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No.: **ICC-02/11-01/11**
Date: **1 November 2012**

APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

Public Redacted Version

Corrigendum to the "Prosecution's response to Defence document in support of appeal against the Decision on the Defence request for provisional release of Laurent Gbagbo"

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INTRODUCTION

1. Laurent Gbagbo (hereinafter, “Appellant”) is seeking reversal on appeal of the Single Judge’s ruling under Article 60 (2), where she ordered the continued detention of the Appellant (hereinafter, “Decision”).
2. The Prosecution submits that the appeal of Mr Gbagbo against the Single Judge’s Decision. Contrary to the contention of the Appellant, the Single Judge did not base her decision on Pre-Trial Chamber III’s prior ruling, but rather made a *de novo* determination with respect to the requirements under Article 58(1)(b). She further correctly analysed the evidence before her and concluded that all requirements under Article 58(3)(b) were met. Having concluded that no condition short of detention at the seat of the Court is sufficient to manage the risks under Article 58(1)(b), the Single Judge properly denied the request for provisional release. Finally, the Single Judge correctly found that under Rule 135, an accused cannot be released on the basis of his alleged health conditions.

STATEMENT OF FACTS

3. On 1 May 2012, the defence for Mr Gbagbo (“Appellant”) submitted its request for interim release of Mr Gbagbo (“Defence Request”).¹ In the first place, the Appellant argued that he was not a flight risk and that his release would not pose a risk to the case or to the commission of future crimes, the predicates for detention under Article 58(1)(b). Secondly, the Appellant submitted that in case the Chamber finds that any of the conditions under Article 58(1)(b) applies, he nonetheless should be conditionally released and that [REDACTED] would comply with any conditions set by the Chamber. Thirdly, the Appellant argued that due to the bad health of Mr Gbagbo, the Chamber should order his release on humanitarian grounds. According to the Appellant, this was necessary for Mr Gbagbo to recover and to be able to effectively prepare his defence and to participate in the confirmation of charges hearing.

¹ ICC-02/11-01/11-105-Conf and Annexes.

4. On 4 June 2012, the Prosecution filed its response to the Defence Request ("Prosecution Response").²
5. On 13 July, the Single Judge of Pre-Trial Chamber I ("Single Judge") issued her decision on the Defence Request ("Decision"),³ rejecting it in its entirety. Based on the evidence presented by the parties, the Single Judge found that "all of the requirements for detention found in article 58(1)(b)(i) to (iii) are met and that continued detention of Mr Gbagbo appears necessary".⁴ The Single Judge also rejected the Appellant's request for conditional release, finding that "there is no conditions short of detention which would be sufficient to mitigate [the] risks [under Article 58(1)(b)]".⁵ Finally, the Single Judge rejected the Appellant's request for release on humanitarian grounds, concluding that pursuant to Rule 135 "interim or conditional release cannot be ordered on the basis of the alleged health conditions of Mr Gbagbo".⁶
6. On 23 July 2012, the Appellant filed his notice of appeal against the Decision.⁷ On 13 August 2012, the Appellant filed the document in support of his appeal against the Decision ("Appeal Brief").⁸

STANDARD OF REVIEW

7. The Appeals Chamber has made clear that in the context of appeals of rulings granting or denying release, 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". It has also underlined that "the appraisal of evidence lies, in the first place, with the relevant Chamber. Therefore, in determining whether a Pre-Trial or Trial Chamber has misappreciated facts in a

² ICC-02/11-01/11-137-Conf and Annexes.

³ ICC-02/11-01/11-180-Conf.

⁴ Decision, para.71.

⁵ Decision, para.74.

⁶ Decision, para.79.

⁷ ICC-02/11-01/11-193-Conf.

⁸ ICC-02/11-01/11-210-Conf.

decision on interim release, the Appeals Chamber will ‘defer or accord a margin of appreciation both to the inferences [that the Pre-Trial or Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention’ and 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”.⁹

8. The burden is on the Appellant to demonstrate the existence of such an error of fact, law or procedure vitiating the Decision. Absent such a showing, the findings of the Single Judge should remain undisturbed.

THE ALLEGED ERRORS

A. First Ground of Appeal: an alleged error of law regarding the applicable standard of evaluation under Article 60(2)

9. The Appellant argues that the Single Judge erred in law when taking the Pre-Trial Chamber’s Article 58(1) decision as a starting point for her determination under Article 60(2). According to the Appellant, the Single Judge merely examined whether there was a change in circumstances with respect to her prior decision, instead of determining anew whether the requirements for detention under Article 58(1) were met. The Appellant further claims that reliance by the Single Judge on prior jurisprudence of the Appeals Chamber was inappropriate, as that jurisprudence refers to instances where decisions on detention under Article 60(2) were reviewed pursuant to Article 60(3).¹⁰
10. The Prosecution submits that these arguments are misconceived. The Single Judge correctly referred to the Appeals Judgment in the *Katanga* case, when finding that “in assessing whether the conditions of detention under Article 58(1) of the Statute continue to be met, the Chamber must address anew the issue of

⁹ ICC-01/05-01/08-1937-Red2 OA09

¹⁰ Appeal Brief, paras.4-13.

detention in light of the material placed before it”.¹¹ This decision was perfectly applicable to the case, since it deals with the procedure to be applied by a Pre-Trial or Trial Chamber when deciding on a request for interim release pursuant to Article 60(2).¹²

11. To be sure, the Single Judge also found that a Chamber “may sustain or modify its ruling if it is satisfied that changed circumstances so require” and specified that “the notion of ‘changed circumstances’ imports ‘either a change in some or all of the facts underlying a previous decision on detention or a new fact satisfying a Chamber that a modification of its prior ruling is necessary.”¹³ In so doing, the Single Judge relied on a quote from the Appeals Chamber that was made in the context of a judgement against a decision on the review of detention pursuant to Article 60(3).¹⁴ However, as it will be demonstrated below, notwithstanding the reference to “changed circumstances”, the Single Judge in fact made a fresh analysis of all relevant factors based on the submissions and material advanced by both parties.
12. Thus, the Single Judge’s reference to Pre-Trial Chamber III’s prior decision on detention under Article 58(1) and to any “changed circumstances” in the context of its decision under Article 60(2) does not, standing alone, constitute an error of law requiring reversal. It is correct that when seeking interim release under Article 60(2), the defence has the first opportunity to challenge the evidence presented by the Prosecution and to present its own evidence.¹⁵ But the duty to make a “fresh determination” does not mean that a Judge or Chamber, when considering the relevant issues, must adhere to the fiction that it has never previously seen and examined the evidence already in the record. To the contrary, it has a duty to make informed decisions based on the totality of the

¹¹ Decision, para.47, quoting ICC-01/04-01/07-572, para.12.

¹² ICC-01/04-01/07-572, paras.1, 12.

¹³ Decision, para.47.

¹⁴ Decision, footnote 58, quoting ICC-01/05-01/08-631-Red, para.60. The Prosecution notes that footnote 57 should be placed in the middle of the sentence as the reference to “changed circumstances” in that sentence is supported by ICC-01/05-01/08-631-Red, para.60, rather than ICC-01/04-01/07-572, para.12.

¹⁵ Appeal Brief, para.5.

record, including the new Defence evidence and arguments as well as both new and resubmitted Prosecution evidence. And, in this case, this is exactly what the Single Judge did.

13. The core of Appellant's submissions, that in making an Article 60(2) determination the judge must ignore previous relevant findings under Article 58, is incorrect. The Appeals Chamber identified the close connections between both provisions when it stated that "Article 60(2) of the Statute aims to provide the detainee with an early opportunity to contest his or her arrest and sequential detention. This he may do by reference to article 58 of the Statute, which defines the legal framework within which justification of his detention may be examined."¹⁶ In addition, in a separate opinion Judge Pikis explained that "[t]he criteria set down in article 60(2) of the Statute for determining the need for the continued detention of the arrestee are the same as those laid down in article 58(1) of the Statute. *The difference between (these) two provisions [...] lies in the change of the time perspective from which justification and necessity of the detention are to be judged. The Pre-Trial Chamber must decide whether the conditions set down in article 58(1) of the Statute [...] exist at the time of consideration of an application for interim release.*"¹⁷
14. The Prosecution further notes that the Appellant also misrepresents the Single Judge's approach. Contrary to the contention of the Appellant, the Single Judge did not use the Pre-Trial Chamber's prior ruling under Article 58(1) as a "starting point" and did not base her decision on the prior conclusions reached therein.¹⁸ Neither did she abbreviate her examination of the issues as a consequence of her reference to "changed circumstances". On the contrary, and as expressly stated in, she "address[ed] anew the issue of detention in light of the material placed

¹⁶ ICC-01/04-01/07-572, para.12.

¹⁷ ICC-01/04-01/06-824 OA7, 13 February 2007, para. 10 Sep. Op., emphasis added.

¹⁸ Appeal Brief, paras.5 and 9; see also instances referred to in footnote 9.

before it”.¹⁹ This is evidenced by the following examples adduced by the Appellant:²⁰

- Appellant argues that at paragraph 53 of the Decision, the Chamber stated that “[i]n relation to the requirement under article 58(1)(a) of the Statute, the Single Judge recalls the findings of the Decision on the Article 58 Application”. But since in his application under Article 60(2), the Appellant had not argued that the conditions under Article 58(1)(a) were not met,²¹ there was no need for the Single Judge to conduct any further analysis or enter a finding on the matter.
- Appellant argues that at paragraph 57, the Single Judge “recalls that in the Decision on the Article 58 Application Pre-Trial Chamber III found that detention of Mr Gbagbo was necessary to ensure his appearance before the Court, inter alia, because he appeared to have the political motivations as well as the necessary political contacts and funds to abscond.” But, in addition to the evidence that it had previously submitted, the Prosecution provided additional evidence to corroborate that detention was necessary to guarantee Mr Gbagbo’s presence, thereby to demonstrate that the same facts continued to apply post-arrest and should be considered in response to the Article 60(2) request.²² Based on the Single Judge’s finding that “the conclusions reached by Pre-Trial Chamber III at the time of [the Article 58 Decision] continue to be valid to date”,²³ -- and did not find, significantly, that the Appellant failed to prove any change in circumstances -- it can be inferred that she weighed the Prosecution and Defence evidence and submissions and entered a *de novo* finding on the matter.

¹⁹ Decision, para.47.

²⁰ Appeal Brief, footnote 9.

²¹ That “there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court”.

²² Prosecution Response, paras.15-22.

²³ Decision, para.57.

- Appellant also cites the Single Judge's finding at paragraph 60 that "there appears to exist in Côte d'Ivoire a large and well-organised network of political supporters of Mr Gbagbo, as already found in the Decision on the Article 58 Application" and that "[t]here is no indication that the support network has ceased activity in the period since the Decision on the Article 58 Application". These passages do not indicate an abdication of the obligation to make findings, but instead are express and independent findings based on the evidence before the Single Judge, albeit findings that reiterate the earlier fact-based conclusions. This is further apparent from the Single Judge's reference to the fact that the Prosecution has provided "new information on the members of the network, its objective [...], its activities [and] capacity".²⁴
- Appellant cites paragraph 64 of the Decision, in which the Single Judge recalled that "[i]n the Decision on the Article 58 Application, Pre-Trial Chamber III held that the arrest of Mr Gbagbo was necessary to ensure that he does not use his political or economic resources to obstruct or endanger the investigation". This statement, which only recalls a prior conclusion, was not indicative of an abdication of the responsibility to look anew at the issue, but merely a predicate explanation of the previous finding. In the following paragraphs, which form the basis of the Single Judge's conclusions, she analysed the arguments and the evidence presented by the parties under the requirements of Article 58(1)(b)(ii).²⁵
- The same applies with respect to the general statement at paragraph 68, which recalled Pre-Trial Chamber III's previous conclusion with respect to Article 58(1)(b)(iii), while then proceeding to analyse the evidence and arguments presented by the parties.²⁶

²⁴ Decision, para.60.

²⁵ Decision, para.65-67.

²⁶ Decision, para.69-70.

15. The correctness of the Single Judge's approach is further apparent in the manner in which she phrased her conclusions. She stated that "based on the above analysis, [...] all of the requirements for detention found in article 58(1)(b)(i)-(iii) are met".²⁷ If the Single Judge had applied the standard of evaluation under Article 60(3) as contended by the Appellant, she would have concluded that there were no changed circumstances that require a modification of its prior ruling, as stipulated by that provision.
16. For the above reasons, the Appellant's First Ground of Appeal should be dismissed. Even if the inartful reference by the Single Judge to a "change of circumstance" at paragraph 47 of the Decision constitutes an error of law, it cannot conceivably be one that materially impacted on the Decision, as the Single Judge then expressly, and correctly, found that it "must address anew the issue of detention in light of the material placed before it".²⁸ In fact, as demonstrated above, the record reflects that the Single Judge then fully and appropriately assessed all the arguments and evidence presented by the Prosecution and the Defence and made a *de novo* determination – based on the evidence before her – that the conditions under Article 58(1) were met.

B. Second Ground of Appeal: alleged errors of fact regarding to Article 58(1)(b)

17. The Appellant submits that when drawing her conclusions with respect to the criteria under Article 58(1)(b)(i)-(iii), the Single Judge relied on the evidence presented by the Prosecution without critically assessing its relevance and veracity.²⁹ The Appellant raises a number of individual errors that it classifies as errors of law.³⁰ However, from the manner in which these alleged errors are presented and the Appellant's overall submission that none of the elements taken into account by the Single Judge are factually founded and substantiated,³¹ it appears to be the case that the Appellant is actually raising errors of fact. As a

²⁷ Decision, para.71; see also Decision, paras.63, 67, 70.

²⁸ Decision, para.47.

²⁹ Appeal Brief, para.14.

³⁰ Appeal Brief, paras.15-38.

³¹ Appeal Brief, para.39

result, and under the applicable standard of review, the Appeals Chamber should defer to the factual findings of the Single Judge, unless it is established that the Single Judge.”

18. In this context, the Prosecution emphasizes that the applicable evidentiary standard for factual findings pursuant to Article 58(1)(b) is that “[t]he arrest of the person appears necessary. As stated by the Appeals Chamber, “[t]he question revolves around the possibility, not the inevitability, of a future occurrence”.³²
19. In addition, the Prosecution notes that the necessity of continued detention pursuant to any of the grounds under Article 58(1)(b) “does not necessarily have to be established on the basis of one factor taken in isolation. It may also be established on the basis of an analysis of all relevant factors taken together.”³³ Hence, even if the Single Judge erred with respect to one of several factors that she took into account to conclude that Mr Gbagbo’s continued detention was necessary, this would not necessarily invalidate her overall conclusion.

Alleged errors in the assessment of the risk of absconding

(i) The seriousness of the crimes and the sentence incurred

20. The Appellant argues that at this stage, no charges against Mr Gbagbo have been confirmed and that the seriousness of the crimes should not be given too much weight as all crimes within the jurisdiction of the Court are serious. According to the Appellant, the same argument applies with respect to the potential sentence incurred.³⁴
21. Consideration of these factors is not error -- legal or factual – nor an abuse of discretion. The Single Judge noted that “Mr Gbagbo is charged with four counts of crimes against humanity under article 7 of the Statute, namely murder, rape and other sexual violence, other inhumane acts and persecution” and that the

³² *Ngudjolo OA04*, para.21; ICC-01/05-01/08-323 OA01 (“*Bemba OA01*”), para.55.

³³ ICC-01/05-01/08-323 OA, para. 55.

³⁴ Appeal Brief, paras.15-18.

gravity of these charges and “the lengthy prison sentence that may ensue in the event of conviction, constitute an incentive for him to abscond”.³⁵ In support of its finding, the Single Judge correctly referred to relevant jurisprudence of the Appeals Chamber, including decisions wherein, before confirmation, the gravity of the crimes charged and prospects of a lengthy sentence were taken into consideration.³⁶ In light of this jurisprudence and the fact that the charges against Mr Gbagbo include his responsibility as an indirect co-perpetrators for the murder of at least 153 persons, the rape of at least 32 women and girls, and the infliction of serious bodily injury and suffering on at least 39 persons, the Single Judge committed no error in her discretion when giving weight to these factors.

(ii) The means to abscond

Financial means

22. The Appellant argues that the Single Judge relied solely on the Prosecution’s affirmation that “some assets may not have been frozen”, without any verification. According to the Appellant, the Single Judge also ignored the Registry’s analysis conducted during the assessment of the indigence of the accused to obtain legal aid and failed to notice the flagrant contradictions in the Prosecutor’s factual allegations as to the financial situation of Mr Gbagbo.³⁷
23. In its request for provisional release, the Appellant had claimed that all the financial resources of Mr Gbagbo, as well as the resources of his family and supporters were frozen.³⁸ In response, the Prosecution provided documentary evidence to prove that two accounts (one joint account of Laurent and Simone Gbagbo and one account of Simone Gbagbo) which collectively held an amount equivalent to over 100.000 EUR, were not frozen. It submitted that this showed that the asset freeze referred to by the Appellant did not cover all of the assets of

³⁵ Decision, para.56.

³⁶ See authorities in footnote 70 of the Decision. See in particular ICC-01/05-01/08-323 (Bemba Appeals Judgement OA), para.55).

³⁷ Appeal Brief, paras.19-21.

³⁸ Defence Request, para.54.

Mr Gbagbo and his supporters.³⁹ The Single Judge verified the evidence presented by the Prosecution and gave it some weight.⁴⁰ The Prosecution submits that in so doing, the Single Judge did not commit any error, especially since the Prosecution's evidence demonstrated that the Appellant's assertion that "all" assets had been frozen was incorrect.

24. Finally, the Prosecution notes that for the purposes of the Decision, the Single Judge was also not required to rely on the Registry's assessment on the indigence of Mr Gbagbo, since the Registry's assessment was based on only limited evidence and excluded, for example, the additional evidence referred to above.

Mr Gbagbo's network of supporters

25. The Appellant argues that the Single Judge did not determine the actual existence of such a network as she solely relied on the decision to issue an arrest warrant and the Prosecutor's allegations. The Appellant further submits that the evidence presented by the Prosecution is vague and does not explain how it supports the Prosecution's submissions.⁴¹
26. As stated above, the Single Judge did not base its findings with respect to Mr Gbagbo's network of supporters by merely referring to the previous decision of Pre-Trial Chamber III. Rather, she examined the extensive evidence presented by the Prosecution, most of which was new evidence,⁴² and gave it due weight.⁴³ The Single Judge did not err in her findings, especially when she took note of the Prosecution evidence demonstrating the activities of the network and establishing the liberation of Mr Gbagbo as its purpose. The Single Judge was further persuaded that the network's ability to mobilize more than 140,000 telephone calls to the Court from Cote D'Ivoire, all asking to speak to Mr Gbagbo

³⁹ Prosecution Response, para.20.

⁴⁰ Decision, para.59.

⁴¹ Appeal Brief, paras.22-26

⁴² Prosecution Response, paras.19, 25-26.

⁴³ Decision, para.60.

(all in a short period in December 2011), proved the capacity of that network.⁴⁴ Contrary to the contention of the Appellant, all the findings of the Single Judge are perfectly reasonable and well supported by the Prosecution evidence. In addition, it does not matter that the Single Judge did not expressly differentiate between those parts of the network that are organized around Gbagbo's political party, the FPI, and those that are not. She was persuaded by the fact that the various components of the network had a joint objective and that acted in concert.⁴⁵

Alleged errors in the assessment of the risk of obstructing the investigations

27. The Appellant submits that the Judge solely relied on the Prosecution's allegations and the decision to issue an arrest warrant to establish the existence of such a risk without any material evidence.⁴⁶
28. Concerning the Appellant's arguments with respect to Mr Gbagbo's network of supporters,⁴⁷ the Prosecution has already demonstrated above that the Single Judge correctly examined the abundant evidence before it that demonstrated the existence, the activities and the intentions of that network.⁴⁸ As a result, she did not err in the exercise of her discretion when giving some weight to the existence, activities, and purpose of that network and when concluding on the basis of that evidence that the continued of Mr Gbagbo appeared necessary to prevent that he obstructs or endangers the investigation.⁴⁹
29. The Appellant further argues that the Single Judges' reference to Mr Gbagbo's intention to obstruct the investigations is unsupported.⁵⁰ However, the Prosecution had provided evidence to that effect in its Response, some of which related to the conduct of Mr Gbagbo's and persons loyal to him during the post-

⁴⁴ Decision, para.60.

⁴⁵ The Prosecution notes that the Appellant concedes that Mr Gbagbo has a network of supporters some are linked to political parties (see Appeal Brief, para.38).

⁴⁶ Appeal Brief, para.27.

⁴⁷ Appeal Brief, paras.28-29.

⁴⁸ See para.26 above.

⁴⁹ Decision, para.65.

⁵⁰ Appeal Brief, paras.30-31.

election crisis.⁵¹ The Single Judge did not merely refer to her previous findings as the basis for her conclusion. Rather, based on the evidence presented by the Prosecution, including but not limited to evidence it had earlier submitted to the Pre-Trial Chamber in the Article 58 application,⁵² the Single Judge found that “the continued detention of Mr Gbagbo appears necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings.”⁵³ From this it can be inferred that the Single Judge entered a *de novo* finding on the matter.⁵⁴

30. In addition, contrary to the Appellant’s submission,⁵⁵ it was appropriate for the Single Judge to give some weight to Mr Gbagbo’s “extensive knowledge of the source of the evidence against him”.⁵⁶ In its Request, the Defence had alleged that Mr Gbagbo cannot interfere with the Prosecution’s investigation because he is not aware of the scope of the Prosecution’s investigation, nor does he know the identity of its witnesses and the contents of their statements.⁵⁷ The Prosecution demonstrated that this submission was misleading, since it had already provided the Defence with the document containing the charges and all incriminating evidence that it intended to rely on for confirmation, including the identity and statements of 17 Prosecution witnesses.⁵⁸ On that basis, the Single Judge correctly rejected the Defence submissions. Finally, the Appellant’s concern that if the Single Judge can consider what has been disclosed, then disclosure will inevitably and unfairly result in prolonged detention, is unjustified.⁵⁹ The Single Judge stated that “[k]nowledge of the details of incriminating evidence as such does not make detention necessary, but it constitutes [...] a factual circumstance that must be taken into account when assessing the level of risk for the

⁵¹ Prosecution Response, para.24; see also paras.17, 22.

⁵² Prosecution Response, paras.15-22.

⁵³ Decision, para.67.

⁵⁴ To be sure, she also stated that “the conclusions reached by Pre-Trial Chamber III at the time of such decision continue to be valid to date”, see Decision, para.57. But, as argued above, any language that seems to refer, even indirectly, to the “changed circumstances” analysis is, even if mistaken in this context, inadequate to require reversal if the actual analysis reflects a *de novo* review.

⁵⁵ Appeal Brief, paras.32-33.

⁵⁶ Decision, para.66.

⁵⁷ Defence Request, para.66.

⁵⁸ Prosecution Response, para.28.

⁵⁹ Appeal Brief, para.33.

investigation and the court proceedings”.⁶⁰ This conclusion is correct and further demonstrates that the Chamber specifically examined the risk that would emanate from Mr Gbagbo – as opposed to third persons - to the investigations if he was to be provisionally released.

Alleged errors in the assessment of the risk of further crimes

31. Contrary to the contention of the Appellant, the Single Judge did not merely refer to the prior conclusions of Pre-Trial Chamber III,⁶¹ but considered the “available material”,⁶² i.e. the evidence before it.⁶³ In particular in relation to the defence allegation regarding the [REDACTED],⁶⁴ the Prosecution provided evidence, including [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED].⁶⁵ Contrary to the Appellant’s contention, the Single Judge did not suggest that it would be a crime for Mr Gbagbo to reacquire the Presidency;⁶⁶ rather, her conclusion was that to do so through violence against political opponents would indeed be a crime, warranting continued detention.
32. For the above reasons, the Prosecution submits that the Appeals Chamber should defer to the factual findings of the Single Judge and dismiss the Appellant’s Second Ground of Appeal.

⁶⁰ Decision, para.66.

⁶¹ Appeal Brief, para.35.

⁶² Decision, para.69.

⁶³ See for instance Prosecution Response, paras.31-32.

⁶⁴ See arguments in Appeal Brief, paras.36-37.

⁶⁵ Prosecution Response, para.31, footnote 75.

⁶⁶ Appeal Brief, para.38.

C. Third Ground of Appeal: alleged error regarding conditions for provisional release

33. The Appellant further argues that the Single Judge erred by not considering the guarantees offered [REDACTED] and whether these guarantees could mitigate the identified risks.⁶⁷
34. The Appeals Chamber has ruled that “if [...] the release [of a person] would lead to any of the risks described in Article 58(1)(b) of the Statute, the Chamber *may*, pursuant to Rule 119(1) of the Rules of Procedure and Evidence, examine appropriate conditions with a view to mitigating or negating the risk.”⁶⁸ In a separate judgment, the Appeals Chamber further emphasized the discretionary nature of the procedure under Rule 119.⁶⁹
35. The Single Judge concluded that in light of the factual circumstances of this case, “there is no condition short of detention which would be sufficient to mitigate [the] risks [described in Article 58(1)(b)]”.⁷⁰ In particular, she found that “the existing risks can only effectively be managed in detention at the seat of the Court”.⁷¹ Accordingly, and contrary to the contention of the Appellant, the Single Judge did assess whether guarantees could mitigate the identified risks. However, having concluded that anything other than detention of the seat of the Court would be inadequate to manage these risks, the Single Judge was under no duty to examine the guarantees offered [REDACTED] in detail. The Appellant’s Third Ground of Appeal should therefore be dismissed.

D. Fourth Ground of Appeal: alleged error of law regarding conditions for provisional release

36. The Appellant argues that the Single Judge erred when holding that, as a matter of law, interim or conditional release cannot be ordered on the basis of the

⁶⁷ Appeal Brief, paras.41-47.

⁶⁸ ICC-01/05-01/08-631-Red OA02, para.105 (emphasis added).

⁶⁹ ICC-01/05-01/08-1626-Red OA07, paras.55, 82.

⁷⁰ Decision, para.74.

⁷¹ Decision, para.74.

alleged health conditions of Mr Gbagbo.⁷² According to the Appellant, the regulatory framework must be interpreted in the context of internationally recognized human rights pursuant to Article 21(3), which require that a Chamber release an accused if his or her state of health so requires.⁷³ The Defence also argues that it did not request release on humanitarian grounds pursuant to Rule 135, but that it requested the Single Judge to draw the legal consequences of Mr Gbagbo's state of health by reference to Article 21(3).⁷⁴

37. The Prosecution submits that the Single Judge correctly examined the request for provisional release on humanitarian grounds on the basis of Rule 135. The Appellant in his submissions before the Single Judge expressly invoked Rule 135 as the basis for his request.⁷⁵ Moreover, the Appellant has triggered the procedure under Rule 135 by presenting a report by a physician who examined Mr Gbagbo⁷⁶ and by arguing that Mr Gbagbo's fitness to stand trial is at stake.⁷⁷
38. The Prosecution submits that the Single Judge correctly found that interim or conditional release cannot be ordered on the basis of alleged health grounds of Mr Gbagbo.⁷⁸ Rule 135(4) stated that "[w]here the [...] Chamber is satisfied that the accused is unfit to stand trial, it shall order that the trial be adjourned". However, nowhere does Rule 135 authorize the Chamber to order the person's provisional release. To the contrary, a detained person who needs medical treatment shall continue to be detained, even if transferred to a hospital. Regulation 103(5) of the Regulations of the Court states: "A detained person who requires specialist treatment shall, as far as possible, be treated within the detention centre. Should hospitalization be necessary, the detained person shall be transferred to a hospital without delay. The Registrar shall ensure the continuous detention of the person both at the place of treatment and when in

⁷² Decision, para.79; see also paras.75-78.

⁷³ Appeal Brief, paras.48-55.

⁷⁴ Appeal Brief, para.52

⁷⁵ Defence Request, para.102.

⁷⁶ Defence Request, Annex 8.

⁷⁷ Defence Request, paras.97, 105, 143. See also Appeal Brief, para.54; Decision, para.78.

⁷⁸ Decision, para.79.

transit.” Similarly, Regulation 157(1) of the Regulations of the Registrar provides that “[a]ny treatment or medication recommended by an external medical practitioner shall be administered solely by the medical officer or his or her deputy”.

39. The Prosecution agrees with the Appellant that the Court’s regulatory framework “must be interpreted and applied in accordance with internationally recognized human rights, as declared in article 21(3) of the Statute”.⁷⁹ However, the Prosecution submits that this does not require the release of an accused on health grounds. The applicable provisions, and in particular Regulation 103(5), ensure that a detained person shall receive all necessary medical treatment, and if required also through hospitalization outside the prison facilities. The fact that the Appellant prefers to be provisionally released and to obtain medical treatment or recuperation outside the detention facility does not demonstrate that Regulation 103(5) is inconsistent with internationally recognized human rights.
40. The example from the Bemba case invoked by the Appellant does not support his submissions.⁸⁰ Although Mr Bemba was allowed to travel to Belgium for 24 hours – [REDACTED] -- to attend his father’s funeral, the Chamber’s very strict conditions effectively meant that Mr Bemba was in custody at all times, albeit briefly outside the Court’s detention centre.⁸¹ Similarly, the ICTY jurisprudence quoted by the Appellant is unhelpful,⁸² as the ICTY is subject to a different regulatory framework and lacks provisions comparable to Rule 135(4) or Regulation 103(5).
41. Finally, having found that no condition other than detention at the seat of the Court can effectively manage the identified risks under Article 58(1)(b),⁸³ the Single Judge was under no obligation to entertain the merits of the arguments of

⁷⁹ ICC-01/04-168 OA3, para. 38; ICC-01/04-01/06-772 OA4, para. 36.

⁸⁰ Appeal Brief, para.49.

⁸¹ See ICC-01/05-01/08-80-Anx, paras.63-65 ; see also ICC-01/05-01/08-485, para.29.

⁸² Appeal Brief, para.50.

⁸³ Decision, para.74.

the Appellant with respect to the state of health of Mr Gbagbo or to consider any hypothetical release on humanitarian grounds.⁸⁴ The Prosecution therefore submits that the Appellant's Fourth Ground of Appeal should be dismissed.

CONCLUSIONS

42. For the reasons set out above, the Prosecution submits that the Defence Appeal should be dismissed in its entirety and the Decision should be upheld.
43. In the even that the Appeals Chamber grants one or more of the grounds of appeal, the Prosecution submits that the Appeals Chamber should refer the matter back to the Pre-Trial Chamber for a new determination and order that Mr Gbagbo remain in detention pending such new determination.



Fatou Bensouda, Prosecutor

Dated this 1st day of November 2012

At The Hague, The Netherlands

⁸⁴ Appeal Brief, para.51.