDACTED]".¹⁰¹ As set out above, the Trial Chamber was then required, in the Impugned Decision, to address the question of whether there has been a change in circumstances and, in doing so, to satisfy itself that the bases for those rulings were still current as of the date of the review. In this regard, the Appeals Chamber notes that the Trial Chamber set out to "review whether there [had] been changed circumstances that would warrant a modification of its previous rulings on detention, namely vis-à-vis 'Mr Gbagbo's network of supporters'".¹⁰² It then, correctly, expressly stated that, "[g]iven the updated information provided by the parties in their submissions, as well as the information on the case record, [it would] determine whether the network is still operational and whether it could have the wherewithal to help Mr Gbagbo abscond or to obstruct the trial proceedings" (footnote omitted).¹⁰³ After discussing the submissions from the parties related to changed circumstances, the Trial Chamber concluded that, "having reviewed the submissions and all material

⁹⁶ [Document in Support of the Appeal](#), paras 24-34.

⁹⁷ [Document in Support of the Appeal](#), para. 34.

⁹⁸ [Decision on Application for Interim Release](#), para. 60.

⁹⁹ [Third Decision on the Review of Detention](#), para. 49.

¹⁰⁰ [Decision on Application for Interim Release](#), para. 60.

¹⁰¹ [Decision on Application for Interim Release](#), para. 59.

¹⁰² [Impugned Decision](#), para. 13.

¹⁰³ [Impugned Decision](#), para. 13.

before it, the Chamber is satisfied that the circumstances have not changed to such an extent as to warrant Mr Gbagbo's release".¹⁰⁴

41. The Appeals Chamber understands the Trial Chamber's statements in paragraphs 13 and 20 of the Impugned Decision, as just cited, and in particular the references to "the information on the case record" and it having "reviewed the submissions and all material before it", to mean that it carried out the required review, as set out above. While the Trial Chamber should have been more explicit in its reference to the material which it considered underpinned its decision, as is required and is explained above, and in future decisions the Trial Chamber should do this, in its reasoning in the Impugned Decision, it referred specifically to the new information before it, including the activities of Mr Gbagbo's supporters on social media and information that court orders aimed at protecting witnesses had been circumvented.¹⁰⁵ In light of the aforementioned references in paragraphs 13 and 20, the Appeals Chamber considers that the Trial Chamber was not assessing whether this information, in itself, sufficiently established the existence of a network, but was correct in embarking on an assessment as to whether there were changes to the nature of the network found to exist in previous decisions.

42. As to Mr Gbagbo's argument that the finding that the support network had the intention to help him abscond was baseless and that it cannot be said that the members of the network had "criminal aims", the Trial Chamber observed that "there is no need for the Prosecutor to establish the criminality of Mr Gbagbo's network of supporters, but merely its ongoing existence, on the basis, *inter alia*, that such support could indeed facilitate absconding".¹⁰⁶ The Trial Chamber also determined that "there is little doubt concerning [the pro-Gbagbo supporters'] willingness to assist him in any way possible" and that, "[w]hile there are no specific indications that his supporters are willing to break the law for Mr Gbagbo's sake, the Chamber cannot discount such a possibility".¹⁰⁷

¹⁰⁴ [Impugned Decision](#), para. 20.

¹⁰⁵ [Impugned Decision](#), paras 15-16.

¹⁰⁶ [Impugned Decision](#), para. 14.

¹⁰⁷ [Impugned Decision](#), para. 16.

43. The Appeals Chamber does not consider that the Trial Chamber's findings illustrate an error. The Appeals Chamber has previously considered that "[w]hat may justify [...] 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".¹⁰⁸ The Appeals Chamber has found that this may be the case where a detained person has, *inter alia*, connections to a political party.¹⁰⁹ Although demonstrating the general criminal nature of a support network may indicate that interference with, or avoidance of, the proceedings is likely, it is not a prerequisite. It is sufficient to show that it is possible that members of that network of supporters could break the law for the detainee. Accordingly, the Trial Chamber correctly considered whether, given its earlier findings underpinning the decision on detention and the new evidence presented by the Prosecutor, there continued to be a possibility that members of the network of supporters would break the law. The Appeals Chamber considers that Mr Gbagbo has not established that these findings were unreasonable. The Appeals Chamber also rejects Mr Gbagbo's argument that the Trial Chamber "place[d] the onus on the Defence to demonstrate that none of the members of the supposed network has criminal intent".¹¹⁰ This argument is based on an incorrect premise because, as noted, it is not necessary to establish the existence of criminal intent.

44. In sum, the Appeals Chamber therefore rejects Mr Gbagbo's arguments under the first and third grounds of appeal.

2. *Fourth ground of appeal*

45. The fourth ground of appeal is that "[t]he Chamber's majority erred by refusing to consider the Accused's age and state of health in determining his release".¹¹¹

¹⁰⁸ *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](#) (OA4) ("*Ngudjolo* OA4 Judgment"), para. 21.

¹⁰⁹ [Gbagbo OA6 Judgment](#), para. 77.

¹¹⁰ [Document in Support of the Appeal](#), para. 40.

¹¹¹ [Document in Support of the Appeal](#), p. 16.

(a) Relevant part of the Impugned Decision

46. The Trial Chamber noted, in the summary of Mr Gbagbo’s submissions, that he argued that he “has pathologies that affect his physical and psychological well-being” and that, “given his age, detention has negative effects on his health” (footnotes omitted).¹¹² In its determination, it stated that

Mr Gbagbo’s age is also not decisive [...]. On the contrary, given the gravity of the crimes charged, any sentence may well imply that Mr Gbagbo will spend the rest of his life in prison. In the event of a conviction, he therefore has a clear incentive to abscond to avoid such a scenario.¹¹³

47. No reference is made in the determination to Mr Gbagbo’s health.

(b) Submissions of the parties and participants

(i) Mr Gbagbo’s submissions

48. Mr Gbagbo avers that the Trial Chamber erred in law by failing to consider his health or age.¹¹⁴ He argues that the Trial Chamber refused to take his health into account¹¹⁵ and that the Trial Chamber should have taken his age into account, both in combination with the state of his health and as a factor in and of itself.¹¹⁶ According to Mr Gbagbo, the Trial Chamber in fact considered that his age militated in favour of maintaining his detention.¹¹⁷ He argues that the Trial Chamber held his age against him and omitted to consider “his [REDACTED] state of health” and that it should have “undertake[n] a genuine assessment of the risks associated with the conditions of article 58(1) [...] [REDACTED]”.¹¹⁸

(ii) Prosecutor’s response

49. The Prosecutor submits that Mr Gbagbo’s fourth ground of appeal should be dismissed.¹¹⁹ In the view of the Prosecutor, consideration of Mr Gbagbo’s state of health “is discretionary – as opposed to mandatory – because there is no provision in the Court’s legal texts that specifically provides for the interim or conditional release

¹¹² [Impugned Decision](#), para. 9.

¹¹³ [Impugned Decision](#), para. 17.

¹¹⁴ [Document in Support of the Appeal](#), para. 52.

¹¹⁵ [Document in Support of the Appeal](#), paras 42-46.

¹¹⁶ [Document in Support of the Appeal](#), para. 48.

¹¹⁷ [Document in Support of the Appeal](#), paras 49-50.

¹¹⁸ [Document in Support of the Appeal](#), para. 51.

¹¹⁹ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 35.

of a detained person on health grounds”.¹²⁰ The Prosecutor submits that, “[i]n any event, the Majority [of the Trial Chamber] implicitly considered Mr Gbagbo’s health as part of its findings that there had been no change of circumstances with respect to the risks under article 58(1)(b)(i) and (ii)”.¹²¹ The Prosecutor argues that, “[e]ven if, *arguendo*, the Majority [of the Trial Chamber] was required to make express findings with respect to Mr Gbagbo’s state of health in its article 60(3) review Decision, such an error would not materially affect the [Impugned] Decision”¹²² (footnote omitted). In the view of the Prosecutor, “[b]ecause Mr Gbagbo’s state of health is intrinsically linked to his age, it logically follows that if the latter factor could not have had a decisive impact on the Majority’s [Impugned] Decision, neither could the former”.¹²³

50. Regarding Mr Gbagbo’s age, the Prosecutor argues that “[t]he Defence disagrees with the Majority’s conclusion and simply re-litigates their prior arguments”, which warrants dismissal in and of itself (footnote omitted).¹²⁴ The Prosecutor also submits that “the Majority [of the Trial Chamber] did not err by finding that Mr Gbagbo’s elevated age could give him an incentive to abscond, considering the potentially high sentence that he could face, if convicted”, since the Appeals Chamber has found that this factor may properly be taken into account (footnote omitted).¹²⁵ The Prosecutor further avers that Mr Gbagbo’s general reliance on the advanced age of a suspect and his health condition “fails to consider that a Chamber must make a holistic assessment of all relevant facts and determine whether there continues to be a risk under article 58(1)(b) that justifies detention”.¹²⁶ According to the Prosecutor, where the Trial Chamber “has verified that Mr Gbagbo has the support of a ‘large group of persons’ who have previously created a ‘serious risk to the integrity of these proceedings and to the safety of the witnesses’ and who are willing to assist Mr Gbagbo ‘in any way possible’, [it] correctly balanced Mr

¹²⁰ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 25.

¹²¹ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 27.

¹²² [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 28.

¹²³ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 28.

¹²⁴ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 30.

¹²⁵ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 32, referring to [Bemba OA2 Judgment](#), para. 70.

¹²⁶ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 33.

Gbagbo's age against those and other factors, and concluded that it was not a decisive factor in its Decision to keep Mr Gbagbo in detention" (footnotes omitted).¹²⁷

(iii) *Victims' response*

51. The Victims submit "that the majority of the [Trial] Chamber did not commit an error by refusing to consider Mr Gbagbo's age and health condition".¹²⁸ The Victims argue that the Trial Chamber did consider these factors.¹²⁹ The Victims further contend that Mr Gbagbo's arguments amount to mere disagreement with the findings of the Trial Chamber.¹³⁰ In addition, in the view of the Victims, "the consideration of humanitarian factors is not envisaged as such in the Statute or in the Rules in order to decide on requests for *interim* release" (footnote omitted).¹³¹ The Victims further aver that the finding of the Trial Chamber "that Mr Gbagbo may well spend the rest of his life in prison merely reflects the Appeals Chamber's finding that the length of the sentence that an accused is likely to serve if convicted may be considered by the Chamber as an important incentive for him or her to abscond".¹³²

(c) **Determination by the Appeals Chamber**

52. Mr Gbagbo challenges the Impugned Decision both with regard to the assessment of his age and his health.

53. In relation to age, Mr Gbagbo argues that the Trial Chamber refused to consider his age either as a separate factor or in combination with his health condition. The Appeals Chamber notes that, taken on its own, it cannot be said that a person's advanced age means *per se* that he or she will be less likely to abscond or less likely to obstruct proceedings. However, Mr Gbagbo also refers to the fact that, while the Trial Chamber found that "Mr Gbagbo's age is not decisive" in evaluating "how likely it is that the accused would actually abscond or obstruct the proceedings",¹³³ the Trial Chamber goes on to state that

¹²⁷ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 34.

¹²⁸ [Victims' Response to the Document in Support of the Appeal](#), para. 34.

¹²⁹ [Victims' Response to the Document in Support of the Appeal](#), paras 35, 37-40.

¹³⁰ [Victims' Response to the Document in Support of the Appeal](#), paras 36, 40.

¹³¹ [Victims' Response to the Document in Support of the Appeal](#), paras 41-42.

¹³² [Victims' Response to the Document in Support of the Appeal](#), para. 43, referring to [Gbagbo OA Judgment](#), para. 54.

¹³³ [Impugned Decision](#), para. 17.

[o]n the contrary, given the gravity of the crimes charged, any sentence may well imply that Mr Gbagbo will spend the rest of his life in prison. In the event of a conviction, he therefore has a clear incentive to abscond to avoid such scenario.¹³⁴

54. The Appeals Chamber finds no fault in a Chamber relying on the possible length of sentence that a detained person may receive as a factor that may increase the incentive to abscond.¹³⁵ Nevertheless, the Appeals Chamber is of the view that the Trial Chamber erred by considering Mr Gbagbo's advanced age as a factor that increased his desire to abscond, rather than one that may potentially mitigate the possibility of absconding. Examples in international jurisprudence show that advanced age may be considered as a factor potentially in support of release alongside other factors, including, for example, ill health.¹³⁶ Without aiming to exhaustively set out the circumstances in which age may be considered in the context of interim release, the Appeals Chamber considers that it is generally more appropriate for age to be considered in such a manner rather than as a factor that could evidence a motivation to abscond.

55. With regard to Mr Gbagbo's argument that the Trial Chamber refused to consider the state of his health, it seems that he is arguing that his health condition should have been considered in relation to conditional release, but also in relation to

¹³⁴ [Impugned Decision](#), para. 17.

¹³⁵ [Bemba OA2 Judgment](#), para. 70.

¹³⁶ See e.g. cases at the ICTY which suggest that the Chambers look to age as one factor among others which may contribute to a decision to release: Trial Chamber, *Prosecutor v. Popović et al.*, "[Decision on Gvero's motion for provisional release during the break in the proceedings](#)", 9 April 2008, IT-05-88-T, paras 15-16, which was reversed by the Appeals Chamber on 15 May 2008 ("[Decision on consolidated appeal against Decision Borovčanin's motion for a custodial visit and Decisions on Gvero's and Miletić's motions for provisional release during the break in the proceedings](#)", IT-05-88-AR65.4, AR65.5, AR65.6) but not seemingly in relation to the reference to age (para. 23); Trial Chamber, *Prosecutor v. Šainović et al.*, "[Decision on Milutinović Motion for Provisional Release](#)", 22 May 2007, IT-05-87-T, para. 14; Trial Chamber, *Prosecutor v. Prlić et al.*, "[Order on provisional release of Slobodan Praljak](#)", 30 July 2004, IT-04-74-PT, paras 21, 33; Trial Chamber, *Prosecutor v. Pavle Strugar et al.*, "[Order on the provisional release of the accused Pavle Strugar](#)", 30 November 2001, IT-01-42-PT, pp. 2-5. See also cases in the European Court of Human Rights ("ECtHR") where age has been referred to as a factor in favour of release in the context of decisions on interim release (article 5 (3) of the European Convention on Human Rights ("ECHR")): *Gulyayeva v. Russia*, "[Judgment](#)", 1 April 2010, application no. 67413/01, para. 190; *Nerattini v. Greece*, "[Judgment](#)", 18 December 2008, application no. 43529/07, para. 38. See also decisions of the ECtHR where age can be taken into account under article 3 of the ECHR in the context of release following a sentence of imprisonment: *Mouisel v. France*, "[Judgment](#)", 14 November 2002, application no. 67263/01, paras 37-38; *Papon v. France (No. 1)*, "[Decision](#)", 7 June 2001, application no. 64666/01. In the case of *Arutyunyan v. Russia*, "[Judgment](#)", 10 January 2012, application no. 48977/09, paras 68 *et seq.*, it seems that the Court did not distinguish between pre-trial and post-conviction detention in considering article 3 of the ECHR.

the assessment of risk.¹³⁷ The Appeals Chamber recalls that it previously addressed, in this case, how issues related to a detainee's medical condition could have an impact on a decision as to interim release. It found that "there is no provision in the Court's legal texts that specifically provides for the interim or conditional release of a detained person on health grounds".¹³⁸ However, it also stated, *inter alia*, that "the medical condition of a detained person may have an effect on the risks under article 58 (1) (b) of the Statute, for instance on his or her ability to abscond, potentially negating those risks".¹³⁹

56. [REDACTED]. In relation to the assessment of risk, the Single Judge of the Pre-Trial Chamber, in the First Decision on the Review of Detention, found certain information as to Mr Gbagbo's health to be a new circumstance but considered that it had "no impact on the necessity of Mr Gbagbo's continued detention".¹⁴⁰ She first recalled that it had found that Mr Gbagbo was fit to take part in the proceedings despite the existence of medical issues.¹⁴¹ She was

of the view that the physical and mental conditions of Mr Gbagbo, even though diminished to a certain extent, still allow him to take steps towards fleeing from the Court's jurisdiction, disrupting the investigation and the Court's proceedings and furthering the commission of crimes within the jurisdiction of the Court. Indeed, nothing in the medical reports presented to the Chamber suggests that the medical or mental conditions of Mr Gbagbo are such that he could not take such steps. Furthermore, he could avail himself of the assistance of an extensive network of political contacts and supporters both in Côte d'Ivoire and abroad as discussed elsewhere in this Decision.¹⁴² [Footnote omitted.]

57. The Single Judge concluded that, "[i]n light of these considerations, [...] the medical condition of Mr Gbagbo does not have a bearing on the risks under article 58(1)(b) of the Statute".¹⁴³ In the Third Decision on the Review of Detention, the Trial Chamber found that arguments as to his state of health that were raised by Mr

¹³⁷ [Document in Support of the Appeal](#), paras 46, 51.

¹³⁸ [Gbagbo OA Judgment](#), para. 86.

¹³⁹ [Gbagbo OA Judgment](#), para. 87.

¹⁴⁰ [First Decision on the Review of Detention](#), para. 51.

¹⁴¹ [First Decision on the Review of Detention](#), para. 52.

¹⁴² [First Decision on the Review of Detention](#), para. 52.

¹⁴³ [First Decision on the Review of Detention](#), para. 53.

Gbagbo were “limited to repeating arguments which were previously heard by the Chamber, and [did] not raise any new circumstance”.¹⁴⁴

58. [REDACTED].¹⁴⁵ [REDACTED].¹⁴⁶ [REDACTED].¹⁴⁷ [REDACTED].¹⁴⁸ However, the Appeals Chamber notes that the Trial Chamber further stated that it was “appropriate to receive submissions from the parties and participants for the purpose of Article 60(3) of the Statute” [REDACTED].¹⁴⁹

59. The Appeals Chamber observes that [REDACTED]. For that matter, the Appeals Chamber observes that there does not appear to be any consideration in the record of Mr Gbagbo’s health condition in that regard since the Third Decision on the Review of Detention. In such circumstances, and [REDACTED], the Appeals Chamber finds that the Trial Chamber erred in failing to consider whether circumstances had changed such that the risks enumerated in article 58 (1) (b) (i) and (ii) of the Statute were impacted.

3. *Fifth ground of appeal*

60. The fifth ground of appeal is that “[t]he Chamber erred in law by basing the continued detention on the ‘extreme gravity of the charges’ and on the fact that the Accused ‘denies responsibility’” (footnote omitted).¹⁵⁰

(a) **Relevant part of the Impugned Decision**

61. The Trial Chamber stated that it

has no specific evidence before it that Mr Gbagbo has any intention of absconding or obstructing the trial proceedings. However, it must take into consideration the extreme gravity of the charges against him as well as the fact that he denies any responsibility.¹⁵¹

¹⁴⁴ [Third Decision on the Review of Detention](#), para. 51.

¹⁴⁵ [REDACTED].

¹⁴⁶ [REDACTED].

¹⁴⁷ [REDACTED].

¹⁴⁸ [REDACTED].

¹⁴⁹ Decision of 6 December 2016, para. 8.

¹⁵⁰ [Document in Support of the Appeal](#), p. 19.

¹⁵¹ [Impugned Decision](#), para. 17.

(b) Submissions of the parties and participants

(i) Mr Gbagbo's submissions

62. Mr Gbagbo avers that, having found that there was “no specific evidence before it that Mr Gbagbo has any intention of absconding or obstructing the trial proceedings”, the Trial Chamber erred in law by determining that Mr Gbagbo has a “clear incentive to abscond” on the basis of “the extreme gravity of the charges against him and the fact that he denies responsibility”.¹⁵² Mr Gbagbo argues that the Trial Chamber failed to explain what extreme gravity means.¹⁵³ According to Mr Gbagbo, if the Trial Chamber was referring to all the crimes within the jurisdiction of the Court, the consequence would be that no accused before the Court would be able to obtain interim release.¹⁵⁴ Mr Gbagbo further contends that the fact that the Trial Chamber considered his denial of responsibility as a reason in favour of maintaining his detention amounts to a breach of the principle of the presumption of innocence and his defence rights.¹⁵⁵

(ii) Prosecutor's response

63. The Prosecutor submits that Mr Gbagbo's fifth ground of appeal should be dismissed.¹⁵⁶ In the view of the Prosecutor, “the Majority [of the Trial Chamber] did not need to define the concept of ‘extreme gravity’”, because what matters “is that Mr Gbagbo, if convicted of these crimes, would indeed face a lengthy sentence [...] which in turn could impact on his incentive to abscond, particularly given his age” (footnote omitted).¹⁵⁷ As to the “Majority's finding that there is ‘no specific evidence before it that Mr Gbagbo has any intention of absconding or obstructing the trial proceedings’”, the Prosecutor argues that this finding “merely acknowledges that there is no *direct* or otherwise concrete evidence to that effect” (footnote omitted, emphasis in original).¹⁵⁸ The Prosecutor also argues that, in respect of the reference to Mr Gbagbo's denial of responsibility by the Trial Chamber, “[t]he Majority made this finding when assessing the length of the sentence that Mr Gbagbo could potentially

¹⁵² [Document in Support of the Appeal](#), paras 53-59.

¹⁵³ [Document in Support of the Appeal](#), paras 55-56.

¹⁵⁴ [Document in Support of the Appeal](#), para. 55.

¹⁵⁵ [Document in Support of the Appeal](#), paras 57-59.

¹⁵⁶ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 40.

¹⁵⁷ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 37.

¹⁵⁸ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 38.

face, and the impact of such a sentence on his risk of flight”.¹⁵⁹ She submits that, “[b]ecause Mr Gbagbo denies any responsibility over the crime – thereby exercising his rights under article 66(1) and 67(1) – he is less likely to benefit from the substantial reduction of sentence that the [Trial] Chamber might otherwise grant”, which does not entail, “however, that no accused claiming his or her innocence may be granted provisional release” (footnote omitted).¹⁶⁰ She also submits that “[n]or does this violate Mr Gbagbo’s presumption of innocence or his defence rights” (footnote omitted).¹⁶¹

(iii) *Victims’ response*

64. The Victims submit that Mr Gbagbo’s fifth ground of appeal “should [...] be dismissed”.¹⁶² In the view of the Victims, Mr Gbagbo’s arguments concerning the extreme gravity of the charges brought against him have already been dismissed by the Appeals Chamber.¹⁶³ As to Mr Gbagbo’s argument regarding his denial of responsibility, the Victims submit that Mr Gbagbo misreads the Impugned Decision, considering that the Trial Chamber “carefully analysed the relevant factors in order to conclude that Mr Gbagbo has a clear incentive to abscond”.¹⁶⁴

(c) **Determination by the Appeals Chamber**

65. With regard to Mr Gbagbo’s argument as to the Trial Chamber’s statement that it “has no specific evidence before it that Mr Gbagbo has any intention of absconding or obstructing the trial proceedings”,¹⁶⁵ the Appeals Chamber finds that, as argued by the Prosecutor, this determination merely indicates that the Trial Chamber considered that there was “no *direct* or otherwise concrete evidence to that effect”.¹⁶⁶ The Trial Chamber then went on to consider the factors that it considered bore on the likelihood of Mr Gbagbo attempting to abscond or obstructing the proceedings.¹⁶⁷ The Appeals Chamber finds no error in this approach *per se*, recalling its previous finding that “[w]hat may justify arrest [or] continued detention [...] under article 58 (1) (b) of the

¹⁵⁹ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 39.

¹⁶⁰ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 39.

¹⁶¹ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 39.

¹⁶² [Victims’ Response to the Document in Support of the Appeal](#), para. 47.

¹⁶³ [Victims’ Response to the Document in Support of the Appeal](#), paras 45-46.

¹⁶⁴ [Victims’ Response to the Document in Support of the Appeal](#), para. 47.

¹⁶⁵ [Impugned Decision](#), para. 17.

¹⁶⁶ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 38.

¹⁶⁷ [Impugned Decision](#), para. 17.

Statute is that it must ‘appear’ to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence”.¹⁶⁸

66. As to Mr Gbagbo’s arguments regarding the Trial Chamber’s assessment concerning the gravity of the charges, the Appeals Chamber recalls that similar arguments were previously raised by Mr Gbagbo on appeal and addressed by the Appeals Chamber in the *Gbagbo* OA Judgment. In that appeal, the Appeals Chamber stated that

the gravity of the charges and the resulting expectation of a lengthy prison sentence are relevant factors for decisions on interim release. The Appeals Chamber does not consider that relying on those factors, amongst others, amounts to an “irrebuttable presumption”. What is important is whether a given factor exists in respect of the particular detained person. In the case at hand, there can be no doubt that the charges that the Prosecutor has brought against Mr Gbagbo and for which the warrant of arrest against him was issued – crimes against humanity of murder, rape and other forms of sexual violence, as well as other inhumane acts and persecution – are serious and may lead to a lengthy sentence in case of conviction. Whether charges may be similarly serious in respect of some or all other suspects who are brought before the Court is irrelevant because even if this were the case, this does not detract from the fact that the charges against Mr Gbagbo *are* serious.¹⁶⁹ [Emphasis in original, footnotes omitted.]

67. The Trial Chamber, in the Impugned Decision, referred to “the extreme gravity of the charges against” Mr Gbagbo.¹⁷⁰ The fact that the Trial Chamber reiterated in the Impugned Decision that the gravity of the charges was relevant to it is, as seen above, not an error. The fact that the Trial Chamber referred to the gravity of the charges as being “extreme”, is also not on its face an error, on the understanding that what the Trial Chamber meant was simply that the charges against him are serious, something that the Appeals Chamber has, as stated, already confirmed.

¹⁶⁸ [Ngudjolo OA4 Judgment](#), para. 21; Appeals Chamber, *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), para. 55; Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba et al.*, “Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled ‘Decision on the “Requête de mise en liberté” submitted by the Defence for Jean-Jacques Mangenda’”, 11 July 2014, [ICC-01/05-01/13-560](#) (OA4), para. 123.

¹⁶⁹ [Gbagbo OA Judgment](#), para. 54, with further references.

¹⁷⁰ [Impugned Decision](#), para. 17.

68. With regard to Mr Gbagbo's arguments as to the Trial Chamber's reference to the fact that "he denies any responsibility", however, the Appeals Chamber finds that the Trial Chamber erred. Article 66 of the Statute provides that Mr Gbagbo is entitled to a presumption of innocence. In addition, under article 67 (1) (g) of the Statute, Mr Gbagbo has the right "[n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence". As argued by Mr Gbagbo,¹⁷¹ taking into account the fact that a person denies responsibility for the charges he faces, as a factor favouring detention, would clearly place detained persons in a paradoxical situation. They could either decide to maintain that they are innocent – which could then be taken into account as a factor favouring detention – or accept responsibility for the crimes they are charged with – which in all likelihood could also be taken into account as a factor favouring detention. The Appeals Chamber considers that no one should be forced to accept responsibility in order to achieve interim release. The Appeals Chamber therefore finds that the Trial Chamber erred.

69. The Appeals Chamber notes that the Prosecutor argues that the Trial Chamber "made this finding when assessing the length of the sentence that Mr Gbagbo could potentially face, and the impact of such a sentence on his risk of flight".¹⁷² She submits that, "[b]ecause Mr Gbagbo denies any responsibility over the crime [...] he is less likely to benefit from the substantial reduction of sentence that the [Trial] Chamber might otherwise grant".¹⁷³ Even if it was the intention of the Trial Chamber to make this finding, which is by no means clear from the Impugned Decision, the Appeals Chamber considers that the Trial Chamber erred. Reference to the gravity of the crimes charged was made in the context of a decision on interim release when referring to Mr Gbagbo's possible motivation to abscond. This is, generally speaking, an assessment made based on the particular charges in a case: if the charges brought against the detained person are serious, they may result in a lengthy prison sentence in case of a conviction; this, in turn, indicates a probability that the detained person has motivation to abscond. The Prosecutor, however, seems to suggest that the Trial Chamber should already assess the concrete sentence that Mr Gbagbo might receive,

¹⁷¹ [Document in Support of the Appeal](#), para. 58.

¹⁷² [Prosecutor's Response to the Document in Support of the Appeal](#), para. 39.

¹⁷³ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 39.

and that his denial of responsibility could make him less likely to benefit from a reduction of sentence that the Trial Chamber might otherwise grant. It cannot be expected that the Trial Chamber enter into such a detailed assessment at this stage, nor would this be appropriate, as the concrete sentence is only determined at the end of the trial, if and when the person is actually found guilty of a crime. Accordingly, considerations as to potential factors in case of a conviction and sentence should not form part of a decision on interim release.

C. Length of detention – second ground of appeal

70. The second ground of appeal is that “[t]he Chamber erred in law by failing to consider the time spent in pre-trial detention”.¹⁷⁴

(a) Relevant part of the Impugned Decision

71. When summarising the arguments of the parties and participants in the Impugned Decision, the Trial Chamber stated that “[t]he Defence submits that Mr Gbagbo has already been detained for almost six years and has pathologies that affect his physical and psychological well-being. Moreover, given his age, detention has negative effects on his health” (footnotes omitted).¹⁷⁵ The Trial Chamber did not address these submissions any further in the remainder of the Impugned Decision.

(b) Submissions of the parties and participants

(i) Mr Gbagbo’s submissions

72. Mr Gbagbo avers that the Trial Chamber erred in law by failing to take the time he has spent in detention pending trial into account in assessing whether there have been changed circumstances within the meaning of article 60 (3) of the Statute.¹⁷⁶ In Mr Gbagbo’s view, the passage of time between two decisions maintaining the detention of a person necessarily amounts to changed circumstances.¹⁷⁷ He submits that “[a]s time has passed, the context has changed, and it is for the Chamber to verify, as indicated above, that what was true yesterday is still true today”.¹⁷⁸ He argues that the longer the detention, the less it is warranted, in view of the right to

¹⁷⁴ [Document in Support of the Appeal](#), p. 8.

¹⁷⁵ [Impugned Decision](#), para. 9.

¹⁷⁶ [Document in Support of the Appeal](#), paras 20, 23.

¹⁷⁷ [Document in Support of the Appeal](#), para. 20.

¹⁷⁸ [Document in Support of the Appeal](#), para. 20.

liberty.¹⁷⁹ Mr Gbagbo further argues that the failure to take this factor into account amounts to a lack of respect for the spirit of the Statute.¹⁸⁰

(ii) *Prosecutor's response*

73. The Prosecutor submits that Mr Gbagbo's second ground of appeal should be dismissed.¹⁸¹ In the view of the Prosecutor, "[t]he Majority [of the Trial Chamber] properly took into account the period that Mr Gbagbo has already spent in detention when assessing whether there has been a change in circumstances, and in particular Mr Gbagbo's right to liberty".¹⁸² According to the Prosecutor, "the lapse of time is only relevant to the extent that it has an impact on a risk under article 58(1)(b) that has been established in a prior decision of detention".¹⁸³

(iii) *Victims' response*

74. The Victims submit that "the majority of the [Trial] Chamber did not commit an error by not taking into account the duration of Mr Gbagbo's detention *as such*" (emphasis in original).¹⁸⁴ The Victims contend that "[t]he mere lapse of time does not satisfy" the requirement of changed circumstances and that Mr Gbagbo's interpretation "would imply that there would always be '*changed circumstances*' within the meaning of article 60(3) of the Statute after some time has elapsed since the detention of a person" (emphasis in original).¹⁸⁵ According to the Victims, "[t]he purpose and context of article 60(3) confirm this conclusion".¹⁸⁶

(c) **Determination by the Appeals Chamber**

75. The Appeals Chamber notes that Mr Gbagbo argues that the length of time he has spent in detention should be considered a changed circumstance.¹⁸⁷ Contrary to this assertion, the Appeals Chamber recalls that it stated in a prior judgment that

the lapse of time in detention cannot be considered on its own to be a changed circumstance within the meaning of article 60 (3) of the Statute. This is so

¹⁷⁹ [Document in Support of the Appeal](#), para. 21.

¹⁸⁰ [Document in Support of the Appeal](#), para. 22.

¹⁸¹ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 15.

¹⁸² [Prosecutor's Response to the Document in Support of the Appeal](#), para. 11.

¹⁸³ [Prosecutor's Response to the Document in Support of the Appeal](#), para. 12.

¹⁸⁴ [Victims' Response to the Document in Support of the Appeal](#), para. 23.

¹⁸⁵ [Victims' Response to the Document in Support of the Appeal](#), para. 25.

¹⁸⁶ [Victims' Response to the Document in Support of the Appeal](#), para. 26.

¹⁸⁷ [Document in Support of the Appeal](#), paras 20-23.

because the review of an individual's detention under article 60 (3) of the Statute is based on whether the conditions of article 58 (1) (a) and (b) of the Statute, which were found to be met in the initial article 60 (2) assessment, have changed such that detention is no longer justified.¹⁸⁸

76. Nevertheless, the Appeals Chamber went on to state in the same judgment:

However, in light of the recognized human rights principles mentioned above, the duration of time in detention pending trial is a factor that needs to be considered along with the risks that are being reviewed under article 60 (3) of the Statute, in order to determine whether, all factors being considered, the continued detention “stops being reasonable” and the individual needs to be released. In the context of the legal framework of the Court, such a determination requires balancing the risks under article 58 (1) (b) of the Statute that were found to still exist against the duration of detention, taking into account relevant factors that may have delayed the proceedings and the circumstances of the case as a whole.¹⁸⁹ [Footnote omitted.]

77. The Appeals Chamber found that “[i]nterim release and the issue of the reasonableness of the period of detention are fact intensive and case specific” and that “the circumstances of the specific case as a whole will always be the guiding factor”.¹⁹⁰ Although this jurisprudence arises out of proceedings in relation to charges brought under article 70 of the Statute, and not those in relation to the crimes referred to in article 5 of the Statute, the Appeals Chamber sees no reason why it should not also apply in the latter cases.

78. The Appeals Chamber observes that, as set out above, the Trial Chamber did not address the issue of the duration of Mr Gbagbo's detention in the Impugned Decision. This was despite having noted [REDACTED],¹⁹¹ and despite Mr Gbagbo having raised the issue of the length of time he has spent in detention, [REDACTED] in general terms¹⁹² [REDACTED].¹⁹³ The Appeals Chamber also recalls that Mr Gbagbo has been detained by the Court since 30 November 2011, the trial began on 28 January 2016 and the Prosecutor is still in the process of calling evidence.

¹⁸⁸ *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, “Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification”, 29 May 2015, [ICC-01/05-01/13-969](#) (OA5 OA6 OA7 OA8 OA9) (“*Bemba et al.* OA5 OA6 OA7 OA8 OA9 Judgment”), para. 44.

¹⁸⁹ [Bemba et al. OA5 OA6 OA7 OA8 OA9 Judgment](#), para. 45.

¹⁹⁰ [Bemba et al. OA5 OA6 OA7 OA8 OA9 Judgment](#), para. 45.

¹⁹¹ [REDACTED].

¹⁹² [Mr Gbagbo's Submissions of 3 February 2017](#), para. 2.

¹⁹³ [REDACTED].

79. In such circumstances, the Appeals Chamber considers that the Trial Chamber should have considered the duration of time Mr Gbagbo has spent in detention alongside the risks being reviewed and it should have determined whether, all factors being considered, Mr Gbagbo's detention continues to be reasonable. The Appeals Chamber therefore finds that the Trial Chamber erred.

V. APPROPRIATE RELIEF

80. On an appeal pursuant to article 82 (1) (b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence).

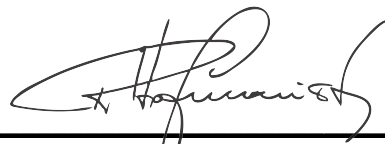
81. In the present case, the Appeals Chamber has found that the Trial Chamber committed a number of errors. The Trial Chamber erroneously considered that Mr Gbagbo's age militated in favour of maintaining his detention. Furthermore, despite the presumption of innocence and Mr Gbagbo's right not to be compelled to testify or to confess guilt, the Trial Chamber erroneously relied on the fact that he has denied responsibility for the crimes with which he is charged. It also failed to consider the duration of Mr Gbagbo's detention and his state of health. The Appeals Chamber considers that these errors materially affected the Impugned Decision. In these circumstances, the Appeals Chamber finds that it is appropriate to reverse the Impugned Decision and remit the matter to the Trial Chamber for a new review of the ruling on Mr Gbagbo's detention, under article 60 (3) of the Statute, addressing all relevant factors. This matter is remitted to the Trial Chamber because an assessment of this nature is one which should be taken, in the first instance, by the Chamber "which has daily control of the case and a full awareness of the complete factual background".¹⁹⁴ In making this decision, the Appeals Chamber emphasises that it is not suggesting or predetermining what the outcome of the Trial Chamber's new review should be. The Trial Chamber should, however, in carrying out this review, bear in mind the Appeals Chamber's guidance as to the law, as set out in paragraphs 37 *et seq.* above, and its decision should be properly reasoned, including as regards its

¹⁹⁴ Appeals Chamber, *Prosecutor v. Germain Katanga*, "Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled 'Decision on the Defence Request Concerning Languages'", 27 May 2008, [ICC-01/04-01/07-522](#) (OA3), para. 65. See also [Kenyatta OA5 Judgment](#), para 93.

reference to the material which may underpin its decision, if that is its conclusion, that detention should be maintained. Prior to rendering its new decision, the Trial Chamber should decide as to whether the parties should be given the opportunity to file new submissions.

82. Having found that the Trial Chamber erred in its review of the ruling on the release or detention of Mr Gbagbo, the Appeals Chamber finds that it is not necessary to deal with Mr Gbagbo's arguments regarding conditional release, including as to how his health condition may relate to conditional release and as to how the Trial Chamber refused to consider the possibility of conditional release.¹⁹⁵ This is because the question of conditional release may only be meaningfully addressed once it has been determined whether or not continued detention, in principle, appears necessary.

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



Judge Piotr Hofmański
Presiding Judge

Dated this 19th day of July 2017

At The Hague, The Netherlands

¹⁹⁵ [Document in Support of the Appeal](#), paras 46, 60-71.