

1 International Criminal Court

2 Appeals Chamber - Courtroom 1

3 Situation: Republic of Côte d'Ivoire

4 In the case of The Prosecutor v. Laurent Gbagbo - ICC-02/11-01/11

5 Presiding Judge Sanji Mmasenono Monageng

6 Appeals Hearing Judgment

7 Friday, 26 October 2012

8 (The hearing starts in open session at 2.30 p.m.)

9 THE COURT USHER: All rise.

10 The International Criminal Court is now in session.

11 Please be seated.

12 THE COURT OFFICER: Yes, Madam President. The situation in the Republic of

13 Côte d'Ivoire, in the case of The Prosecutor versus Laurent Gbagbo, case reference

14 ICC-02/11-01/11.

15 PRESIDING JUDGE MONAGENG: Good afternoon. Before I deliver a summary

16 of the judgment on the appeal, may I ask the participants to introduce themselves for

17 the record, beginning with the Office of the Prosecutor.

18 MR GALLMETZER: Good afternoon, your Honour. The Office of the Prosecutor

19 this afternoon is represented by Meritxell Regue and Reinhold Gallmetzer.

20 PRESIDING JUDGE MONAGENG: Thank you. May I now turn to the

21 Defence and ask you to introduce yourselves?

22 MR ALTIT: (Interpretation) Thank you, Madam President. We have

23 Maître Fauveau Ivanovic from the Paris Bar; Jennifer Nauori, who is legal assistant;

24 and there is Gaëlle Buchet, case manager and myself, Emmanuel Altit principal

25 counsel for Mr Gbagbo.

1 PRESIDING JUDGE MONAGENG: Thank you very much. And for the record, I'm
2 Judge Sanji Monageng, the Presiding Judge in this appeal, and here is the summary:
3 This afternoon I shall summarise the judgment of the Appeals Chamber on the appeal
4 of Mr Gbagbo against the decision of Pre-Trial Chamber I of 13 July, year 2012, that
5 rejected his application for interim release. I should emphasise that the actual
6 judgment, which will be filed and notified to the parties and participants shortly, and
7 not this summary is authoritative.

8 Before addressing the merits of the appeal, I shall briefly recount the relevant
9 procedural history that precedes the appeal.

10 On 13 July 2012, Pre-Trial Chamber I, which for purposes of the record we'll refer to
11 as PTC1, rendered its decision on Mr Gbagbo's application for interim release
12 wherein it concluded that:

- 13 (i) all the requirements for detention found in Article 58 subparagraph (1)(b)(i) to (iii)
14 are met and that Mr Gbagbo's continued detention remains necessary.
15 (ii) that no condition short of detention would be sufficient to mitigate the risks and,
16 (iii) that interim release cannot be ordered on the basis of the alleged health
17 conditions of Mr Gbagbo.

18 On 23 July 2012, Mr Gbagbo filed his Notice of Appeal against PTC1's decision,
19 followed shortly thereafter by his Document in Support of the Appeal in which
20 Mr Gbagbo raises four grounds of appeal.

21 On 21 August 2012 the Prosecutor filed her response to the Document in Support of
22 the Appeal in which she contended that all four grounds of appeal should be
23 dismissed.

24 Turning now to the Appeals Chamber's consideration of the merits of the appeal, I
25 shall address each ground in turn and state the Appeals Chamber's determination of

1 each ground.

2 First ground of appeal:

3 As his first ground of appeal, Mr Gbagbo argues that the Pre-Trial Chamber I, or
4 PTC1, applied an incorrect standard when deciding on his application for interim
5 release. He argues that the reliance of the Pre-Trial Chamber on the Arrest Warrant
6 Decision as a starting point, coupled with the Chamber's reference to the standard of
7 changed circumstances, indicates that the incorrect standard was applied by the
8 Chamber thus vitiating the entire decision.

9 In response to the Prosecutor -- sorry, in response, the Prosecutor submits that
10 notwithstanding the Chamber's reference to changed circumstances, when talking
11 about the standard of review, the Chamber nevertheless undertook a de novo review
12 as is required under Article 60, subparagraph (2) of the Impugned Decision.

13 The Appeals Chamber has previously pronounced on the difference between the
14 standard of review for a decision under Article 60, subparagraph (2), of the Statute
15 and under Article 60, subparagraph (3), of the Statute. Under Article 60,
16 subparagraph (2), the decision must be de novo in the course of which the Pre-Trial
17 Chamber must determine whether the conditions under Article 58, subparagraph (1),
18 are met.

19 In contrast, the decision under Article 60, subparagraph (3), is a review of a prior
20 decision on detention during which the Pre-Trial Chamber may modify its ruling on
21 release or detention if it is satisfied that changed circumstances so require.

22 The Appeals Chamber notes that the Impugned Decision was the first decision on an
23 application for interim release by Mr Gbagbo and as such the Chamber was required
24 to inquire anew into the existence of facts justifying detention. The Appeals
25 Chamber observes however, that in a section of the decision that summarised the

1 applicable law the Pre-Trial Chamber misstated the applicable standard when it
2 referred to "changed circumstances."

3 The Appeals Chamber finds that notwithstanding this the Pre-Trial
4 Chamber nevertheless carried out a de novo assessment in light of the material placed
5 before it. In particular, the Appeals Chamber notes that in concluding its assessment
6 the Pre-Trial Chamber stated that, and I quote, "It is satisfied that all of the
7 requirements for detention found in Article 58, subparagraph (1)(b)(i) to (iii) are met
8 and that the continued detention of Mr Gbagbo appears necessary." End of quote.

9 The use of the present tense in its overall conclusion and the lack of any reference to
10 "changed circumstances" throughout its assessment confirm that the Pre-Trial
11 Chamber indeed carried out a de novo review.

12 Furthermore, the Appeals Chamber finds that the factors underpinning a warrant of
13 arrest decision may be the same as those for the decision under Article 60,
14 subparagraph (2), of the Statute. Thus, in a decision under Article 60, subparagraph
15 (2), a Pre-Trial Chamber may refer to the warrant of arrest decision without this
16 affecting the de novo character of the Pre-Trial Chamber's decision. Thus,
17 Mr Gbagbo's arguments under this ground of appeal must be dismissed.

18 Regarding the second ground of appeal, Mr Gbagbo raises several interrelated and
19 overlapping arguments, which for the sake of clarity will be addressed under two
20 groups: (a) arguments relating to the alleged failure of the Pre-Trial Chamber to
21 provide a sufficiently reasoned decision, and (b) arguments alleging that the Pre-Trial
22 Chamber's factual conclusions were erroneous.

23 In relation to the lack of reasoning, the Appeals Chamber is required to address
24 whether the reasoning in the Impugned Decision indicates with sufficient clarity the
25 basis of the decision. In the case at hand, the Appeals Chamber observes that the

1 reasoning was relatively sparse. In particular, the Pre-Trial Chamber did not set out
2 in much detail how it analysed the evidence presented or how it reached its factual
3 conclusions.

4 Nevertheless, and despite those shortcomings, the Appeals Chamber does not
5 consider the Impugned Decision to be so lacking in reasoning that it can be said that
6 the Pre-Trial Chamber failed to comply with its obligation to provide a reasoned
7 decision. This is because how the Pre-Trial Chamber reached the conclusions it did
8 is still comprehensible. In particular, if the reasoning provided in the Impugned
9 Decision is read together with the evidence referred to in the footnotes and the
10 submissions of Mr Gbagbo and the Prosecutor, it is clear not only what conclusions
11 the Chamber reached but also on what basis.

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

14 In relation to the accuracy of the Pre-Trial Chamber's factual conclusions, the Appeals
15 Chamber recalls its standard of review with regard to factual errors in that it will only
16 interfere in the case of a clear error, where it cannot discern how the Chamber's
17 conclusions could have been reached from the evidence before it. Mere
18 disagreement with the conclusions of the Pre-Trial Chamber, or the weight accorded
19 by it to particular factors, is not enough to establish a clear error.

20 In the case at hand, Mr Gbagbo disputes the factual findings of the Pre-Trial
21 Chamber in relation to each limb under Article 58, subparagraph (1)(b). The
22 Pre-Trial Chamber first found that detention was justified on the basis of
23 Mr Gbagbo's intention to abscond, which it inferred from the fact that he was facing
24 serious charges that can lead to a lengthy prison sentence; his political motivation; the
25 availability of funds to abscond; international contacts and a support network.

1 In respect of each of those findings, Mr Gbagbo raises arguments. The Appeals
2 Chamber however, is not persuaded by these arguments as they do not demonstrate
3 any clear error in the Pre-Trial Chamber's decision. For the sake of this summary, I
4 will address only two of these arguments.

5 Firstly, Mr Gbagbo argues that the Pre-Trial Chamber's reasoning regarding the
6 gravity of the charges applies to any suspect before the Court and therefore amounts
7 to an irrebuttable presumption. In the Appeals Chamber's view, reliance on the
8 gravity of the charges and the resulting expectation of a lengthy prison sentence are
9 relevant factors for decisions on interim release and does not create an irrebuttable
10 presumption.

11 What is important is whether a given factor exists in respect of the particular detained
12 person.

13 In the case at hand, there can be no doubt that the charges that Mr Gbagbo faces, such
14 as crimes against humanity of murder, rape and other forms of sexual violence, are
15 serious and may result in a lengthy prison sentence if he is convicted. Whether
16 charges may be similarly serious in respect of other -- in respect of some or all other
17 suspects who are brought before the Court is irrelevant because even if this is so it
18 does not detract from the fact that the charges against Mr Gbagbo are serious.

19 Secondly, Mr Gbagbo argues in relation to his financial resources, that his few assets
20 have been frozen. The Appeals Chamber notes however, that contrary to this
21 submission there was evidence before the Pre-Trial Chamber indicating that there
22 were assets belonging to Mr Gbagbo or his wife that had not yet been frozen. In
23 light of the existence of such, it was not unreasonable for the Pre-Trial Chamber to
24 infer that Mr Gbagbo may have other assets that the Court was still unaware of as the
25 Prosecutor had argued before the Pre-Trial Chamber .

1 Turning to the findings of the Pre-Trial Chamber under Article 58, subparagraph
2 (1)(ii), the Chamber found that the continued detention of Mr Gbagbo was necessary
3 to ensure that he does not obstruct or endanger the investigation or the Court
4 proceedings. The Chamber based its findings on the existence of a support network,
5 Mr Gbagbo's motivation to obstruct the investigation of the alleged crimes and the
6 fact that he has extensive knowledge of the evidence against him. Mr Gbagbo raises
7 arguments in relation to all three aspects of the Pre-Trial Chamber's findings. Again,
8 the Appeals Chamber is not persuaded by these arguments, as they do not
9 demonstrate any clear error in the Pre-Trial Chamber's decision.

10 For instance, Mr Gbagbo argues that the Pre-Trial Chamber's finding that he has the
11 intent to obstruct the investigation against him was unsupported by evidence. The
12 Appeals Chamber recalls that in support of its finding, the Pre-Trial
13 Chamber referred to its findings as to Mr Gbagbo's intent and resources to abscond,
14 including the political motivation to do so.

15 The Appeals Chamber considers that the intent to abscond, and the intent to obstruct
16 or endanger the investigation, have the same ultimate objective because both are
17 directed towards preventing the trial from taking place or at the very least from being
18 based on all of the relevant evidence.

19 Thus, the findings in respect of both the intent to obstruct -- I mean, the intent to
20 abscond and the intent to obstruct or endanger the investigation were based on
21 evidence that overlapped. While it would have been preferable for the Pre-Trial
22 Chamber to explain its finding in more detail, Mr Gbagbo's argument that the
23 Pre-Trial Chamber's finding was unsupported is unpersuasive.

24 Likewise, the Appeals Chamber finds Mr Gbagbo's argument under Article 58,
25 subparagraph (1)(b)(iii), that the Pre-Trial Chamber's finding is unsupported by

1 evidence to also be unpersuasive. In this regard, the Pre-Trial Chamber held that
2 Mr Gbagbo's continued detention appeared necessary to prevent the continuing
3 commission of the crimes alleged or related crimes on the basis of the information
4 that his supporters sought his return to power. In particular, this information was
5 supported by a statement of a witness.

6 In sum, Mr Gbagbo's second ground of appeal must be dismissed.

7 As his third ground of appeal, Mr Gbagbo argues that the Pre-Trial Chamber's
8 decision in respect of conditional release lacks a legal basis. In essence, Mr Gbagbo
9 argues that the Pre-Trial Chamber failed to consider in any detail the conditions of
10 release proposed by the State concerned.

11 The Appeals Chamber has previously held that when considering an application for
12 interim release, if one or more of the risks listed under Article 58, subparagraph (1)(b)
13 of the Statute are present, as in the present case, the Pre-Trial Chamber nevertheless
14 has discretion to consider conditional release. This discretion must be exercised
15 judiciously and with full cognizance of the fact that a person's personal liberty is at
16 stake. Therefore, in circumstances where a State has offered to accept a detained
17 person and to enforce conditions, it is incumbent upon the Pre-Trial Chamber to
18 consider conditional release.

19 In the case at hand, the Pre-Trial Chamber did not disregard the concerned
20 State's proposals but expressly took note of them. However, despite these proposals,
21 the Pre-Trial Chamber rejected Mr Gbagbo's request for conditional release since in its
22 view no condition could mitigate the identified risks. Having rejected the possibility
23 for conditional release, the Appeals Chamber finds that the Pre-Trial Chamber was
24 under no obligation to address the concerned State's proposals any further.

25 Therefore the arguments under this ground of appeal must be dismissed.

1 As his fourth ground of appeal, Mr Gbagbo submits that the Pre-Trial Chamber erred
2 when deciding that ill health cannot be the basis for interim release.

3 As the Pre-Trial Chamber noted, there's no provision in the court's legal texts that
4 specifically provides for interim or conditional release of a detained person on health
5 grounds. Nevertheless, the Appeals Chamber considers that medical reasons can
6 play a role in decisions on interim release in at least two ways: First, the medical
7 condition of a detained person may have an effect on the risks under Article 58,
8 subparagraph (1)(b) of the Statute, for instance, on his or her ability to abscond,
9 potentially negating those risks. Second, the medical condition of the detained
10 person may be a reason for the Pre-Trial Chamber to grant interim release with
11 conditions.

12 Turning to the Impugned Decision, the statement of the Pre-Trial Chamber that the
13 legal texts of the Court do not provide for release as a remedy in case of the ill health
14 of the detained person is, as such, correct. However, the statement stops short of
15 acknowledging the potential impact of medical reasons on the risks identified under
16 Article 58, subparagraph (1)(b) of the Statute.

17 In this regard, it should be noted that Mr Gbagbo, in his submissions before the
18 Pre-Trial Chamber, raised his medical condition as a separate ground for his release
19 based on his fitness to stand trial. Mr Gbagbo made these arguments without
20 linking them to Article 58, subparagraph (1)(b) of the Statute or the question of
21 conditional release.

22 When understood in this context, the Pre-Trial Chamber's conclusion was not a
23 categorical finding as to the law, but a direct response to Mr Gbagbo's submissions.
24 Furthermore, given that at the time of the rendering of the Impugned Decision the
25 question of Mr Gbagbo's health and his fitness to stand trial were in any event under

1 consideration in the context of proceedings under Rule 135 of the Rules of Procedure
2 and Evidence, the Appeals Chamber considers that under these circumstances any
3 decision by the Pre-Trial Chamber on Mr Gbagbo's release or detention based on
4 medical reasons would have been premature. Therefore the Appeals Chamber finds
5 that the Pre-Trial Chamber did not err by not taking medical reasons into account in
6 the circumstances of this case and accordingly, this ground of appeal must be
7 dismissed.

8 In conclusion, it is appropriate to confirm the Impugned Decision as it was not
9 materially affected by any error. Consequently, the appeal is dismissed.

10 Now, Judge Ušacka files a dissent because in her assessment the Impugned Decision
11 does not conform to the standards required of a reasoned decision on detention. She
12 would therefore reverse the Impugned Decision and remand the resolution of
13 Mr Gbagbo's request for interim release to Pre-Trial Chamber I for a new
14 determination.

15 Furthermore, Judge Kourula agrees with the majority that grounds 1, 3 and 4 of the
16 appeal must be dismissed. He is also in agreement with the majority's conclusion in
17 relation to Article 58(1)(b)(i) of the Statute under the second ground of appeal. He
18 only disagrees with the remaining assessment of the second ground of appeal by the
19 majority relating to the Pre-Trial Chamber's findings under Article 58 (1)(b)(ii) and
20 (iii) of the Statute. He would therefore remand the assessment of those two grounds
21 for detention to the Pre-Trial Chamber.

22 Thank you.

23 Before I bring the proceedings to an end, I would like to thank representatives of the
24 Office of the Prosecutor, and I would also like to thank the Defence team, and of
25 course staff of the ICC and not forgetting our interpreters. Thank you very much.

- 1 This brings these proceedings to an end. Thanks.
- 2 THE COURT USHER: All rise.
- 3 (The hearing ends in open session at 3.01 p.m.)