

1 International Criminal Court

2 Appeals Chamber - Courtroom 2

3 Situation: Republic of Côte d'Ivoire

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

5 Single Judge Akua Kuenyehia

6 Appeals Chamber Judgment

7 Tuesday, 29 October 2013

8 (The hearing starts in open session at 9.04 a.m.)

9 THE COURT OFFICER: All rise.

10 The International Criminal Court is now in session.

11 Please be seated.

12 JUDGE KUENYEHIA: Good morning, everyone.

13 Court officer, you may call the case.

14 THE COURT OFFICER: Thank you, Madam President. Situation in the Republic of  
15 Côte d'Ivoire, in the case of The Prosecutor versus Laurent Gbagbo, ICC-02/11-01/11.

16 JUDGE KUENYEHIA: Thank you very much.

17 May I ask the participants to please introduce themselves for the record, starting with  
18 the Office of the Prosecution. Prosecutor?

19 MR GUARIGLIA: Good morning, your Honour. I am Fabricio Guariglia,  
20 Prosecution's co-ordinator in the Office of the Prosecutor, and appearing with me  
21 today are Mr Reinhold Gallmetzer and Mr Julian Ederfield.

22 JUDGE KUENYEHIA: Thank you very much.

23 Now the Defence, please?

24 MR ALTIT: (Interpretation) Good morning, your Honour. If you would allow  
25 me to present Maître Baroan from the Côte d'Ivoire Bar; you have Jennifer Naouri,

1 legal assistant; behind me on the left is Professor Jacobs from the University of Leiden;  
2 our intern, Claire Vaills; and our case manager, Barbara Le Guennec; and I am  
3 Emmanuel Altit, counsel. Thank you.

4 JUDGE KUENYEHIA: Merci beaucoup.

5 And now the representatives of victims?

6 MS MASSIDDA: Good morning, your Honours. Victims in these proceedings are  
7 represented by the Office of Public Counsel for Victims. Appearing today  
8 Mr Dmytro Suprun, counsel, and I am Paolina Massidda, principal counsel.

9 JUDGE KUENYEHIA: Thank you very much.

10 This morning I shall summarise the judgment of the Appeals Chamber on the appeal  
11 of Mr Gbagbo against the third decision of the review of his detention, pursuant to  
12 Article 63 of the Statute, in which the Pre-Trial Chamber I decided that Mr Gbagbo  
13 should remain in detention.

14 I should emphasise that the written judgment, which will be filed confidentially and  
15 in a public redacted form after this hearing, shall be the authentic version and not this  
16 summary.

17 The Appeals Chamber after careful deliberation decides by majority, Judge Anita  
18 Ušacka dissenting and Judge Erkki Kourula appending a separate opinion, that the  
19 decision of the Pre-Trial Chamber I of 11 July 2013 entitled "Third decision on the  
20 review of Laurent Gbagbo's detention pursuant to Article 63 of the Rome Statute" is  
21 confirmed.

22 I shall now summarise the reasons for the Appeals Chamber's judgment.

23 Mr Gbagbo's appeal is founded on ten grounds, which will be discussed in turn.

24 However, preliminarily, the Appeals Chamber will address Mr Gbagbo's overarching  
25 arguments regarding the sufficiency of the reasoning of the decision of 13 July 2012,

1 which was the initial ruling on detention pursuant to Article 62 of the Statute, as well  
2 as the sufficiency of the reasoning of the impugned decision.

3 The Appeals Chamber dismisses these arguments on the basis that the reasoning of  
4 the decision of 13 July 2012 was previously held on appeal to be sufficient.

5 Similarly, the Appeals Chamber finds that Mr Gbagbo fails to demonstrate an error  
6 that would have materially affected the impugned decision in relation to the  
7 sufficiency of the reasoning in the impugned decision.

8 Accordingly, these arguments are dismissed.

9 **The first ground of appeal:**

10 In relation to the first ground of appeal, Mr Gbagbo submits that the Pre-Trial  
11 Chamber erred in law by finding that its recent decision to adjourn the Confirmation  
12 of Charges hearing in order to allow the Prosecutor to consider providing further  
13 evidence or conduct further investigation with respect to all charges, which I will  
14 refer to hereinafter as "the adjournment decision," did not constitute a changed  
15 circumstance requiring verification that the conditions under Article 58(1)(a) of the  
16 Statute is still met.

17 Mr Gbagbo submits that the Pre-Trial Chamber's finding in the adjournment decision  
18 that there was a dearth of probative evidence to support the charges against him is a  
19 new factor which may affect the existence of reasonable grounds to believe that  
20 Mr Gbagbo committed a crime within the Court's jurisdiction and that it was  
21 therefore incumbent on the Chamber to verify de novo whether Article 58(1)(a)  
22 conditions continue to be met.

23 The Appeals Chamber recalls that in the adjournment decision the Pre-Trial Chamber  
24 indicated that, and I quote, "The Prosecutor's evidence viewed as a whole, although  
25 apparently insufficient, does not appear to be so lacking in relevance and probative

1 value that it leaves the Chamber with no choice but to decline to confirm the charges,"  
2 unquote.

3 This indicates that, while the Prosecutor's evidence in relation to the charges against  
4 Mr Gbagbo was inadequate, there remained a degree of suspicion in relation to his  
5 alleged commission of the crimes.

6 Furthermore, the Pre-Trial Chamber specifically adverted to the progressively higher  
7 thresholds applicable in the course of the different stages of the proceedings,  
8 including the fact that the evidentiary threshold for the confirmation of charges is  
9 higher than that required to issue a warrant of arrest.

10 In the impugned decision, the Pre-Trial Chamber reiterated this by stating that the  
11 findings under Article 58(1)(a) of the Statute, and I quote, "... are made to a  
12 significantly lower standard of proof," unquote, than those under Article 67(1), and  
13 the fact that the available evidence did not meet the evidentiary threshold for Article  
14 67(1) does not mean that there was insufficient evidence for the purposes of Article  
15 58(1)(a) of the Statute.

16 In light of the Pre-Trial Chamber's analysis of the different evidentiary threshold in  
17 both the impugned decision and the adjournment decision, and its election to adjourn  
18 the confirmation hearing rather than decline to confirm the charges, the Appeals  
19 Chamber thus finds that the Pre-Trial Chamber did advert to the issue of whether the  
20 sufficiency of the evidence affected the conditions under Article 58(1)(a).

21 Accordingly, there was no obligation for the Pre-Trial Chamber to assess anew  
22 whether there were reasonable grounds to believe that Mr Gbagbo committed a crime  
23 within the jurisdiction of the Court as the Pre-Trial Chamber found that no changed  
24 circumstances existed.

25 The Appeals Chamber finds no error in the approach of the Pre-Trial Chamber and

1 therefore this ground of appeal is dismissed.

2 **The second ground:**

3 Under the second ground of appeal, Mr Gbagbo submits that the Pre-Trial Chamber  
4 erred in law by not examining the facts pertaining to each item of evidence previously  
5 used to justify his detention and thereby declined to assess whether there were  
6 changed circumstances for the purposes of Article 63 of the Statute.

7 Mr Gbagbo avers that the Pre-Trial Chamber merely adverted to earlier decisions in  
8 relation to his detention, rather than analysing the current situation or the arguments  
9 of the parties.

10 The Appeals Chamber notes that the principal issue in dispute under this ground of  
11 appeal relates to the manner in which a periodic review of detention ought to be  
12 carried out.

13 The Appeals Chamber recalls that there is a clear difference between the standard of a  
14 decision under Article 62 of the Statute and under 63 of the Statute. While a review  
15 of detention pursuant to Article 62 entails a decision de novo in which the Pre-Trial  
16 Chamber must decide whether the conditions under Article 58(1) are met, the  
17 Pre-Trial Chamber may modify its ruling on release or detention under Article 63 of  
18 the Statute only if it is satisfied that changed circumstances so require.

19 The Appeals Chamber has previously held that the Chamber does not have to enter  
20 findings on the circumstances already decided upon in the ruling on detention in the  
21 absence of changed circumstances, given that the scope of the review carried out in  
22 reaching a decision under Article 63 of the Statute is potentially much more limited  
23 than that to be carried out in reaching a decision under Article 62 of the Statute.

24 The Appeals Chamber therefore finds Mr Gbagbo's argument that the Pre-Trial  
25 Chamber erred in failing to perform a systematic review of each of the circumstances,

1 which had provided the basis for the detention in order to determine whether any of  
2 these had changed, distorts the manner in which reviews of detention pursuant to  
3 Article 63 of the Statute should be conducted.

4 Indeed, it is first for the Chamber to determine whether changed circumstances exist  
5 to warrant the disturbing of a previous ruling on detention, rather than addressing  
6 each factor underpinning detention in a de novo manner to determine whether any of  
7 these are changed.

8 On this basis, the Appeals Chamber finds that the Pre-Trial Chamber did not err in  
9 finding no change in the relevant circumstances that would affect the grounds  
10 justifying detention under Article 58(1)(b)(i), (ii) and (iii).

11 Accordingly, this ground of appeal is dismissed.

12 **The third and sixth grounds of appeal:**

13 Mr Gbagbo's third ground of appeal is that the Pre-Trial Chamber erred in law by  
14 declining to assess the probative value of the final report produced by the group of  
15 experts on Côte d'Ivoire, despite Mr Gbagbo's request.

16 His sixth ground of appeal is that the Pre-Trial Chamber committed an error of fact by  
17 relying on the findings of this report - that is the final report - despite the fact that he  
18 had called the probative value of the report into question.

19 Given the overlap in these grounds, the Appeals Chamber treats them together.

20 In relation to the third ground of appeal the Appeals Chamber finds that, to the extent  
21 that Mr Gbagbo argues that the Pre-Trial Chamber should have reconsidered its  
22 previous findings that were based on the group of experts' mid-term report,  
23 Mr Gbagbo's submissions before the Pre-Trial Chamber did not contain new evidence  
24 as he now claims on appeal. Rather, he raised before the Pre-Trial Chamber a  
25 number of arguments generally challenging the quality and reliability of the group of

1 experts' work.

2 The Appeals Chamber finds that the majority of his arguments could have been  
3 raised in relation to previous decisions of the Pre-Trial Chamber, most notably the  
4 decision of 12 November 2012 or 12 March 2013 which relied upon the findings of the  
5 mid-term report.

6 Furthermore, the Appeals Chamber finds no error of law on the part of the Pre-Trial  
7 Chamber in failing to analyse the probative value of the final report.

8 The Pre-Trial Chamber did in fact consider the factors which may have impacted on  
9 the reliability of the final report with reference to the applicable standard by which it  
10 assessed the evidence before it. Thus, the third ground of appeal is dismissed.

11 Likewise, the Appeals Chamber finds that Mr Gbagbo's sixth ground of appeal must  
12 also be dismissed as it merely rehearses his arguments in relation to his third ground  
13 of appeal.

14 **Fourth and fifth grounds:**

15 Under his fourth ground of appeal, Mr Gbagbo argues that the Pre-Trial Chamber  
16 committed an error of fact in considering that the publication of the final report did  
17 not constitute a changed circumstance.

18 In his fifth ground of appeal, Mr Gbagbo alleges an error of fact on the part of the  
19 Pre-Trial Chamber for refusing to consider the alleged links between the Prosecutor  
20 and the group of experts, as well as an error of law in failing to clarify this issue upon  
21 Mr Gbagbo's request.

22 In the Appeals Chamber's view, the mere publication of the final report cannot  
23 support the existence of changed circumstances. Only facts contained therein could  
24 potentially result in changed circumstances that may impact on the factors justifying  
25 detention.

1 The Appeals Chamber also notes that Mr Gbagbo does not indicate which purported  
2 discrepancies between the mid-term report and the final report should have been  
3 taken into account by the Pre-Trial Chamber, or how they would have impacted on  
4 the Pre-Trial Chamber's findings.

5 Furthermore, in relation to the fifth ground of appeal the Appeals Chamber finds that  
6 Mr Gbagbo fails to provide any concrete evidence establishing collusion between the  
7 Prosecutor and the group of experts and that his arguments are speculative at best.

8 Recalling that the Appeals Chamber will interfere only in the case of a clear error, it  
9 finds no such error to be established and accordingly the fourth and fifth grounds of  
10 appeal are dismissed.

11 **The seventh ground:**

12 Mr Gbagbo's seventh ground of appeal is that the Pre-Trial Chamber erred in law in  
13 finding, without giving reasons, that Mr Gbagbo could have access to funds.

14 In his document in support of the appeal Mr Gbagbo argues that he only has two  
15 current bank accounts and that no other account exists; a fact which in his view the  
16 Pre-Trial Chamber ignored. He also argues that it is impossible for him to prove that  
17 further unfrozen accounts do not exist. He avers that the risk identified by the  
18 Pre-Trial Chamber that he still has access to other or hidden accounts is based on a  
19 mere series of hypotheses and that it is impossible for Mr Gbagbo to prove changed  
20 circumstances.

21 The Appeals Chamber notes that Mr Gbagbo does not explicitly allege an error of fact  
22 in relation to the Pre-Trial Chamber's appraisal of his access to funds. He argues  
23 instead that an error of law was occasioned by the Pre-Trial Chamber's failure to give  
24 reasons for its finding.

25 However, according to the jurisprudence of the Appeals Chamber, there is no

1 requirement to give reasoning or engage in a de novo review of detention where no  
2 changed circumstances are established. Therefore, it follows that it would need to be  
3 established that changed circumstances existed in relation to Mr Gbagbo's financial  
4 situation in order to support an argument that an error of law was occasioned due to  
5 lack of reasoning.

6 On this basis, and in the absence of any further information coming to light since the  
7 decision of 13 July 2012 regarding unfrozen bank accounts, the Appeals Chamber  
8 dismisses Mr Gbagbo's seventh ground of appeal.

9 **The eighth ground:**

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

12 The Appeals Chamber dismisses the eighth ground of appeal as it rehearses many of  
13 the same arguments in relation to the same ground of -- the second ground of appeal.

14 As the Pre-Trial Chamber's finding in relation to the existence of a pro-Gbagbo  
15 network was based on the findings in the final report and not the mid-term report as  
16 erroneously suggested by Mr Gbagbo, the Appeals Chamber finds that it was not  
17 unreasonable for the Pre-Trial Chamber to rely on the final report.

18 In the absence of the identification of a clear error, and to the extent that an  
19 appellant's mere disagreement with the conclusions of the Pre-Trial Chamber are not  
20 enough to establish a clear error, the Appeals Chamber finds that the Pre-Trial  
21 Chamber did not err in finding that there remains a network of pro-Gbagbo  
22 supporters.

23 **The ninth ground of appeal:**

24 Mr Gbagbo's ninth ground of appeal is that the Pre-Trial Chamber erred in law by not  
25 taking into account his health in its assessment of whether his continued detention

1 remained necessary.

2 On appeal, Mr Gbagbo alleges that the Pre-Trial Chamber erred in failing to consider  
3 that the effluxion of time itself and the evolving nature of Mr Gbagbo's illness are in  
4 and of themselves changed circumstances that have an impact on his detention.

5 In this regard the Appeals Chamber notes that the Pre-Trial Chamber did not enter  
6 into a discussion of the substance of Mr Gbagbo's arguments, but noted that  
7 Mr Gbagbo's arguments merely repeat previous submissions and fail to raise a new  
8 circumstance.

9 The Appeals Chamber can discern no error in the Pre-Trial Chamber's treatment of  
10 these alleged circumstances. Mr Gbagbo's reference to the reports of medical experts  
11 did not constitute changed circumstances, as these were previously assessed by the  
12 Pre-Trial Chamber. Thus, in the absence of any evidence in support of his assertion,  
13 the Pre-Trial Chamber cannot be faulted for not -- for rejecting Mr Gbagbo's  
14 arguments as being merely repetitive.

15 Accordingly, this ground is dismissed.

16 **The tenth ground of appeal:**

17 Mr Gbagbo's tenth ground of appeal is that the Chamber erred in law in its  
18 examination of the requirements for conditional release.

19 Mr Gbagbo contends that the Pre-Trial Chamber erred in not reasoning why  
20 guarantees would not minimise the risks and justify conditional release. In addition,  
21 he avers that it was incumbent upon the Pre-Trial Chamber to explain point by point  
22 why the numerous security measures proposed by a potential Host State would not  
23 mitigate the risks.

24 The Appeals Chamber finds that Mr Gbagbo's arguments concerning the lack of  
25 reasoning of the Pre-Trial Chamber in rejecting the proposal from a potential Host

1 State are untenable, as they relate to submissions he made in relation to previous  
2 decisions of the Pre-Trial Chamber.

3 The Appeals Chamber notes that for the period of detention under review, the  
4 Pre-Trial Chamber did not consider any new proposal from a potential Host State as  
5 no fresh proposals was -- proposal was presented.

6 In the circumstances, the Appeals Chamber considers Mr Gbagbo's arguments an  
7 attempt to re-litigate issues on appeal that were the subject of previous decisions of  
8 the Pre-Trial Chamber and which do not arise in the impugned decisions to be  
9 appropriate and they are therefore rejected.

10 For these reasons, the Appeals Chamber considers it appropriate to dismiss all  
11 grounds of appeal and to confirm the impugned decision.

12 As I mentioned at the start of this summary, Judge Erkki Kourula appends a separate  
13 opinion, while Judge Anita Ušacka appends a dissenting opinion to this judgment.

14 In Judge Kourula's view, the absence of sufficient reasoning in the Pre-Trial  
15 Chamber's decision of 13 July 2012 makes an assessment of changed circumstances in  
16 the current review of detention problematic. In his view, this is reflected in the  
17 Pre-Trial Chamber's assessment of the grounds for detention under Article 58(1)(b)(ii)  
18 and (iii) of the Statute.

19 Given that the grounds for detention under Article 58(1)(b) of the Statute are in the  
20 alternative, he would have found that Mr Gbagbo's continued detention is justified  
21 under Article 58(1)(b)(i) alone and not pursuant to Article 58(1)(b)(ii) and (iii) of the  
22 Statute.

23 In Judge Ušacka's view the Pre-Trial Chamber should have considered, when issuing  
24 the adjournment decision, the reasonableness of the length of Mr Gbagbo's detention  
25 and any prolongations thereof caused by the adjournment.

1 Judge Ušacka is of the opinion that the adjournment decision constituted changed  
2 circumstances that would have required the Pre-Trial Chamber to consider anew the  
3 basis of Mr Gbagbo's detention.

4 In her opinion, changed circumstances exist because the adjournment decision cast  
5 doubt about the evidentiary basis underpinning the charges as a whole and these  
6 doubts necessarily extended to the lower evidentiary threshold laid down in Article  
7 58(1)(a) of the Statute.

8 In finding that changed circumstances thus existed Judge Ušacka would have granted  
9 the first and second grounds of appeal, reversing the impugned decision and  
10 remanding the matter to the Pre-Trial Chamber for fresh consideration involving a de  
11 novo review of Article 58(1)(a) and (b) of the Statute.

12 This concludes the summary of the judgment.

13 Thank you very much.

14 THE COURT OFFICER: All rise.

15 (The hearing ends in open session at 9.30 a.m.)