

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

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

**Date: 11 July 2014**

**THE APPEALS CHAMBER**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

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

**Public document**

**Judgment**

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



**Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:**

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor  
Ms Helen Brady

**Counsel for the Defence**  
Mr Jean-Pierre Kilenda Kakengi Basila

**REGISTRY**

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**Registrar**  
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

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

After deliberation,

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

*Delivers* the following

## JUDGMENT

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

## REASONS

### I. KEY FINDINGS

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

### II. PROCEDURAL HISTORY

#### A. Proceedings before the Pre-Trial Chamber

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

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<sup>1</sup> ICC-01/05-01/13-19-Conf.

<sup>2</sup> Application for Warrants of Arrest, para. 1.

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

4. Following his surrender to the Court, Mr Babala first appeared before the Pre-Trial Chamber on 27 November 2013.<sup>4</sup> He has been in detention at the Court since.

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

6. On 13 December 2013, the Pre-Trial Chamber, its functions being exercised by Judge Cuno Tarfusser acting as single judge,<sup>7</sup> rendered the “Decisions [*sic*] requesting observations on the ‘Requête urgente de la défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’”<sup>8</sup> (hereinafter: “Decision Requesting Observations”), inviting the views of the Prosecutor and the authorities of the Kingdom of the Netherlands and the Democratic Republic of the Congo (hereinafter: “DRC”) on Mr Babala’s Application for Interim Release, by Friday 3 January 2014.<sup>9</sup>

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

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

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

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

<sup>6</sup> Application for Interim Release, pp. 19-20.

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

<sup>8</sup> ICC-01/05-01/13-40.

<sup>9</sup> Decision Requesting Observations, p. 4.

<sup>10</sup> ICC-01/05-01/13-78.

(hereinafter: “First Registry Report”), which contained observations from the Ministry of Justice and Human Rights of the DRC, dated 9 January 2014<sup>11</sup> (hereinafter: “DRC Authorities’ Observations of 9 January 2014”).

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

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

## B. Proceedings before the Appeals Chamber

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

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

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

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

<sup>12</sup> ICC-01/05-01/13-206.

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

<sup>14</sup> ICC-01/05-01/13-258.

<sup>15</sup> Impugned Decision, p. 17.

<sup>16</sup> ICC-01/05-01/13-276-tENG (OA 3).

<sup>17</sup> ICC-01/05-01/13-289 (OA 3).

<sup>18</sup> ICC-01/05-01/13-297 (OA 3).

Chamber (hereinafter: "Request for Leave to Reply"). The Request for Leave to Reply was rejected by the Appeals Chamber on 15 April 2014.<sup>19</sup>

### III. PRELIMINARY ISSUE

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

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

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

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

<sup>20</sup> Response to the Document in Support of the Appeal, para. 1.

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

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

#### IV. MERITS

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

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

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

<sup>23</sup> Document in Support of the Appeal, paras 24-42, 60-64.

<sup>24</sup> Document in Support of the Appeal, paras 44-59, 65-66.

<sup>25</sup> Document in Support of the Appeal, paras 67-74.

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

### A. Standard of review

18. In considering appeals in relation to decisions granting or denying interim release, the Appeals Chamber has previously held that it “will not review the findings of the Pre-Trial Chamber *de novo*, instead it will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision”.<sup>27</sup>

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

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

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

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<sup>27</sup> *Ntaganda OA Judgment*, para. 29; *Prosecutor v. Callixte Mbarushimana*, “Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled ‘Decision on the “Defence Request for Interim Release”””, 14 July 2011, ICC-01/04-01/10-283 (OA) (hereinafter: “*Mbarushimana OA Judgment*”), para. 15, citing *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, 2 December 2009, ICC-01/05-01/08-631-Red (OA 2) (hereinafter: “*Bemba OA 2 Judgment*”), para. 62.

<sup>28</sup> *Ntaganda OA Judgment*, para. 31, citing *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled ‘Decision on the defence’s 28 December 2011 “Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo”””, 5 March 2012, ICC-01/05-01/08-2151-Red (OA 10), para. 16. *See also Prosecutor v. Laurent Koudou Gbagbo*, “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the “Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo”””, 26 October 2012, ICC-02/11-01/11-278-Red (OA) (hereinafter: “*Gbagbo OA Judgment*”), para. 51.

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

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

22. It is also recalled that “an appellant is obliged not only to set out an alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision”.<sup>31</sup> Failure to do so may lead to the Appeals Chamber dismissing arguments *in limine*, without full consideration of their merits.

## **B. First ground of appeal**

### *1. Relevant part of the Impugned Decision*

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

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

<sup>30</sup> *Mbarushimana OA Judgment*, paras 21, 31.

<sup>31</sup> *Ntaganda OA Judgment*, para. 32; *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’”, 19 October 2010, ICC-01/05-01/08-962 (OA 3) (hereinafter: “*Bemba OA 3 Judgment*”), para. 102, citing *Prosecutor v. Joseph Kony et al.*, “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009”, 16 September 2009, ICC-02/04-01/05-408 (OA 3) (hereinafter: “*Kony et al. OA 3 Judgment*”), para. 48.

<sup>32</sup> Impugned Decision, para. 3

<sup>33</sup> Impugned Decision, para. 3.

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

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

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

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

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

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

<sup>35</sup> See Impugned Decision, para. 5.

<sup>36</sup> See Impugned Decision, para. 5.

<sup>37</sup> See Impugned Decision, para. 5.

<sup>38</sup> See Impugned Decision, para. 5.

<sup>39</sup> Impugned Decision, para. 6.

27. The Pre-Trial Chamber referred to the body of evidence it relied upon to conclude that reasonable grounds existed, notably the annexes to the Application for Warrants of Arrest,<sup>40</sup> and the second report submitted by the Independent Counsel on 14 November 2013<sup>41</sup> (hereinafter: “Report of the Independent Counsel”).<sup>42</sup> The Pre-Trial Chamber noted that none of this material contained in the Application for Warrants of Arrest or in the Report of the Independent Counsel was addressed by Mr Babala in his application for interim release.<sup>43</sup> Rather, the Pre-Trial Chamber took note of Mr Babala’s statement that he was ‘awaiting disclosure of the evidence in the Prosecutor’s possession so as to be able to challenge it on legal and factual grounds, and to prove his innocence’.<sup>44</sup>

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

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

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<sup>40</sup> See Impugned Decision, paras 7-9.

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

<sup>42</sup> See Impugned Decision, paras 10-14.

<sup>43</sup> Impugned Decision, para. 10.

<sup>44</sup> Impugned Decision, para. 10, referring to Application for Interim Release, para. 19.

<sup>45</sup> Impugned Decision, para. 11.

<sup>46</sup> Impugned Decision, para. 12.

<sup>47</sup> Impugned Decision, para. 12.

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

## 2. Mr Babala’s submissions before the Appeals Chamber

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

### (a) Alleged insufficiency of material underpinning grounds of detention

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

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

<sup>48</sup> Impugned Decision, para. 13.

<sup>49</sup> See Document in Support of the Appeal, paras 27-32.

<sup>50</sup> See Document in Support of the Appeal, paras 33-43.

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

<sup>52</sup> Document in Support of the Appeal, para. 43.

<sup>53</sup> Document in Support of the Appeal, para. 26.

<sup>54</sup> Document in Support of the Appeal, para. 27.

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

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

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

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

**(b) Alleged insufficiency of grounds of detention**

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

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<sup>56</sup> Document in Support of the Appeal, para. 29. *See also* Document in Support of the Appeal, para. 28.

<sup>57</sup> Document in Support of the Appeal, para. 29.

<sup>58</sup> Document in Support of the Appeal, para. 30. *See also* Document in Support of the Appeal, para. 53.

<sup>59</sup> Document in Support of the Appeal, para. 31.

<sup>60</sup> Document in Support of the Appeal, para. 31.

<sup>61</sup> Document in Support of the Appeal, para. 32.

<sup>62</sup> Document in Support of the Appeal, paras 35-36.

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

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

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

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

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

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<sup>63</sup> Document in Support of the Appeal, paras 33-34.

<sup>64</sup> Document in Support of the Appeal, para. 37.

<sup>65</sup> Document in Support of the Appeal, para. 38.

<sup>66</sup> Document in Support of the Appeal, para. 40. *See also* Document in Support of the Appeal, para. 39.

<sup>67</sup> Document in Support of the Appeal, para. 41.

<sup>68</sup> Document in Support of the Appeal, para. 42.

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

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

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

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

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

<sup>70</sup> Document in Support of the Appeal, para. 52,

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

<sup>72</sup> Document in Support of the Appeal, para. 61.

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

<sup>74</sup> Response to the Document in Support of the Appeal, para. 2.

<sup>75</sup> Response to the Document in Support of the Appeal, para. 2.

**(a) Alleged insufficiency of material underpinning grounds of detention**

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

**(b) Alleged insufficiency of grounds of detention**

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

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<sup>76</sup> Response to the Document in Support of the Appeal, para. 3.

<sup>77</sup> Response to the Document in Support of the Appeal, para. 3.

<sup>78</sup> Response to the Document in Support of the Appeal, para. 4.

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

<sup>80</sup> Response to the Document in Support of the Appeal, para. 5.

<sup>81</sup> Response to the Document in Support of the Appeal, para. 5.

<sup>82</sup> Response to the Document in Support of the Appeal, para. 6.

<sup>83</sup> Response to the Document in Support of the Appeal, para. 6.

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

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

*4. Determination by the Appeals Chamber*

**(a) Alleged insufficiency of material underpinning grounds of detention**

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

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

<sup>84</sup> Response to the Document in Support of the Appeal, para. 1.

<sup>85</sup> Document in Support of the Appeal, para. 26.

<sup>86</sup> Document in Support of the Appeal, para. 27.

<sup>87</sup> Document in Support of the Appeal, paras 28, 29, 31.

<sup>88</sup> Document in Support of the Appeal, para. 32.

<sup>89</sup> Document in Support of the Appeal, para. 26.

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

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

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

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<sup>90</sup> *Gbagbo OA Judgment*, para. 27.

<sup>91</sup> Document in support of the Appeal, para. 29.



49. In similar vein, Mr Babala's argument that the Pre-Trial Chamber did not have sufficient opportunity to properly analyse the Application for Warrants of Arrest before granting it<sup>92</sup> is dismissed as unfounded and speculative.

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

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

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

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

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<sup>92</sup> Document in support of the Appeal, para. 32.

<sup>93</sup> See Impugned Decision, paras 6-8, 13.

<sup>94</sup> See Impugned Decision, para. 4.

<sup>95</sup> Impugned Decision, para. 7.

<sup>96</sup> Impugned Decision, para. 8.

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

**(b) Alleged insufficiency of grounds of detention**

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

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

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<sup>97</sup> Document in Support of the Appeal, para. 36.

<sup>98</sup> Impugned Decision, paras 11-12.

<sup>99</sup> See Arrest Warrant Decision, p. 5, para. 13.

<sup>100</sup> See Document in Support of the Appeal, para. 38.

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



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

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

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

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

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

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<sup>102</sup> See Impugned Decision, para. 7.

<sup>103</sup> See Document in Support of the Appeal, paras 39-42.

<sup>104</sup> Document in Support of the Appeal, para. 52.

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

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

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

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

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

<sup>107</sup> See Document in Support of the Appeal, para. 52.

<sup>108</sup> Document in Support of the Appeal, paras 26, 61.

<sup>109</sup> *Gbagbo OA Judgment*, para. 27.

<sup>110</sup> Impugned Decision, paras 4, 13.

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

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

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

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

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<sup>111</sup> Document in Support of the Appeal, paras 61-62.

<sup>112</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’”, 16 December 2008, ICC-01/05-01/08-323 (OA) (hereinafter: “*Bemba OA Judgment*”), para. 32.

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

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

<sup>115</sup> Arrest Warrant Decision, para. 5.

<sup>116</sup> *Bemba OA Judgment*, para. 33.

not the reason articulated for this later disclosure of the Report of the Independent Counsel.<sup>117</sup>

63. The Appeals Chamber emphasises the need for timely disclosure in relation to article 58 proceedings and therefore notes with concern the timing of the disclosure of the Report of the Independent Counsel. However, in the instant case, it considers that Mr Babala did have access to ample material underpinning the Application for Warrants of Arrest referred to in the Impugned Decision, including transcripts of non-privileged telephone calls relating to the transfers of sums of money<sup>118</sup> which refer to the designation of Mr Babala as “07”<sup>119</sup> (which the Impugned Decision notes in the context of the Report of the Independent Counsel).<sup>120</sup> Mr Babala also had access to the tables outlining money transfers<sup>121</sup> and those pertaining to his role in the MLC,<sup>122</sup> all of which were relied upon by the Pre-Trial Chamber in finding “reasonable grounds to believe” that Mr Babala committed the crimes for which he is charged.

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

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

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

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

<sup>120</sup> Impugned Decision, para. 8.

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

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



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

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

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

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<sup>123</sup> Application for Interim Release, para. 19.

<sup>124</sup> Document in Support of the Appeal, paras 60, 63-64.

<sup>125</sup> Impugned Decision, p. 5.

<sup>126</sup> Impugned Decision, para. 3.

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

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

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

### **C. Second ground of appeal**

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

#### *1. Relevant part of the Impugned Decision*

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

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

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

<sup>129</sup> Impugned Decision, para. 16.

<sup>130</sup> Impugned Decision, para. 16.

<sup>131</sup> Impugned Decision, para. 20.

<sup>132</sup> Impugned Decision, para. 23.

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

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

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

73. With regard to whether detention appeared necessary to ensure that Mr Babala does not obstruct or endanger the investigation or the Court proceedings, the Pre-Trial Chamber considered that the material attached to the Application for Warrants of Arrest and the Report of the Independent Counsel<sup>139</sup> supported that Mr Babala was

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<sup>133</sup> Impugned Decision, para. 16.

<sup>134</sup> Impugned Decision, para. 16.

<sup>135</sup> Impugned Decision, para. 17.

<sup>136</sup> Impugned Decision, para. 19.

<sup>137</sup> Impugned Decision, para. 21.

<sup>138</sup> Impugned Decision, para. 22.

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

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

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

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

<sup>140</sup> Impugned Decision, para. 25.

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

<sup>142</sup> Impugned Decision, para. 26.

<sup>143</sup> Impugned Decision, para. 26.

<sup>144</sup> Impugned Decision, para. 27.

<sup>145</sup> Impugned Decision, para. 29.

<sup>146</sup> Impugned Decision, para. 29.

<sup>147</sup> Impugned Decision, para. 29.

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

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

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

*2. Mr Babala’s submissions before the Appeals Chamber*

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

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

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<sup>148</sup> Impugned Decision, para. 29.

<sup>149</sup> Impugned Decision, para. 30.

<sup>150</sup> Impugned Decision, para. 32.

<sup>151</sup> Impugned Decision, para. 32.

<sup>152</sup> Impugned Decision, para. 32.

<sup>153</sup> Impugned Decision, para. 32.

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

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

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

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

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

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

<sup>154</sup> Document in Support of the Appeal, paras 44-45.

<sup>155</sup> Document in Support of the Appeal, paras 44-45.

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

<sup>157</sup> Document in Support of the Appeal, para. 54.

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

<sup>159</sup> Document in Support of the Appeal, para. 65.

<sup>160</sup> Document in Support of the Appeal, para. 55.

<sup>161</sup> Document in Support of the Appeal, para. 56. *See also* Document in Support of the Appeal, para. 65.



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

81. Finally, Mr Babala submits that the Pre-Trial Chamber “should dismiss the [Parquet Général’s Observations of 17 February 2014], firstly as they were out of time, and secondly as they are incompatible” with the earlier DRC Authorities’ Observations of 9 January 2014.<sup>164</sup> Mr Babala argues that the Pre-Trial Chamber erred in accepting the later views of the Parquet Général’s Observations of 17 February 2014 that negatively impacted upon Mr Babala’s prospect for interim release in the DRC and failed to “ground [its] decision” why it “dismissed” the earlier DRC Authorities’ Observations of 9 January 2014.<sup>165</sup> He adds that the Parquet Général’s Observations of 17 February 2014 did not “in any way supersede” the DRC Authorities’ Observations of 9 January 2014.<sup>166</sup>

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

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

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

<sup>163</sup> Document in Support of the Appeal, paras 47-48.

<sup>164</sup> Document in Support of the Appeal, para. 58.

<sup>165</sup> Document in Support of the Appeal, paras 18, 57-58.

<sup>166</sup> Document in Support of the Appeal, para. 58.

<sup>167</sup> Document in Support of the Appeal, paras 59, 66.

<sup>168</sup> Document in Support of the Appeal, para. 66.

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

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

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

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

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

85. The Prosecutor further argues that Mr Babala fails to "characteris[e] the error or defin[e] the scope of its objection" against the Pre-Trial Chamber's reliance on the observations of the Parquet Général's Observations of 17 February 2014<sup>174</sup> regarding Mr Babala's interim release.<sup>175</sup> The Prosecutor contends that the Pre-Trial Chamber expressly addressed the issue of the late receipt of these observations and Mr Babala does not seem to "challenge [their] inclusion exclusively on that basis".<sup>176</sup> The Prosecutor adds that Mr Babala's argument is inconsistent because he himself relies

<sup>169</sup> Response to the Document in Support of the Appeal, para. 8.

<sup>170</sup> Response to the Document in Support of the Appeal, para. 8.

<sup>171</sup> Response to the Document in Support of the Appeal, para. 9.

<sup>172</sup> Response to the Document in Support of the Appeal, para. 10.

<sup>173</sup> Response to the Document in Support of the Appeal, para. 10, referring to *Bemba OA 2 Judgment*, para. 10; *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", 14 August 2009, ICC-01/05-01/08-475, para. 82.

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

<sup>175</sup> Response to the Document in Support of the Appeal, para. 11.

<sup>176</sup> Response to the Document in Support of the Appeal, para. 12.

on the DRC Authorities' Observations of 9 January 2014<sup>177</sup> filed after the deadline of 3 January 2014.<sup>178</sup> She further maintains that the Pre-Trial Chamber "did not expressly refer to the [DRC Authorities' Observations of 9 January 2014] because it was not relevant to [its] assessment of risk under [a]rticle 58(1)(b)(iii)" and in any event this observation "merely confirms Mr Babala's ability to return to the DRC 'if his Application for Interim Release was granted'".<sup>179</sup> The Prosecutor avers further that the Pre-Trial Chamber was correct to address the Parquet Général's Observations of 17 February 2014 instead of the DRC Authorities' Observations of 9 January 2014 for the purpose of establishing "a credible risk".<sup>180</sup>

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

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

*4. Determination by the Appeals Chamber*

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

87. With regard to Mr Babala's argument contesting the Pre-Trial Chamber's findings on his personal circumstances (namely, education, professional and social status) and the gravity of the offences,<sup>182</sup> the Appeals Chamber finds that Mr Babala has failed to substantiate any material error that would affect the Pre-Trial Chamber's findings. In that regard, he merely argues that these findings amount to "conjecture" which "does not in principle befit a judge who respects the rights of the defence or [...] the fairness of the proceedings".<sup>183</sup> The Appeals Chamber recalls that "an appellant is not only obliged to set out an alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned

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

<sup>178</sup> Response to the Document in Support of the Appeal, para. 12.

<sup>179</sup> Response to the Document in Support of the Appeal, para. 13.

<sup>180</sup> Response to the Document in Support of the Appeal, para. 13.

<sup>181</sup> Response to the Document in Support of the Appeal, para. 14.

<sup>182</sup> Document in Support of the Appeal, paras 44-45.

<sup>183</sup> Document in Support of the Appeal, para. 45.

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

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

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

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<sup>184</sup> *Bemba OA 3 Judgment*, para. 102, citing *Kony et al. OA 3 Judgment*, para. 48.

<sup>185</sup> *See Impugned Decision*, para. 16.

<sup>186</sup> *Impugned Decision*, para. 16.



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

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

<sup>187</sup> Impugned Decision, para. 17. *See also* Arrest Warrant Decision, para. 22.

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

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

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

<sup>191</sup> Document in Support of the Appeal, para. 54.

<sup>192</sup> Impugned Decision, para. 18.

<sup>193</sup> Impugned Decision, para. 18.

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

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

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

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

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<sup>194</sup> See Impugned Decision, para. 17.

<sup>195</sup> Document in Support of the Appeal, para. 65.

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

<sup>197</sup> Document in Support of the Appeal, para. 56. See also Document in Support of the Appeal, para. 65.

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

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

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

96. With respect to Mr Babala's contention that the Parquet Général's Observations of 17 February 2014 should have been dismissed because of their late filing,<sup>201</sup> the Appeals Chamber recalls that the Pre-Trial Chamber ordered the authorities of the DRC to file their observations by 3 January 2014.<sup>202</sup> The First Registry Report indicated that upon a request from the DRC for an extension of the deadline for filing the said observation, the Pre-Trial Chamber extended the deadline to 9 January 2014,<sup>203</sup> rendering the DRC authorities' Observation of 9 January 2014 timely.<sup>204</sup> In terms of the timeliness of the Parquet Général's Observations of 17 February 2014, the Appeals Chamber notes that the Pre-Trial Chamber accepted the late filing of these observations on the ground that the "ongoing nature of the assessment of the persisting existence of the reasons warranting detention makes it possible that a State may wish to supplement, or otherwise amend, its initial response".<sup>205</sup> The Appeals Chamber finds that it was within the Pre-Trial Chamber's discretion to set deadlines

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<sup>198</sup> Impugned Decision, para. 25.

<sup>199</sup> Impugned Decision, para. 27.

<sup>200</sup> Document in Support of the Appeal, paras 48-49.

<sup>201</sup> Document in Support of the Appeal, para. 58.

<sup>202</sup> Decision Requesting Observations, p. 7.

<sup>203</sup> First Registry Report, p. 4.

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

<sup>205</sup> Impugned Decision, para. 29.

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

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

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

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<sup>206</sup> Document in support of the Appeal, paras 18, 58.

<sup>207</sup> First Registry Report, paras 5-6; Second Registry Report, p. 4.

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

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

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

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

**D. Third ground of appeal**

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

*1. Relevant part of the Impugned Decision*

**(a) Alleged failure to consider changed circumstances**

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

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

<sup>211</sup> Document in Support of the Appeal, paras 67-74.

<sup>212</sup> Impugned Decision, para. 32.

<sup>213</sup> Impugned Decision, para. 32.

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

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

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

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

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

*2. Mr Babala’s submissions before the Appeals Chamber*

**(a) Alleged failure to consider changed circumstances**

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

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<sup>214</sup> Impugned Decision, para. 32.

<sup>215</sup> Impugned Decision, para. 39.

<sup>216</sup> Impugned Decision, para. 34.

<sup>217</sup> Impugned Decision, para. 34.

<sup>218</sup> Impugned Decision, para. 35, referring to *Gbagbo OA Judgment*, para. 79.

<sup>219</sup> Document in Support of the Appeal, paras 67-71.

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

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

105. Mr Babala contends that the Pre-Trial Chamber erred in rejecting his request for a hearing under rule 119 (3) of the Rules of Procedure and Evidence<sup>222</sup> as this would have been an opportunity for him to provide "the necessary information" regarding his alleged involvement "in a process to corruptly influence witnesses or to falsify or present evidence which is false or forged".<sup>223</sup>

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

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

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

**(a) Alleged failure to consider changed circumstances**

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

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<sup>220</sup> Document in Support of the Appeal, paras 67, 71.

<sup>221</sup> Document in Support of the Appeal, para. 71.

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

<sup>223</sup> Document in Support of the Appeal, para. 72.

<sup>224</sup> Document in Support of the Appeal, paras 73-74.

<sup>225</sup> Response to the Document in Support of the Appeal, p. 8.

<sup>226</sup> Response to the Document in Support of the Appeal, para. 16.

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

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

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

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

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

*4. Determination by the Appeals Chamber*

**(a) Alleged failure to consider changed circumstances**

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

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

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

<sup>228</sup> Response to the Document in Support of the Appeal, para. 16.

<sup>229</sup> Response to the Document in Support of the Appeal, para. 17.

<sup>230</sup> Response to the Document in Support of the Appeal, paras 15, 17.

<sup>231</sup> *Gbagbo OA Judgment*, para. 23.

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

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

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

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

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<sup>232</sup> *Gbagbo OA Judgment*, para. 23.

<sup>233</sup> *Gbagbo OA Judgment*, para. 23.

<sup>234</sup> Impugned Decision, para. 39.

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



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

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

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

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

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<sup>236</sup> *Kony et al. OA 3 Judgment*, para. 79.

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

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

<sup>239</sup> Document in Support of the Appeal, para. 72.

<sup>240</sup> Document in Support of the Appeal, para. 74.

<sup>241</sup> Impugned Decision, para. 35.

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

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

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

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

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<sup>242</sup> Impugned Decision, para. 35, referring to *Gbagbo OA Judgment*, para. 79.

<sup>243</sup> *Gbagbo OA Judgment*, para. 79.

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

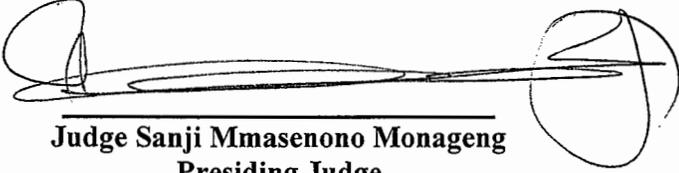
<sup>245</sup> See Impugned Decision, para. 37. See also Impugned Decision, paras 28, 30; Second Registry Report, Annex I.

## V. APPROPRIATE RELIEF

118. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case it is appropriate to confirm the Impugned Decision as no appealable errors have been identified.

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

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



**Judge Sanji Mmasenono Monageng**  
**Presiding Judge**

Dated this 11<sup>th</sup> day of July 2014

At The Hague, The Netherlands