



**Original: English**

**No. ICC-02/11-01/15 OA 6  
Date: 8 September 2015**

**THE APPEALS CHAMBER**

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

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE**

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

**Public**

**Judgment**

**on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of  
8 July 2015 entitled “Ninth decision on the review of Mr Laurent Gbagbo’s  
detention pursuant to Article 60(3) of the Statute”**

**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 Mr Laurent Gbagbo**  
Mr Emmanuel Altit  
Ms Agathe Bahi Baroan

**The Office of Public Counsel for victims**  
Ms Paolina Massidda

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

**REGISTRY**

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**Registrar**  
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled “Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute” of 8 July 2015 (ICC-02/11-01/15-127-Red),

After deliberation,

Unanimously,

*Delivers* the following

## JUDGMENT

1. The Prosecutor’s request to dismiss *in limine* all grounds of appeal relating to Mr Gbagbo’s medical condition (ICC-02/11-01/15-139-Red OA 6) is dismissed as moot.
2. Mr Gbagbo’s requests for leave to reply to the Prosecutor’s response to the notice of appeal and for an extension of the time limit to file the document in support of the appeal (ICC-02/11-01/15-141-Red OA 6) are dismissed as moot.
3. Mr Gbagbo’s request to set a time limit to respond to the victims’ response to the document in support of the appeal (ICC-02/11-01/15-162 OA 6) is dismissed as moot.
4. The “Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute” is confirmed.

## REASONS

### I. KEY FINDINGS

1. In line with the Appeals Chamber’s recent departure from its previous jurisprudence on victim participation in appeals under article 82 (1) (b) and (d) of the Statute, and in the interests of efficiency, it is appropriate for an appellant who wishes to reply to a participant’s response to a document in support of the appeal to first seek leave of the Appeals Chamber under regulation 24 (5) of the Regulations of the Court. Given the time limit set out in regulation 34 (c) of the Regulations of the Court for the

filing of a reply to a response, this procedure is found to be more efficient than that set out in regulation 28 of the Regulations of the Court.

2. In challenging the conditions justifying detention it is not enough to merely allege changed circumstances based solely on arguments that have already been determined to be of no relevance.

3. If participants in appellate proceedings are unable to respond to certain arguments of the appellant on account of not being given full access to them, those arguments are precluded from the scrutiny of the participants, which in turn may affect the Appeals Chamber's determination of the issues on appeal.

## II. PROCEDURAL HISTORY

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

4. On 23 November 2011, Pre-Trial Chamber III issued the "Warrant of Arrest For Laurent Koudou Gbagbo".<sup>1</sup> On 30 November 2011, Pre-Trial Chamber III rendered the "Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo".<sup>2</sup> Following his surrender to the Court, Mr Laurent Gbagbo (hereinafter: "Mr Gbagbo") first appeared before Pre-Trial Chamber III on 5 December 2011.<sup>3</sup> He has been in detention at the Court since.

5. On 27 April 2012, Mr Gbagbo filed the "Defence Application for the Interim Release of President Gbagbo"<sup>4</sup> (hereinafter: "Application for Interim Release"). On 13 July 2012, Judge Silvia Fernández de Gurmendi, acting as Single Judge of Pre-Trial Chamber I (hereinafter: "Pre-Trial Chamber"), rendered the "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'"<sup>5</sup> (hereinafter: "Decision of 13 July 2012"), rejecting the Application for Interim Release. On 26 October 2012, the Appeals Chamber, by majority, Judge Anita

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<sup>1</sup> [ICC-02/11-01/11-1](#). This document was originally filed as under seal *ex parte* but was reclassified as public pursuant to Pre-Trial Chamber III's Decision of 29 November 2011, ICC-02/11-01/11-6-Conf.

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

<sup>3</sup> Transcript of 5 December 2011, [ICC-02/11-01/11-T-1-ENG](#).

<sup>4</sup> ICC-02/11-01/11-105-Conf-tENG registered on 23 May 2012; original French version, registered on 1 May 2012 (ICC-02/11-01/11-105-Conf).

<sup>5</sup> ICC-02/11-01/11-180-Conf-Exp; a confidential version was filed on the same day (ICC-02/11-01/11-180-Conf); a public redacted version was registered on 16 July 2015 ([ICC-02/11-01/11-180-Red](#)).

Ušacka and Judge Erkki Kourula dissenting, rendered a judgment dismissing Mr Gbagbo's appeal against the Decision of 13 July 2012<sup>6</sup> (hereinafter: "*Gbagbo* OA Judgment").

6. On 12 November 2012, Judge Silvia Fernández de Gurmendi, acting as Single Judge, issued the first decision reviewing Mr Gbagbo's detention under article 60 (3) of the Statute, in which she ruled that Mr Gbagbo should remain in detention.<sup>7</sup>

7. On 18 January 2013, Judge Silvia Fernández de Gurmendi, acting as Single Judge, issued the "Decision on the request for the conditional release of Laurent Gbagbo and on his medical treatment", rejecting Mr Gbagbo's request for conditional release.<sup>8</sup>

8. On 12 March 2013,<sup>9</sup> 11 July 2013,<sup>10</sup> 11 November 2013,<sup>11</sup> 12 March 2014<sup>12</sup> and 11 July 2014,<sup>13</sup> the Pre-Trial Chamber rendered decisions pursuant to article 60 (3) of the Statute on the review of Mr Gbagbo's detention. In each decision the Pre-Trial Chamber maintained Mr Gbagbo's detention.

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<sup>6</sup> "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the "Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo"", ICC-02/11-01/11-278-Conf (OA); a public redacted version was filed on the same day ([ICC-02/11-01/11-278-Red \(OA\)](#)).

<sup>7</sup> "[Decision on the review of Laurent Gbagbo's detention pursuant to article 60\(3\) of the Rome Statute](#)", ICC-02/11-01/11-291.

<sup>8</sup> ICC-02/11-01/11-362-Conf, p. 15; a public redacted version was filed on the same day ([ICC-02/11-01/11-362-Red](#)).

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

<sup>10</sup> "[Third decision on the review of Laurent Gbagbo's detention pursuant to article 60\(3\) of the Rome Statute](#)", ICC-02/11-01/11-454. The Appeals Chamber, by majority, Judge Anita Ušacka dissenting, dismissed Mr Gbagbo's appeal against the decision in its "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled "Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute"", 29 October 2013, ICC-02/11-01/11-548-Conf (OA 4); a public redacted version was filed on the same day ([ICC-02/11-01/11-548-Red \(OA 4\)](#)) (hereinafter: "*Gbagbo* OA 4 Judgment").

<sup>11</sup> "[Fourth decision on the review of Laurent Gbagbo's detention pursuant to article 60\(3\) of the Rome Statute](#)", ICC-02/11-01/11-558.

<sup>12</sup> "[Fifth decision on the review of Laurent Gbagbo's detention pursuant to article 60\(3\) of the Rome Statute](#)", ICC-02/11-01/11-633.

<sup>13</sup> "[Sixth decision on the review of Laurent Gbagbo's detention pursuant to article 60\(3\) of the Rome Statute](#)", ICC-02/11-01/11-668.

9. On 11 November 2014<sup>14</sup> and 11 March 2015,<sup>15</sup> Trial Chamber I (hereinafter: “Trial Chamber”) rendered decisions pursuant to article 60 (3) of the Statute on the review of Mr Gbagbo’s detention. In each decision the Trial Chamber maintained Mr Gbagbo’s detention.

10. On 28 May 2015 and 11 June 2015, Mr Gbagbo,<sup>16</sup> the victims, represented by the Office of Public Counsel for victims,<sup>17</sup> and the Prosecutor<sup>18</sup> submitted their respective observations on the continued detention of Mr Gbagbo. Mr Gbagbo filed a response to the Prosecutor’s observations on 25 June 2015.<sup>19</sup>

11. On 8 July 2015, the Trial Chamber issued the “Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute”<sup>20</sup> (hereinafter: “Impugned Decision”).

## **B. Proceedings before the Appeals Chamber**

12. On 14 July 2015, Mr Gbagbo filed a notice of appeal against the Impugned Decision<sup>21</sup> (hereinafter: “Notice of Appeal”) and a request for an extension of the

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<sup>14</sup> “Seventh decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute”, ICC-02/11-01/11-718-Conf; a public redacted version was filed on the same day ([ICC-02/11-01/11-718-Red](#)) (hereinafter: “Seventh Detention Review Decision”).

<sup>15</sup> [“Eighth decision on the review of Laurent Gbagbo’s detention pursuant to article 60\(3\) of the Rome Statute”](#), ICC-02/11-01/11-808 (hereinafter: “Eighth Detention Review Decision”).

<sup>16</sup> [“Soumissions de la défense portant sur les conditions d’application des dispositions de l’article 58\(1\)\(b\), faites à l’invitation de la Chambre, dans le cadre du neuvième réexamen de la détention”](#), ICC-02/11-01/15-83 (hereinafter: “Mr Gbagbo’s Submissions”).

<sup>17</sup> [“Observations of the Common Legal Representative of Victims on the periodic review of Mr. Gbagbo’s detention”](#), ICC-02/11-01/15-89.

<sup>18</sup> “Prosecution’s submission on the ninth detention review of Laurent Gbagbo”, ICC-02/11-01/15-90-Conf (hereinafter: “Prosecutor’s Submissions”); a public redacted version was filed on the same day ([ICC-02/11-01/15-90-Red](#)).

<sup>19</sup> “Réponse de la Défense à la «Prosecution’s submission on the ninth detention review of Laurent Gbagbo» (ICC-02/11-01/15-90-Conf) et réponse de la Défense aux «Observations of the Common Legal Representative of Victims on the periodic review of Mr. Gbagbo’s detention» (ICC-02/11-01/15-89)”, ICC-02/11-01/15-103-Conf (hereinafter: “Mr Gbagbo’s Further Submissions”); a public redacted version was filed on the same day ([ICC-02/11-01/15-103-Red](#)).

<sup>20</sup> ICC-02/11-01/15-127-Conf; a public redacted version was filed on the same day ([ICC-02/11-01/15-127-Red](#)).

<sup>21</sup> “Notice of appeal by the Defence against the ‘Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute’ (ICC-02/11-01/15-127-Conf) of Trial Chamber I deciding to continue Laurent Gbagbo’s detention”, dated 20 July 2015 and registered 27 July 2015, ICC-02/11-01/15-134-Conf-Exp-tENG (OA 6); original French version, dated 14 July 2015 and registered the same day (ICC-02/11-01/15-134-Conf-Exp (OA 6)); a confidential redacted *ex parte* version available to the Registrar, the Prosecutor and the Defence was registered on the same day (ICC-02/11-01/15-134-Conf-Exp-Red (OA 6)); a confidential redacted *ex parte* version available to the Registrar, the Prosecutor, the Defence and Office of Public Counsel for Victims was also registered on the same day (ICC-02/11-01/15-134-Conf-Exp-Red2 (OA 6)); a public redacted version was registered

page limit of the document in support of the appeal.<sup>22</sup> The Prosecutor responded to the Notice of Appeal and Mr Gbagbo's request for an extension of the page limit of the document in support of the appeal on 15 July 2015<sup>23</sup> (hereinafter: "Prosecutor's Response to the Notice of Appeal") and requested the dismissal *in limine* of any ground of appeal relating to Mr Gbagbo's medical condition.<sup>24</sup> The Appeals Chamber rejected Mr Gbagbo's request for an extension of the page limit for the document in support of the appeal on 16 July 2015<sup>25</sup> (hereinafter: "Decision on Page Limit").

13. On 16 July 2015, Mr Gbagbo requested: (i) leave to reply to the Prosecutor's Response to the Notice of Appeal; and (ii) an extension of the time limit to file the document in support of the appeal<sup>26</sup> (hereinafter: "Request for Leave to Reply and Time Extension").

14. On 16 July 2015, Mr Gbagbo filed the "Document à l'appui de l'appel de la «Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article

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on 27 July 2015 ([ICC-02/11-01/15-134-Red3-tENG \(OA 6\)](#)); original French version, dated 20 July 2015 and registered the same day (ICC-02/11-01/15-134-Red3 (OA 6)).

<sup>22</sup> "Requête aux fins d'augmentation du nombre de pages autorisé que comprendra le document à l'appui de l'appel de la «Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute» (ICC-02/11-01/15-127-Conf)", ICC-02/11-01/15-136-Conf-Exp (OA 6); a corrigendum was filed on the same day and registered on 15 July 2015 (ICC-02/11-01/15-136-Conf-Exp-Corr (OA 6)); a confidential redacted *ex parte* version available to the Registrar, the Prosecutor, the Defence and the Office of Public Counsel for victims was filed on 14 July 2015 (ICC-02/11-01/15-136-Conf-Exp-Red (OA 6)); a corrigendum was filed on 14 July 2015 and registered on 15 July 2015 (ICC-02/11-01/15-136-Conf-Exp-Red-Corr (OA 6)); a public redacted version was registered on 20 July 2015 ([ICC-02/11-01/15-136-Corr-Red2 \(OA 6\)](#)).

<sup>23</sup> "[Prosecution's Response to Laurent Gbagbo's Defence notice of appeal \(ICC-02/11-01/15-134-Conf-Exp-Red\) and request for extension of pages of the document in support of appeal \(ICC-02/11-01/15-136-Conf-Exp-Red-Corr\)](#)", ICC-02/11-01/15-139-Red (OA 6). This document was originally filed as confidential *ex parte*, available to the Registry, Prosecutor, Mr Gbagbo and the Office of Public Counsel for victims only, but was reclassified as public pursuant to the "[Order for reclassification of documents](#)", 22 July 2015, ICC-02/11-01/15-157 (OA 6).

<sup>24</sup> [Prosecutor's Response to the Notice of Appeal](#), paras 3-8.

<sup>25</sup> "[Decision on the request of Mr Gbagbo for extension of page limit for his document in support of the appeal](#)", ICC-02/11-01/15-144 (OA 6). This document was originally filed as confidential but was reclassified as public pursuant to the "[Order for reclassification of documents](#)", 22 July 2015, ICC-02/11-01/15-157 (OA 6).

<sup>26</sup> "Demande urgente d'autorisation aux fins de pouvoir répliquer à la «Prosecution's Response to Laurent Gbagbo's Defence notice of appeal (ICC-02/11-01/15-134-Conf-Exp-Red) and request for extension of the page limit for the document in support of appeal (ICC-02/11-01/15-136-Conf-Exp-Red-Corr)» (ICC-02/11-01/15-139-Conf-Exp)", ICC-02/11-01/15-141-Conf-Exp (OA 6); a public redacted version was registered on 2 September 2015 ([ICC-02/11-01/15-141-Red \(OA 6\)](#)).

60(3) of the Statute » (ICC-02/11-01/15-127-Conf) du 8 juillet 2015”<sup>27</sup> (hereinafter: “Document in Support of the Appeal”).

15. On 21 July 2015, the victims requested the Appeals Chamber to rule that victims authorised to participate in the case have an automatic right to participate in the appeal and, alternatively, applied to participate in the present appeal.<sup>28</sup> On 22 July 2015, the Appeals Chamber granted the victims’ request.<sup>29</sup> Reasons for this decision were filed on 31 July 2015<sup>30</sup> (hereinafter: “Reasons for the Decision on Victim Participation”).

16. On 20 July 2015, the Prosecutor requested an unredacted or less redacted version of the Document in Support of the Appeal.<sup>31</sup> On 23 July 2015, the Appeals Chamber rendered the “Decision on the Prosecutor’s request for an unredacted or less redacted version of the document in support of the appeal”<sup>32</sup> (hereinafter: “Decision

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<sup>27</sup> Registered on 28 July 2015, ICC-02/11-01/15-147-Conf-Exp-tENG (OA 6); original French version, dated 8 July 2015 and registered the same day (ICC-02/11-01/15-147-Conf-Exp (OA 6)); a confidential redacted *ex parte* version, available to Mr Gbagbo, the Registry and the Prosecutor only, was filed on 16 July 2015 and registered on 20 July 2015 (ICC-02/11-01/15-147-Conf-Exp-Red OA 6); a public redacted version was registered on 23 July 2015 ([ICC-02/11-01/15-147-Red2 \(OA 6\)](#)).

<sup>28</sup> [“Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention \(ICC-02/11-01/15-134-Red3\)”](#), ICC-02/11-01/15-152 (OA 6).

<sup>29</sup> [“Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention \(ICC-02/11-01/15-134-Red3\)”](#), ICC-02/11-01/15-158 (OA 6).

<sup>30</sup> [“Reasons for the ‘Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention \(ICC-02/11-01/15-134-Red3\)’”](#), ICC-02/11-01/15-172 (OA 6).

<sup>31</sup> “Prosecution’s request for an unredacted or less redacted version of the “Document à l’appui de l’appel de la ‘Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute’ (ICC-02/11-01/15-127-Conf) du 8 juillet 2 (ICC-02/11-01/15-147-Conf-Exp-Red OA)”, ICC-02/11-01/15-149-Conf-Exp (OA 6); a public redacted version was registered on 1 September 2015 ([ICC-02/11-01/15-149-Red \(OA 6\)](#)). Pursuant to the Appeals Chamber’s [“Order on the filing of a response to the Prosecutor’s request for an unredacted or less redacted version of the document in support of the appeal”](#), filed on 22 July 2015 (ICC-02/11-01/15-153 (OA 6)), Mr Gbagbo responded to the Prosecutor’s request on 22 July 2015 (“Réponse à la « Prosecution’s request for an unredacted or less redacted version of the «Document à l’appui de l’appel de la «ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute» (ICC-02/11-01/15-127-Conf) du 8 juillet 2015» (ICC-02/11-01/15-147Conf-Exp-Red OA)”, ICC-02/11-01/15-156-Conf-Exp (OA 6)); a confidential redacted *ex parte* version, available to the Registry, Prosecutor and Mr Gbagbo only, was filed on the same day (ICC-02/11-01/15-156-Conf-Exp-Red (OA 6)); a public redacted version was registered on 2 September 2015 ([ICC-02/11-01/15-156-Red2 \(OA 6\)](#)).

<sup>32</sup> [ICC-02/11-01/15-159-Red \(OA 6\)](#). This document was originally filed confidentially but was reclassified to public pursuant to the [“Order in relation to confidential filings”](#) 31 August 2015, ICC-02/11-01/15-197 (OA 6).

on Redactions”), whereby the Prosecutor’s request was granted and Mr Gbagbo was ordered to file a less redacted version of the Document in Support of the Appeal. On 24 July 2015, Mr Gbagbo filed his “Observations portant sur la nature des expurgations à lever dans le document à l’appui de l’appel de la Défense en fonction de la décision de la Chambre d’Appel du 23 juillet 2015 (ICC-02/11-01/15-159-Conf-Exp)”<sup>33</sup> (hereinafter: “Observations on Decision on Redactions”), to which two different redacted versions of the Document in Support of the Appeal were annexed.<sup>34</sup>

17. On 27 July 2015, Mr Gbagbo filed the “Demande de précisions concernant le délai dont dispose la Défense et l’Accusation pour répondre aux observations de la RLV relatives au Document déposé par la Défense à l’appui de l’appel de la «Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute» (ICC-02/11-01/15-127-Conf) du 8 juillet 2015”<sup>35</sup> (hereinafter: Request to Set a Time Limit”) requesting the Appeals Chamber to set a time limit for his response to the Victims’ response to the Document in Support of the Appeal.

18. On 29 July 2015, the Prosecutor<sup>36</sup> and the Victims<sup>37</sup> filed their responses to the Document in Support of the Appeal (hereinafter: “Prosecutor’s Response to the Document in Support of the Appeal” and “Victims’ Response to the Document in Support of the Appeal” respectively).

19. On 7 August 2015, Mr Gbagbo requested the Appeals Chamber to recognise his automatic right to respond to any observations of the victims and, alternatively, to grant him leave to reply to the Victims’ Response to the Document in Support of the

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<sup>33</sup> ICC-02/11-01/15-161-Conf-Exp; a public redacted version was registered on 2 September 2015 ([ICC-02/11-01/15-161-Red](#) (OA 6)).

<sup>34</sup> One version contained fewer redactions and was made available to the Prosecutor and Mr Gbagbo only, ICC-02/11-01/15-161-Conf-Exp-Anx1. The other version contained more redactions and was made available to the Prosecutor, Mr Gbagbo and the Office of Public Counsel for victims only, ICC-02/11-01/15-161-Conf-Exp-Anx2.

<sup>35</sup> [ICC-02/11-01/15-162 \(OA 6\)](#).

<sup>36</sup> “Prosecution’s Response to the less redacted version of Mr Laurent Gbagbo’s Document in Support of Appeal against the Ninth Article 60(3)Decision (ICC-02/11-01/15-161-Conf-Exp-Anx1 OA6)”, ICC-02/11-01/15-169-Conf-Exp (OA 6); a confidential redacted *ex parte* version, available to the Prosecutor, Registry, Mr Gbagbo and Office of Public Counsel for victims only was filed on the same day (ICC-02/11-01/15-169-Conf-Exp-Red (OA 6)); a public redacted version was also filed on the same day ([ICC-02/11-01/15-169-Red2 \(OA 6\)](#)).

<sup>37</sup> “Response to the Defence’s document in support of the appeal against the ninth decision on the review of Mr Gbagbo’s detention (ICC-02/11-01/15-161-Conf-Exp-Anx2)”, ICC-02/11-01/15-168-Conf-Exp (OA 6); a public redacted version was registered on 20 August 2015 ([ICC-02/11-01/15-168-Red \(OA 6\)](#)).

Appeal<sup>38</sup> (hereinafter: “Request for Leave to Reply to the Victims’ Response to the Document in Support of the Appeal”). On 10 August 2015, the Appeals Chamber rendered a decision<sup>39</sup> (hereinafter: “Decision on Mr Gbagbo’s Request for Leave to Reply to the Victims’ Response to the Document in Support of the Appeal”) rejecting Mr Gbagbo’s requests. Reasons for the abovementioned decision are set out in the present judgment.<sup>40</sup>

### III. MERITS

#### A. Preliminary issues

1. *Prosecutor’s request for the dismissal in limine of any grounds of appeal relating to Mr Gbagbo’s medical condition and Mr Gbagbo’s Request for Leave to Reply and Time Extension.*

20. The Appeals Chamber notes that in her Response to the Notice of Appeal, the Prosecutor requested, *inter alia*, the dismissal *in limine* of any grounds of appeal related to Mr Gbagbo’s medical condition.<sup>41</sup> The Appeals Chamber considers that the Prosecutor’s request was premature, as at that time Mr Gbagbo had not yet filed the Document in Support of the Appeal setting out his arguments. The Appeals Chamber further notes that in the Prosecutor’s Response to the Document in Support of the Appeal, the Prosecutor does not pursue the request to dismiss *in limine* any grounds of appeal relating to his medical condition and instead requests the dismissal of the entire appeal on the merits. Under these circumstances, the Appeals Chamber considers that the Prosecutor’s request is moot and accordingly dismisses it.

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<sup>38</sup> “Defence request for the recognition of its automatic right to respond to any observation by the Representative of Victims and, in the alternative, Defence application for leave to reply to the “Response to the Defence’s document in support of the appeal against the ninth decision on the review of Mr. Gbagbo’s detention (ICC-02/11-01/15-161-Conf-ExpAnx2)” filed by the Representative of Victims (ICC-02/11-01/15-168-Conf-Exp)”, registered on 14 August 2015, ICC-02/11-01/15-177-Conf-Exp-tENG (OA 6); original French version, dated 7 August and registered on the same day; a public redacted version was registered on 2 September 2015 ([ICC-02/11-01/15-177-Red \(OA 6\)](#)).

<sup>39</sup> “[Decision on the “Requête de la Défense aux fins de voir constater son droit automatique de pouvoir répondre à toute intervention du Représentant des victimes et, à titre subsidiaire, demande de la Défense à être autorisée à répliquer à la réponse du Représentant des victimes «to the Defence’s document in support of the appeal against the ninth decision on the review of Mr Gbagbo’s detention \(ICC-02/11-01/15-161-Conf-ExpAnx2\)» \(ICC-02/11-01/15-168-Conf-Exp\)”](#)”, ICC-02/11-01/15-178 (OA 6).

<sup>40</sup> See *infra* paras 23-29.

<sup>41</sup> [Prosecutor’s Response to the Notice of Appeal](#), paras 3-8.

21. The Appeals Chamber further notes that in the Request for Leave to Reply and Time Extension, Mr Gbagbo requested: (i) leave to reply to the Prosecutor's Response to the Notice of Appeal; and (ii) an extension of the time limit to file the Document in Support of the Appeal.<sup>42</sup> The Appeals Chamber observes that Mr Gbagbo's Request for Leave to Reply and Time Extension was filed shortly before the deadline for the filing of the Document in Support of the Appeal. Before the Appeals Chamber had the opportunity to rule upon the request, Mr Gbagbo filed the Document in Support of the Appeal, within the time limit stipulated in regulation 64 (5) of the Regulations of the Court. Under these circumstances and having dismissed as moot the Prosecutor's request to dismiss *in limine* any grounds of appeal relating to Mr Gbagbo's medical condition, the Appeals Chamber considers that the Request for Leave to Reply and Time Extension is moot and hereby dismisses it.

2. *Mr Gbagbo's request to set a time limit to respond to the Victims' Response to the Document in Support of the Appeal*

22. The Appeals Chamber notes that on 27 July 2015, Mr Gbagbo requested the Appeals Chamber to inform him of the time limit for his response to the Victims' Response to the Document in Support of the Appeal.<sup>43</sup> The Appeals Chamber observes that subsequent to Mr Gbagbo's request, the Decision on Victim Participation was rendered and in the reasons therefor the Appeals Chamber held that regulation 24 (4) of the Regulations of the Court "precludes the possibility of an automatic response by the parties to the victims' response, except with the leave of the Appeals Chamber".<sup>44</sup> Under these circumstances, the Appeals Chamber considers Mr Gbagbo's request for the Appeals Chamber to set a time limit for his response to the Victims' Response to the Document in Support of the Appeal to be moot and therefore dismisses it.

3. *Reasons for the Decision on Mr Gbagbo's Request in relation to the Victims' Response to the Document in Support of the Appeal*

23. The Appeals Chamber recalls that in its Decision on Mr Gbagbo's Request for Leave to Reply to the Victims' Response to the Document in Support of the Appeal, it indicated that the reasons for the decision would be set out in the judgment. At the

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<sup>42</sup> [Request for Leave to Reply and Time Extension](#), pp. 9-10.

<sup>43</sup> [Request to Set a Time Limit](#).

<sup>44</sup> [Reasons for the Decision on Victim Participation](#), para. 20.

outset, the Appeals Chamber notes that in his request, Mr Gbagbo while not appearing to seek reconsideration, nevertheless challenges the correctness of the reasoning underlying the Decision on Victim Participation.<sup>45</sup> The Appeals Chamber notes with concern that the manner in which Mr Gbagbo challenges its decision is inappropriate and also amounts to mere disagreement with the Appeals Chamber. Accordingly, the Appeals Chamber disregards his challenge and directs him to be more circumspect when addressing the Appeals Chamber in the future.

24. The Appeals Chamber notes that Mr Gbagbo requested it to recognise his “automatic right” to respond to any observation of the victims, including the Victims’ Response to the Document in Support of the Appeal.<sup>46</sup>

25. In its Reasons for the Decision on Victim Participation, the Appeals Chamber noted that “regulation 24 (2) of the Regulations of the Court provides for victims or their legal representatives to file a response to any document when they are permitted to participate”.<sup>47</sup> The Appeals Chamber concluded that regulation 24 (4) of the Regulations of the Court, which states that a response may not be filed to any document which is itself a response or reply, “precludes the possibility of an automatic response by the parties to victims’ responses, except with the leave of the Appeals Chamber, pursuant to regulation 24 (5) of the Regulations of the Court”.<sup>48</sup>

26. In relation to replies to responses to documents in support of the appeal, the Appeals Chamber is cognisant of its jurisprudence, according to which “in appellate proceedings under rules 154 or 155 of the Rules of Procedure and Evidence, the appellant does not have a right to apply for leave to reply to the other participant’s response to the document in support of the appeal”.<sup>49</sup> The Appeals Chamber has further held:

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<sup>45</sup> [Request for Leave to Reply to the Victims’ Response to Document in Support of the Appeal](#), paras 13-17, 27, 29-30.

<sup>46</sup> [Request for Leave to Reply to the Victims’ Response to Document in Support of the Appeal](#), paras 22-31.

<sup>47</sup> [Reasons for the Decision on Victim Participation](#), para. 20.

<sup>48</sup> [Reasons for the Decision on Victim Participation](#), para. 20.

<sup>49</sup> *Prosecutor v. Thomas Lubanga Dyilo*, “[Decision on the Prosecutor’s “Application for Leave to Reply to ‘Conclusions de la défense en réponse au mémoire d’appel du Procureur’”](#)”, 12 September 2006, ICC-01/04-01/06-424 (OA 3) (hereinafter: “*Lubanga Decision on Leave to Reply*”), para. 5.

This does not mean, however, that further filings by the participants will never be possible in such proceedings; should the arguments that are raised in a response to a document in support of the appeal make further submissions by the appellant necessary for the proper disposal of the appeal, the Appeals Chamber will issue an order to that effect pursuant to regulation 28 (2) of the Regulations of the Court, bearing in mind the principle of equality of arms and the need for expeditious proceedings.<sup>50</sup>

27. In line with the Appeals Chamber's recent departure from its previous jurisprudence on victim participation in appeals under article 82 (1) (b) and (d) of the Statute, and in the interests of efficiency, the Appeals Chamber deems it appropriate for an appellant who wishes to reply to a participant's response to a document in support of the appeal, to first seek leave of the Appeals Chamber under regulation 24 (5) of the Regulations of the Court. Given the time limit set out in regulation 34 (c) of the Regulations of the Court for the filing of a reply to a response, the Appeals Chamber finds this procedure to be more efficient than that set out in regulation 28 of the Regulations of the Court. Under these circumstances, Mr Gbagbo's request to recognise his "automatic right" to respond to any observation of the victims is dismissed.

28. In the alternative, Mr Gbagbo requests leave to reply to the Victims' Response to the Document in Support of the Appeal in relation to the following issues: (i) whether the first instance Chamber must satisfy itself that the conditions of article 58 (1) (b) of the Statute, justifying detention, are met at the time of that Chamber's decision on detention; (ii) whether the first instance Chamber could base its conclusion that there is a pro-Gbagbo network on simple appeals for his release; (iii) whether the Impugned Decision was sufficiently detailed and reasoned; and (iv) whether the second ground of appeal arises from the Impugned Decision.<sup>51</sup>

29. The Appeals Chamber notes that issues (i) and (ii) were not addressed in the Victims' Response to the Document in Support of the Appeal and therefore Mr Gbagbo's observations on these issues would not constitute a reply. As regards issues (iii) and (iv), the Appeals Chamber notes that apart from disagreeing with the arguments made by the victims in their response to the Document in Support of the

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<sup>50</sup> [Lubanga Decision on Leave to Reply](#), para. 7.

<sup>51</sup> [Request for Leave to Reply to the Victims' Response to Document in Support of the Appeal](#), paras 32-57.

Appeal, Mr Gbagbo does not explain how his further submissions on these issues could assist in the determination of the matter under appeal. Finally, the Appeals Chamber observes that the arguments which Mr Gbagbo seeks to make in reply are repetitive of those made in the Document in Support of the Appeal. Under these circumstances, the Appeals Chamber rejects Mr Gbagbo's Request for Leave to Reply to the Victims' Response to the Document in Support of the Appeal.

## **B. First Ground of Appeal**

30. Under the first ground of appeal, Mr Gbagbo alleges that, when reviewing its prior ruling on his detention, the Trial Chamber committed various legal errors. In addition, Mr Gbagbo raises a factual error in relation to the Trial Chamber's finding that Mr Gbagbo's support network continues to pose a risk under article 58 (1) (b) (i) and (ii) of the Statute thus warranting his continued detention.

### *1. Alleged legal error: Reversal of the burden of proof*

#### **(a) Relevant procedural background and part of the Impugned Decision**

31. In anticipation of the Trial Chamber's periodic review of Mr Gbagbo's detention pursuant to article 60 (3) of the Statute read with rule 118 (2) of the Rules of Procedure and Evidence, Judge Geoffrey Henderson acting as Single Judge (hereinafter: "Single Judge") on behalf of the Trial Chamber issued an order<sup>52</sup> inviting submissions on Mr Gbagbo's continued detention or release as follows:

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

ORDERS the Defence to submit any observations on Mr Gbagbo's continued detention or release (with or without conditions), including the existence of any changed circumstances pursuant to Article 60(3) of the Statute, on 28 May 2015;

ORDERS the Office of the Prosecutor and the Legal Representative of Victims to file any observations on Mr Gbagbo's continued detention or release (with or without conditions), including the existence of any changed circumstances pursuant to Article 60(3) of the Statute, on 11 June 2015; and

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<sup>52</sup> ["Order requesting the parties' and participants' observations under Article 60 \(3\) of the Statute"](#), dated 8 May 2015 and registered on 11 May 2015, ICC-02/11-01/15-61 (hereinafter: "Order Requesting Submissions").

ORDERS the Defence to file its response, if any, on 25 June 2015.<sup>53</sup>

32. In the Impugned Decision, the Trial Chamber noted Mr Gbagbo's contention that by inviting his submissions on changed circumstances prior to those of the Prosecutor and the Victims, the Chamber reversed the burden of proof.<sup>54</sup> In response, the Trial Chamber reasoned:

[W]hen conducting a review of its previous decision concerning the detention of the accused under Article 60(3) of the Statute, [the Trial Chamber] need only consider whether any changed circumstances exist, rather than conducting a *de novo* review of the conditions underpinning detention. Therefore, while the Chamber must, *inter alia*, “weigh the [Prosecutor's] submissions against the submissions, if any, of the detained person”, there is no requirement for the Prosecution to first “re-establish circumstances that have already been established”. Consequently, in the Chamber's view, given the limited nature of the detention review under Article 60(3) of the Statute, the fact that the Defence was ordered to file its submissions first did not result in a reversal of the burden of proof. The Chamber therefore dismisses this argument.<sup>55</sup> [Footnotes omitted]

**(b) Mr Gbagbo's submissions**

33. On appeal, Mr Gbagbo argues that in responding to his argument the Trial Chamber “sidesteps the point in question”.<sup>56</sup> He submits that while the Prosecutor “is not required to re-establish what was true in the past”, she is required to “prove that what was true yesterday is still true today”.<sup>57</sup> Thus in his view, in review proceedings under article 60 (3) of the Statute, the Prosecutor has the duty to establish that there has been no change in the circumstances underpinning detention and by requiring him to make his submissions first and the Prosecutor and the victims to subsequently reply to his submissions, the Trial Chamber effectively reversed the burden of proof.<sup>58</sup> In addition, Mr Gbagbo argues that the Trial Chamber's “claim not to have reversed the burden of proof is logically false and does not rest on any demonstration or substantiated reasoning”.<sup>59</sup> Mr Gbagbo argues further that the Trial Chamber fails to explain what it means by “limited nature of the detention review”.<sup>60</sup> In his view, it may suggest that the Trial Chamber will erroneously rely on what was decided in the

<sup>53</sup> [Order Requesting Submissions](#), p. 5.

<sup>54</sup> [Impugned Decision](#), para. 3 referring to [Mr Gbagbo's Submissions](#), paras 22-24.

<sup>55</sup> [Impugned Decision](#), para. 3.

<sup>56</sup> [Document in Support of the Appeal](#), para. 22.

<sup>57</sup> [Document in Support of the Appeal](#), para. 22.

<sup>58</sup> [Document in Support of the Appeal](#), paras 20-23.

<sup>59</sup> [Document in Support of the Appeal](#), para. 24.

<sup>60</sup> [Document in Support of the Appeal](#), para. 23.

past and in so doing, “discharge the Prosecution of its duty to demonstrate in the present”.<sup>61</sup> Lastly, Mr Gbagbo contends that this “reversal of the burden of proof constitutes an error in law that vitiates the Impugned Decision”.<sup>62</sup>

**(c) Prosecutor’s submissions**

34. The Prosecutor submits that the Trial Chamber “did not alter the burden of proof when it ordered [Mr Gbagbo] to file his observations first”.<sup>63</sup> In her view, Mr Gbagbo shows no error in the Trial Chamber’s approach as the Prosecutor was required to show that there were no changed circumstances.<sup>64</sup> In addition, the Prosecutor avers that even though Mr Gbagbo filed first, he was authorised to respond to the Prosecutor’s and victims’ submissions.<sup>65</sup> With respect to Mr Gbagbo’s argument concerning the Trial Chamber’s reference to the “limited nature” of the detention review, the Prosecutor submits that Mr Gbagbo is misconstruing the Trial Chamber’s reference by disregarding its proper context.<sup>66</sup> The Prosecutor observes that the Trial Chamber was using the language of the Appeals Chamber in the *Gbagbo* OA Judgment to “distinguish the scope of review required in reaching a decision under article 60(3) from a decision under article 60(2)”.<sup>67</sup>

**(d) Victims’ submissions**

35. The victims submit that the Trial Chamber did not impose “any burden on the Defence to prove that the detention is not currently justified”.<sup>68</sup> The victims observe that Mr Gbagbo was invited and not compelled to present his submissions.<sup>69</sup> Moreover, they observe that the Prosecutor “was ordered to file observations on Mr. Gbagbo’s continued detention or release, to which the Defence was given an opportunity to respond” (footnote omitted).<sup>70</sup> Further, the victims observe that the “articulation of the Impugned Decision presenting first the arguments of the Prosecution to maintain Mr. Gbagbo in detention and confronting them with those of

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<sup>61</sup> [Document in Support of the Appeal](#), para. 23.

<sup>62</sup> [Document in Support of the Appeal](#), para. 24.

<sup>63</sup> [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 10.

<sup>64</sup> [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 10.

<sup>65</sup> [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 10.

<sup>66</sup> [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 10.

<sup>67</sup> [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 10 referring to [Gbagbo OA Judgment](#), para. 24.

<sup>68</sup> [Victims’ Response to the Document in Support of the Appeal](#), para. 24.

<sup>69</sup> [Victims’ Response to the Document in Support of the Appeal](#), para. 25.

<sup>70</sup> [Victims’ Response to the Document in Support of the Appeal](#), para. 25.

the Defence to release Mr. Gbagbo further shows that there has not been any reversal of the burden of proof” (footnote omitted).<sup>71</sup>

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

36. At the outset, the Appeals Chamber recalls that it has previously indicated that in proceedings under article 60 (3) of the Statute, although the Prosecutor does not have to re-establish circumstances that have already been established she must however show that there has been no change in those circumstances that previously justified detention and “[s]he must bring to the attention of the Chamber any other relevant information of which [s]he is aware that relates to the question of detention or release”.<sup>72</sup> Consequently, there can be no doubt that in proceedings under article 60 (3) of the Statute the onus is on the Prosecutor to demonstrate that there has been no change in the circumstances justifying detention.

37. On this basis, the Appeals Chamber finds that the Trial Chamber did not reverse the burden of proof when it ordered Mr Gbagbo to file observations on his continued detention or release before the Prosecutor and the victims. This is because, regardless of the order in which submissions were received, the Prosecutor was still required by the Trial Chamber to show that circumstances had not changed to warrant any modification in the ruling on detention. Moreover, the Appeals Chamber notes that in the Impugned Decision, the Trial Chamber correctly acknowledged and observed its duty to “weigh the Prosecutor’s submissions against the submissions, if any, of the detained person”<sup>73</sup> when conducting the review of Mr Gbagbo’s detention. The Trial Chamber further permitted Mr Gbagbo to have the last word by availing him of the opportunity to respond to the submissions of the Prosecutor and the victims, an opportunity of which, the Appeals Chamber notes, Mr Gbagbo took full advantage.<sup>74</sup>

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<sup>71</sup> [Victims’ Response to the Document in Support of the Appeal](#), para. 26.

<sup>72</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, “[Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118\(2\) of the Rules of Procedure and Evidence”](#)”, 25 November 2010, ICC-01/05-01/08-1019 (OA 4) (hereinafter: “*Bemba OA 4 Judgment*”), para. 51.

<sup>73</sup> [Impugned Decision](#), para. 3 referring to [Bemba OA 4 Judgment](#), para. 52.

<sup>74</sup> See [Mr Gbagbo’s Further Submissions](#).

38. In the circumstances, the Appeals Chamber is not persuaded by Mr Gbagbo's argument that the Trial Chamber reversed the burden of proof by ordering him to file his observations first. The argument is therefore rejected.

39. With respect to Mr Gbagbo's remaining arguments, namely (i) that the Trial Chamber failed to properly reason its finding that it had not reversed the burden of proof and (ii) that the Trial Chamber had failed to explain what it meant by "limited nature of the detention review", the Appeals Chamber is unpersuaded by these arguments. The Appeals Chamber considers the Trial Chamber's reasoning to be sufficiently clear to discern the basis for its finding that the burden of proof had not been reversed.<sup>75</sup> Furthermore, in the Appeals Chamber's view, given that the Trial Chamber, in the context of discussing the nature of a review under article 60 (3) of the Statute, cited to the previous jurisprudence of the Appeals Chamber on the "limited nature" of a periodic review of detention, it is unclear in the circumstances, what further explanation the Trial Chamber was expected to give in this regard.<sup>76</sup> Mr Gbagbo does not demonstrate any error in either of these two arguments and they are accordingly rejected.

2. *Alleged legal error: Failure to review the conditions underpinning detention*

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

40. As noted in paragraph 32 above, in the context of reasoning why it had not reversed the burden of proof when it ordered Mr Gbagbo to file his observations first, the Trial Chamber stated that "when conducting a review of its previous decision concerning the detention of the accused under Article 60(3) of the Statute, it need only consider whether any changed circumstances exist, rather than conducting a *de novo* review of the conditions underpinning detention" (footnote omitted).<sup>77</sup>

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<sup>75</sup> See *Prosecutor v. Thomas Lubanga Dyilo*, "[Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"](#)", 14 December 2006, ICC-01/04-01/06-773 (OA 5) (hereinafter: "*Lubanga OA 5 Judgment*"), para. 20.

<sup>76</sup> See *Gbagbo OA Judgment*, para. 24.

<sup>77</sup> *Impugned Decision*, para. 3.

**(b) Mr Gbagbo's submissions**

41. Mr Gbagbo argues that the Trial Chamber committed an error of law “when it considered that it did not have to ‘review the conditions underpinning detention’”.<sup>78</sup> In Mr Gbagbo’s view, the issue does not revolve around whether the review is *de novo* or not, but rather around the Trial Chamber’s “duty to satisfy itself that a person is not kept in detention for no reason”.<sup>79</sup>

**(c) Prosecutor's submissions**

42. The Prosecutor submits that in reaching its determination that there were no changed circumstances, the Trial Chamber did not need to address *de novo* each factor underpinning detention.<sup>80</sup> Furthermore, the Prosecutor avers that the Trial Chamber’s correct application of the law confirms its correct understanding of the relevant law.<sup>81</sup> In particular, the Prosecutor notes that in conducting its review the Trial Chamber, “in light of the previous decisions on detention, [...] analysed whether there had been any changed circumstances with respect to [Mr Gbagbo’s] network of supporters, which would affect its previous ruling that [Mr Gbagbo’s] continued detention [...] was necessary”.<sup>82</sup> Thus, in the Prosecutor’s view the Trial Chamber did satisfy itself that in the absence of changed circumstances, Mr Gbagbo’s continued detention was warranted.<sup>83</sup>

**(d) Victims' submissions**

43. The victims submit that the Trial Chamber correctly stated that under article 60 (3) of the Statute it “*need only consider whether any changed circumstances exist* [to warrant the disturbing of a previous ruling on detention], *rather than conducting a de novo review of the conditions underpinning detention*” (footnote omitted).<sup>84</sup> Relying on the previous jurisprudence of the Appeals Chamber, the victims submit that “a *de novo* or *ab initio* review is only merited under Article 60 (2) of the [...] Statute”.<sup>85</sup>

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<sup>78</sup> [Document in Support of the Appeal](#), para. 30 quoting [Impugned Decision](#), para. 3.

<sup>79</sup> [Document in Support of the Appeal](#), para. 29.

<sup>80</sup> [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 6 referring to [Gbagbo OA 4 Judgment](#), para. 53.

<sup>81</sup> [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 8.

<sup>82</sup> [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 8.

<sup>83</sup> [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 8.

<sup>84</sup> [Victims’ Response to the Document in Support of the Appeal](#), para. 32.

<sup>85</sup> [Victims’ Response to the Document in Support of the Appeal](#), para. 32.

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

44. The Appeals Chamber understands Mr Gbagbo's arguments under this ground of appeal to allege an error in the Trial Chamber's application of the law relevant to periodic reviews of detention. In particular, the Appeals Chamber notes that Mr Gbagbo argues that in conducting its review of his detention, the Trial Chamber "seems to wish to use the fact that it does not have to undertake a '*de novo* review' to avoid its obligation to check whether the conditions justifying the detention are still met".<sup>86</sup>

45. The Appeals Chamber has determined that in conducting a periodic review of detention under article 60 (3) of the Statute, a Chamber "does not have to enter findings on the circumstances already decided upon in the ruling on detention. It must, however, look at those circumstances, [...] and determine whether they still exist" in light of changed circumstances, if any.<sup>87</sup> The requirement of 'changed circumstances' "imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary".<sup>88</sup> Thus, the circumstances justifying detention may change over time.

46. In the case at hand, the Appeals Chamber observes that contrary to Mr Gbagbo's contention, the Trial Chamber did in fact comply with its obligation to review the circumstances underpinning Mr Gbagbo's detention. In particular, the Trial Chamber noted that "the issue of Mr Gbagbo's network of supporters has been considered as a relevant circumstance underpinning the need for his continued detention under Article 58(1)(b)(i) and (ii) of the Statute".<sup>89</sup> The Trial Chamber went on to acknowledge that given the fluctuating nature of this "network's political and military organisation" it was appropriate to assess whether any changed circumstances

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<sup>86</sup> [Document in Support of the Appeal](#), para. 26.

<sup>87</sup> [Bemba OA 4 Judgement](#), para. 53.

<sup>88</sup> *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), para. 60.

<sup>89</sup> [Impugned Decision](#), para. 7.

with respect to the network would affect its previous ruling on detention.<sup>90</sup> In light of this, the Appeals Chamber considers Mr Gbagbo's argument to be misleading and hereby rejects it.

3. *Alleged legal error: Failure to address Mr Gbagbo's arguments which were previously dismissed*

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

47. In the Impugned Decision, the Trial Chamber identified four of Mr Gbagbo's arguments which it found had been previously raised and dismissed. These are: "(i) the conditions underpinning detention must be re-assessed to maintain consistency with human rights principles; (ii) there is currently no organised network of people supporting Mr Gbagbo; (iii) the calls for Mr Gbagbo's release are legitimate; and (iv) Mr Gbagbo's release will have positive consequences on the national reconciliation process" (footnotes omitted).<sup>91</sup> In this regard the Trial Chamber held:

[It] recalls that it is not required to 'entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions'. In this regard, the Chamber notes with concern that the aforementioned arguments made by the Defence have been raised previously and already dismissed by the Chamber as irrelevant to its assessment of Mr Gbagbo's detention under Article 60(3) of the Statute. The Chamber shall therefore not adjudicate these arguments further.<sup>92</sup> [Footnotes omitted.]

**(b) Mr Gbagbo's submissions**

48. Mr Gbagbo submits that the Trial Chamber "erred in law by not responding to the Defence's new arguments and by discounting them as a matter of principle".<sup>93</sup> In Mr Gbagbo's submission, the Trial Chamber refused to examine his arguments "on the basis of their appearance (a discussion of the existence of a network) and not on their substance, allowing it to dispense with debate on the reasons for [his] detention".<sup>94</sup> Furthermore, he argues that in doing so, the Trial Chamber effectively "precludes [him] from challenging at each review the *current* existence of conditions

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<sup>90</sup> [Impugned Decision](#), para. 7.

<sup>91</sup> [Impugned Decision](#), para. 5.

<sup>92</sup> [Impugned Decision](#), para. 6.

<sup>93</sup> [Document in Support of the Appeal](#), para. 35.

<sup>94</sup> [Document in Support of the Appeal](#), para. 32.

justifying the detention on the basis that previous submissions on the non-existence at that time of a network did not succeed” (emphasis in original).<sup>95</sup>

**(c) Prosecutor’s submissions**

49. The Prosecutor submits that “[c]onsistent with the Appeals Chamber’s jurisprudence, the Trial Chamber correctly dismissed [Mr Gbagbo’s] arguments because they had been previously raised and dismissed” (footnotes omitted).<sup>96</sup> With respect to Mr Gbagbo’s argument that there is no organised network of people supporting him, the Prosecutor submits that “the Pre-Trial Chamber, Trial Chamber and Appeals Chamber have repeatedly dismissed the same arguments and confirmed that there is such an organised network of supporters justifying [Mr Gbagbo’s] detention” (footnotes omitted).<sup>97</sup>

**(d) Victims’ submissions**

50. The victims submit that the Trial Chamber did not err in dismissing Mr Gbagbo’s arguments. In their view, the Trial Chamber acted reasonably and “in line with the relevant jurisprudence” (footnote omitted).<sup>98</sup>

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

51. The Appeals Chamber has previously stated that in conducting a periodic review of detention a Chamber is not required to “entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions”.<sup>99</sup> In the appeal at hand, Mr Gbagbo takes issue with the Trial Chamber’s dismissal of some of his arguments on this basis. In Mr Gbagbo’s view, such reasoning precludes him “from challenging at each review the *current* existence of conditions justifying the detention” (emphasis in original).<sup>100</sup> For the reasons that follow, the Appeals Chamber finds no merit in this argument.

52. The Appeals Chamber recalls that in

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<sup>95</sup> [Document in Support of the Appeal](#), para. 33.

<sup>96</sup> [Prosecutor's Response to the Document in Support of the Appeal](#), para. 11 referring to [Impugned Decision](#), para. 6 and to [Bemba OA 4 Judgment](#), para. 53.

<sup>97</sup> [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 11 referring to [Decision of 13 July 2012](#), paras 60-62; [Seventh Detention Review Decision](#), paras 54-60, 65; [Eighth Detention Review Decision](#), paras 30, 39; [Gbagbo OA Judgment](#), paras 59, 63; [Gbagbo OA 4 Judgment](#), para. 54.

<sup>98</sup> [Victims’ Response to the Document in Support of the Appeal](#), para. 39.

<sup>99</sup> [Bemba OA 4 Judgment](#), para. 53.

<sup>100</sup> [Document in Support of the Appeal](#), para. 33.

carrying out a periodic review of a ruling on detention under article 60 (3) of the Statute [a Chamber] must satisfy itself that the conditions under article 58 (1) of the Statute, as required by article 60 (2) of the Statute, continue to be met. In doing so, the Chamber must revert to the ruling on detention to determine whether there has been a change in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58 (1) of the Statute.<sup>101</sup> [Footnotes omitted.]

It follows, that a periodic review of detention, necessarily involves an assessment of whether the conditions under article 58 (1) of the Statute continue to be met at that time. In light of this, it cannot be said that Mr Gbagbo was precluded from challenging the *current* existence of conditions justifying his detention. The Appeals Chamber notes, however, that in challenging the conditions justifying detention, it is not enough to merely allege changed circumstances based solely on arguments that have already been determined to be of no relevance.

53. In the case at hand, the Trial Chamber dismissed Mr Gbagbo's various arguments on the basis that they had been previously rejected as irrelevant to its assessment of his continued detention.<sup>102</sup> The Appeals Chamber finds no error in this determination, as it is evident from the Trial Chamber's reference at footnote 22 of the Impugned Decision, that these same arguments were indeed dismissed in the Seventh Detention Review Decision for lack of relevance. The Appeals Chamber considers that by repeatedly raising these same arguments without more, Mr Gbagbo demonstrates mere disagreement with the Trial Chamber's finding that his arguments are irrelevant. Hence, the Appeals Chamber finds that Mr Gbagbo does not establish an error and his arguments are therefore rejected.

4. *Alleged legal error: Failure to provide a sufficiently reasoned decision*

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

54. In the Impugned Decision, the Trial Chamber referred to the parties' submissions and evidence,<sup>103</sup> dismissed repetitive arguments,<sup>104</sup> and on the basis of the evidence before it concluded that there were no changed circumstances regarding

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<sup>101</sup> [Bemba OA 4 Judgment](#), para. 52.

<sup>102</sup> [Impugned Decision](#), para. 6.

<sup>103</sup> [Impugned Decision](#), paras 4-5.

<sup>104</sup> [Impugned Decision](#), para. 6.

Mr Gbagbo's support network, that would warrant a modification of its risk assessment under article 58 (1) (b) (i) and (ii) of the Statute.<sup>105</sup>

**(b) Mr Gbagbo's submissions**

55. Mr Gbagbo submits that only four pages of the Impugned Decision are devoted to the Trial Chamber's analysis.<sup>106</sup> He further avers that the Trial Chamber failed to explain the manner in which it analysed the evidence presented by the Prosecutor and on what basis it did not consider the facts alleged by him.<sup>107</sup> In particular, Mr Gbagbo argues that it is not possible to identify the facts on which the Trial Chamber relied to reach its conclusion that his continued detention was warranted, on the basis that a pro-Gbagbo support network continues to exist.<sup>108</sup> In Mr Gbagbo's view, the failure of the Trial Chamber to provide sound reasoning amounts to a "flagrant violation of [Mr Gbagbo]'s fundamental right to liberty a violation of the letter and the spirit of article 60 (3)" of the Statute.<sup>109</sup>

**(c) Prosecutor's submissions**

56. The Prosecutor argues that the Trial Chamber "adequately reasoned [the Impugned Decision]".<sup>110</sup> She contends that the Trial Chamber addressed the parties' submissions, "indicated which information and facts it relied on" and explained the reasons for which some arguments were disregarded.<sup>111</sup> The Prosecutor recalls that the Trial Chamber did not entertain Mr Gbagbo's arguments because they were repetitive of arguments already considered and dismissed.<sup>112</sup> According to the Prosecutor, a concise analysis can also be comprehensive.<sup>113</sup>

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<sup>105</sup> [Impugned Decision](#), paras 7-11.

<sup>106</sup> [Document in Support of the Appeal](#), para. 46.

<sup>107</sup> [Document in Support of the Appeal](#), para. 46.

<sup>108</sup> [Document in Support of the Appeal](#), para. 49.

<sup>109</sup> [Document in Support of the Appeal](#), para. 49.

<sup>110</sup> [Prosecutor's Response to the Document in Support of the Appeal](#), para. 12.

<sup>111</sup> [Prosecutor's Response to the Document in Support of the Appeal](#), para. 12 referring to [Impugned Decision](#), paras 4-5, 8-11.

<sup>112</sup> [Prosecutor's Response to the Document in Support of the Appeal](#), para. 12 referring to [Impugned Decision](#), para. 6.

<sup>113</sup> [Prosecutor's Response to the Document in Support of the Appeal](#), para. 12.

**(d) Victims' submissions**

57. The victims submit that the analysis in the Impugned Decision “is sufficiently detailed and reasoned”.<sup>114</sup> Citing human rights jurisprudence, the victims further argue that the Trial Chamber was not obliged to provide a “full explanation for each and every aspect” of the Impugned Decision.<sup>115</sup> In the victims’ view, the Trial Chamber referred to the parties’ arguments and the evidence submitted by them and correctly disregarded those arguments that had been previously submitted and found to be irrelevant.<sup>116</sup> Finally, the victims submit that the Trial Chamber indicated the evidence on which it relied.<sup>117</sup>

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

58. The Appeals Chamber understands Mr Gbagbo to raise three arguments in relation to the alleged lack of reasoning in the Impugned Decision, namely (i) the Trial Chamber’s failure to identify the facts on which it relied to reach its conclusion that his continued detention was warranted; (ii) the basis on which the Trial Chamber dismissed facts alleged by him; and (iii) the Trial Chamber’s failure to explain the manner in which it analysed the evidence presented by the Prosecutor. In relation to Mr Gbagbo’s second argument, the Appeals Chamber notes that this argument is repeated by Mr Gbagbo and was addressed in the preceding section of this judgment.<sup>118</sup> As such, the Appeals Chamber will not restate its findings here.

59. The Appeals Chamber has held that when assessing the sufficiency of reasoning in a decision:

The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the [...] Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.<sup>119</sup>

60. As to Mr Gbagbo’s first argument, the Appeals Chamber considers that the Impugned Decision identifies with sufficient clarity the fact that the “calls for release

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<sup>114</sup> [Victims’ Response to the Document in Support of the Appeal](#), para. 47.

<sup>115</sup> [Victims’ Response to the Document in Support of the Appeal](#), para. 47.

<sup>116</sup> [Victims’ Response to the Document in Support of the Appeal](#), paras 48, 50.

<sup>117</sup> [Victims’ Response to the Document in Support of the Appeal](#), para. 50.

<sup>118</sup> See paras 51-53.

<sup>119</sup> [Lubanga OA 5 Judgment](#), para. 20.

of Mr Gbagbo” demonstrated “the continued existence of Mr Gbagbo’s support network”, which in turn necessitated his continued detention (footnote omitted).<sup>120</sup> Thus, the Appeals Chamber finds no merit in Mr Gbagbo’s argument that the Trial Chamber failed to identify the facts on which it relied to reach its conclusion.

61. As to Mr Gbagbo’s remaining argument, the Appeals Chamber considers that the Trial Chamber did not set out in much detail how it analysed the evidence presented by the Prosecutor or how it reached its factual conclusion that Mr Gbagbo’s support network continued to exist. Nevertheless, the Appeals Chamber considers that it is still discernible how the Trial Chamber reached its conclusion. This is because, in stating its conclusion, the Trial Chamber reasoned that the “further material provided by the [Prosecutor], particularly that supporting calls for release of Mr Gbagbo [...] clearly illustrates the continued existence of Mr Gbagbo’s support network” (footnotes omitted).<sup>121</sup> This reasoning, when read together with the Trial Chamber’s references in the footnotes, to the relevant paragraphs of the submissions of the Prosecutor and those of Mr Gbagbo, reveals the basis underlying the conclusion reached. Mr Gbagbo’s argument in this regard is therefore rejected.

62. In sum, the Appeals Chamber is not persuaded by Mr Gbagbo’s arguments that the Trial Chamber failed to meet its obligation to provide a reasoned decision.

5. *Alleged factual error: The existence of a network of supporters and the risks under article 58 (1) (b) (i) and (ii) of the Statute related thereto*

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

63. The Trial Chamber recalled that the issue of Mr Gbagbo’s network of supporters had been found to be a relevant circumstance underpinning the need for his continued detention under article 58 (1) (b) (i) and (ii) of the Statute. Accordingly, the Trial Chamber considered it “appropriate to assess whether there are any changed circumstances with respect to Mr Gbagbo’s network” that could have an effect on the previous rulings regarding the conditions under article 58 of the Statute.<sup>122</sup>

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<sup>120</sup> [Impugned Decision](#), para. 11.

<sup>121</sup> [Impugned Decision](#), para. 11.

<sup>122</sup> [Impugned Decision](#), para. 7.

64. The Trial Chamber cited the information submitted by the Prosecutor in support of the ongoing existence of the network of supporters, namely, a report of the United Nations Groups of Experts on Côte d'Ivoire dated 13 April 2015,<sup>123</sup> information obtained from a witness,<sup>124</sup> references to the role of Mr Hubert Oulaye<sup>125</sup> and evidence of calls for Mr Gbagbo's release.<sup>126</sup>

65. The Trial Chamber decided not to rely on the statement of a witness.<sup>127</sup> It concluded:

[T]he Chamber is of the view that the further material provided by the [Prosecutor], particularly that supporting calls for [the] release of Mr Gbagbo, a fact which is not refuted by [Mr Gbagbo], clearly illustrates the continued existence of Mr Gbagbo's support network. The Chamber is therefore satisfied that there are no changed circumstances regarding Mr Gbagbo's network of supporters which would warrant a modification of its risk assessment under [a]rticle 58(1)(b)(i) and (ii) of the Statute.<sup>128</sup> [Footnotes omitted.]

#### (b) Mr Gbagbo's submissions

66. Mr Gbagbo submits that the Trial Chamber failed to direct the Prosecutor to provide details of what the "pro-Gbagbo network" means and how it operates.<sup>129</sup> Mr Gbagbo argues that the fact that the FPI leaders and activists claim to be Mr Gbagbo's followers does not suffice to criminalise the FPI.<sup>130</sup> Mr Gbagbo avers that the Prosecutor's arguments regarding FPI hardliners are unsubstantiated.<sup>131</sup>

67. Mr Gbagbo submits that, in response to the Prosecutor's assertions, he showed that: (i) the circumstances on which she relied existed between 2012 and 2014; (ii) recent arrests in the Republic of Côte d'Ivoire do not concern FPI hardliners but members of the non-FPI opposition; and (iii) calls for Mr Gbagbo's release came

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<sup>123</sup> [Impugned Decision](#), para. 8 referring to [Prosecutor's Submissions](#), para. 7 referring to United Nations, Security Council, "[Final Report of the Groups of Experts on Côte d'Ivoire pursuant to paragraph 27 of the Security Council resolution 2153 \(2014\)](#)", 13 April 2015, S/2015/252 (hereinafter: "Group of Experts Report"), p. 3.

<sup>124</sup> [Impugned Decision](#), para. 8 referring to [Prosecutor's Submissions](#), para. 8 and confidential annex A to [Prosecutor's Submissions](#).

<sup>125</sup> [Impugned Decision](#), para. 8 referring to [Prosecutor's Submissions](#), paras 10-11.

<sup>126</sup> [Impugned Decision](#), para. 8 referring to [Prosecutor's Submissions](#), paras 13-16.

<sup>127</sup> [Impugned Decision](#), para. 10.

<sup>128</sup> [Impugned Decision](#), para. 11.

<sup>129</sup> [Document in Support of the Appeal](#), para. 37.

<sup>130</sup> [Document in Support of the Appeal](#), para. 39.

<sup>131</sup> [Document in Support of the Appeal](#), para. 40.

from politicians as well as from members of the civil society.<sup>132</sup> Mr Gbagbo further argues that the Trial Chamber disregarded these arguments or considered them to be irrelevant.<sup>133</sup>

68. Finally, Mr Gbagbo asserts that the Prosecutor failed to provide evidence that the people calling for his release wish to help him abscond.<sup>134</sup> He contends that he continues to be detained because of his popularity.<sup>135</sup>

**(c) Prosecutor's submissions**

69. The Prosecutor submits that Mr Gbagbo's arguments regarding the network's structure and the Prosecutor's purported conflation of the network with the FPI were already dismissed in previous decisions.<sup>136</sup> She contends that Mr Gbagbo's arguments concerning incidents to which she refers constitute "mere disagreement with the Trial Chamber's conclusions, or with the weight it [...] accorded to particular factors".<sup>137</sup> The Prosecutor argues that the events relied upon by the Trial Chamber occurred from March to May 2015, rather than in 2012-2014, as argued by Mr Gbagbo.<sup>138</sup>

**(d) Victims' submissions**

70. The victims submit that Mr Gbagbo raises arguments already considered by the Trial Chamber and only refers to a disagreement with the findings of the Trial Chamber rather than establishing that the Trial Chamber could not have reasonably reached its conclusions on the basis of the evidence before it.<sup>139</sup>

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

71. The Appeals Chamber notes that Mr Gbagbo challenges findings made by the Pre-Trial and Trial Chambers in previous decisions concerning the review of his detention.<sup>140</sup> The Appeals Chamber emphasises that its review is limited to the findings made in the Impugned Decision. Accordingly, to the extent that Mr Gbagbo

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<sup>132</sup> [Document in Support of the Appeal](#), para. 41.

<sup>133</sup> [Document in Support of the Appeal](#), para. 42.

<sup>134</sup> [Document in Support of the Appeal](#), para. 43.

<sup>135</sup> [Document in Support of the Appeal](#), para. 44.

<sup>136</sup> [Prosecutor's Response to the Document in Support of the Appeal](#), para. 9 referring to [Gbagbo OA 4 Judgment](#), para. 54.

<sup>137</sup> [Prosecutor's Response to the Document in Support of the Appeal](#), para. 9.

<sup>138</sup> [Prosecutor's Response to the Document in Support of the Appeal](#), para. 9 referring to [Impugned Decision](#), footnote 31.

<sup>139</sup> [Victims' Response to the Document in Support of the Appeal](#), para. 44.

<sup>140</sup> [Document in Support of the Appeal](#), para. 38.

challenges findings made in decisions other than the Impugned Decision, the Appeals Chamber will not consider his arguments.

72. The Appeals Chamber understands Mr Gbagbo to allege an error of fact on the part of the Trial Chamber in determining that a network of pro-Gbagbo supporters continues to pose a risk under article 58 (1) (b) (i) and (ii) of the Statute. The Appeals Chamber has explained its approach to factual errors 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>141</sup> [Footnotes omitted.]

73. The Appeals Chamber has further held that mere disagreement with the conclusions that the first-instance Chamber drew from the available information or the weight it accorded to particular factors does not suffice to establish an error.<sup>142</sup> Mr Gbagbo’s arguments have been assessed against this standard of review.

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<sup>141</sup> *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 referring to *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. 25; *Prosecutor v. Jean-Pierre Bemba Gombo*, “[Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled ‘Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011’](#)”, 23 November 2011, ICC-01/05-01/08-1937-Red2 (OA 9), para. 48; *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. 17; *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), para. 61.

<sup>142</sup> *Mbarushimana OA Judgment*, paras 21, 31.

74. The Appeals Chamber notes that the Trial Chamber found that the network of Mr Gbagbo's supporters continued to exist and no changed circumstances warranted a modification of the assessment of the conditions under article 58 (1) (b) (i) and (ii) of the Statute on the basis of the evidence submitted by the Prosecutor, "particularly that supporting calls for release of Mr Gbagbo".<sup>143</sup> The Appeals Chamber considers that information about the recent activities of the alleged network of supporters and the calls for Mr Gbagbo's release expressed by various actors, established on the basis of the additional evidence submitted by the Prosecutor, including a report of the United Nations Group of Experts on Côte d'Ivoire dated 13 April 2015<sup>144</sup> and references to the role of Mr Hubert Oulaye,<sup>145</sup> constitute relevant factors in determining whether a network of pro-Gbagbo supporters continues to exist. The Appeals Chamber finds that it was not unreasonable for the Trial Chamber to conclude, on the basis of the available evidence that such a network continued to exist.

75. The Appeals Chamber finds no merit in Mr Gbagbo's argument that the Prosecutor and the Trial Chamber failed to set out the contours of the alleged network of supporters. Such contours were set out in previous decisions on detention and the Impugned Decision focused on the issue of whether the network continued to exist. The Appeals Chamber further notes that Mr Gbagbo's argument that the facts relied upon by the Trial Chamber were outdated is inaccurate as the Trial Chamber relied on facts dated March, April and May 2015.<sup>146</sup>

76. With regard to Mr Gbagbo's submission regarding recent arrests of non-FPI opposition members, the Appeals Chamber notes that Mr Gbagbo does not explain how the Trial Chamber's alleged failure to consider this fact affects the Impugned Decision. The Appeals Chamber recalls that an appellant is obliged to clearly identify the alleged error and "to indicate, with sufficient precision, how this error would have materially affected the impugned decision. Failure to do so may lead to the Appeals

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<sup>143</sup> [Impugned Decision](#), para. 11 referring to [Prosecutor's Submissions](#), paras 15-19.

<sup>144</sup> [Impugned Decision](#), para. 8 referring to [Prosecutor's Submissions](#), para 7 referring to the Group of Experts Report. *See also* [Impugned Decision](#), para. 8 referring to Group of Experts Report, para. 3.

<sup>145</sup> [Impugned Decision](#), para. 8 referring to [Prosecutor's Submissions](#), paras 10-11.

<sup>146</sup> Group of Experts Report; [Prosecutor's Submissions](#), paras 10, 13-17.

Chamber dismissing arguments *in limine*, without full consideration of their merits” (footnotes omitted).<sup>147</sup> In light of this, the argument is rejected.

77. In relation to Mr Gbagbo’s arguments regarding the insufficiency of evidence to “criminalise” the FPI and the impossibility of establishing the existence of a network of supporters on the basis of it, the Appeals Chamber recalls that it has already addressed similar arguments raised by Mr Gbagbo in the *Gbagbo* OA Judgment. In that decision, the Appeals Chamber held:

As to the existence of a support network, Mr Gbagbo argues in essence that all that the Pre-Trial Chamber could establish was that there was a political party, the FPI, providing him with political support, but that there was no evidence of the FPI leader’s intention to assist him to abscond. In the view of the Appeals Chamber, these arguments do not establish a clear error in the Impugned Decision. The existence of a political party that supports the detained person is a factor that is relevant to the determination of whether the continued detention appears necessary under article 58 (1) (b) (i) of the Statute, because such support could indeed facilitate absconding.

[...] [I]t is not unreasonable to assume that a support network that may assist in the absconding of the detained person may also assist in obstructing or endangering the investigation or the court proceedings.<sup>148</sup>

In line with its previous finding, the Appeals Chamber finds that the existence of a network of supporters is a relevant factor in determining whether continued detention appears necessary under article 58 (1) (b) (i) and (ii) of the Statute. The Appeals Chamber recalls its jurisprudence according to which “[w]hat may justify [...] continued detention [...] under article 58 (1) (b) of the Statute is that it must “appear” to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence”.<sup>149</sup> Accordingly, the Appeals Chamber considers that it was not

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<sup>147</sup> *Prosecutor v Jean-Pierre Bemba Gombo et al.*, “[Judgement on the appeal of Mr Jean Jacques Mandenda Kabongo against the decisión of Pre-Trial Chamber II of 17 March 2014 entitled “Decision on the “Requete demise en liberte’ submitted by the Defence for Jean-Jacques Mangenda”](#)”, 11 July 2014, ICC-01/05-01/13-560 (OA 4), para. 28 citing *Prosecutor v Bosco Ntaganda* “[Judgment on the appeal of Mr Bosco Ntaganda against the decision of 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-Conf (OA), para. 31-32; a public redacted version was filed on 5 March 2015 (ICC-01/04-02/06-271-Red (OA)). See also *Prosecutor v Mathieu Ngudjolo Chui*, “[Judgement on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’](#)”, 7 April 2015, ICC 01/04-02/12-271-Corr (hereinafter: “*Ngudjolo* A Judgment”), para. 251 quoting *Bemba OA 4 Judgment*, para. 69.

<sup>148</sup> *Gbagbo OA Judgment*, paras 59, 63.

<sup>149</sup> *Ngudjolo OA 4 Judgment*, para. 21.

unreasonable for the Trial Chamber to find that a risk continued to exist that the network of pro-Gbagbo supporters may help Mr Gbagbo to abscond and/or obstruct or endanger the court proceedings.

78. On the basis of the foregoing considerations, the Appeals Chamber rejects Mr Gbagbo's arguments regarding the continued existence of a network of supporters posing a risk under article 58 (1) (b) (i) and (ii) of the Statute.

#### 6. *Conclusion*

79. Having rejected the totality of Mr Gbagbo's arguments, the Appeals Chamber accordingly rejects the first ground of appeal.

### **C. Second Ground of Appeal**

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

80. Referring to Mr Gbagbo's "fleeting suggestion" regarding the possibility of house arrest, the Trial Chamber stated that it was not seized of any request concerning that possibility.<sup>150</sup> It further held that "[i]n the absence of a concrete proposal for conditional release [...] its discretion to consider conditional release is unfettered" (footnote omitted).<sup>151</sup> The Trial Chamber reiterated that "requests for conditional release [could] [...] be made at any time".<sup>152</sup>

#### 2. *Mr Gbagbo's submissions*

81. Under the second ground of appeal, Mr Gbagbo avers that the Trial Chamber erred in law by failing to consider itself seized of a request for conditional release and that this effectively ended the entire process of allowing Mr Gbagbo to receive adequate and effective treatment.<sup>153</sup> He submits that the request for conditional release has been pending since April 2012.<sup>154</sup> Mr Gbagbo argues that it is incomprehensible that the Trial Chamber considered itself seized of the request for conditional release in May 2015 and a few weeks later considered itself no longer seized thereof.<sup>155</sup> He

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<sup>150</sup> [Impugned Decision](#), para. 12.

<sup>151</sup> [Impugned Decision](#), para. 12.

<sup>152</sup> [Impugned Decision](#), para. 12, referring to the Transcript of 16 June 2015, ICC-02/11-01/15-T-2-CONF-EXP-ENG, p. 7, lines 16-24.

<sup>153</sup> [Document in Support of the Appeal](#), paras 52-69.

<sup>154</sup> [Document in Support of the Appeal](#), para. 51.

<sup>155</sup> [Document in Support of the Appeal](#), para. 58.

argues that the Trial Chamber's invitation to submit a new request for conditional release amounts to an error of law.<sup>156</sup>

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

82. The Prosecutor submits that the Pre-Trial Chamber and the Trial Chamber have not been "seized with an ongoing request for conditional release" for three years.<sup>157</sup> Rather, she argues, the Pre-Trial Chamber rejected several requests for conditional release.<sup>158</sup> The Prosecutor submits that in parallel to the proceedings and decisions regarding conditional release, the Registry and Mr Gbagbo have held consultations to improve his medical treatment.<sup>159</sup> The Prosecutor submits that the Trial Chamber's references to the need to await reports resulting from those consultations before deciding on conditional release, should be understood in this context.<sup>160</sup> The Prosecutor observes that despite the Trial Chamber's order for observations on the periodic review under article 60 (3) of the Statute, Mr Gbagbo did not request conditional release or present a concrete proposal on that issue.<sup>161</sup>

### 4. *Victims' submissions before the Appeals Chamber*

83. The victims submit that the Trial Chamber's invitation for Mr Gbagbo to file a request for conditional release does not stem from the Impugned Decision, but from an earlier ruling, which Mr Gbagbo sought to appeal in a separate procedure.<sup>162</sup>

### 5. *Determination by the Appeals Chamber*

84. The Appeals Chamber notes preliminarily that Mr Gbagbo failed to fully comply with its decision directing him to file a lesser redacted version of the Document in Support of Appeal. While the decision authorised him to withhold some information, the Appeals Chamber was not persuaded that there was justification for redactions to other information.<sup>163</sup> Contrary to the Appeals Chamber's directions, Mr Gbagbo retained most of the previously applied redactions. He explained that he followed (i) the general principles set out in the Decision on Redactions, rather than

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<sup>156</sup> [Document in Support of the Appeal](#), para. 64.

<sup>157</sup> [Prosecutor's Response to the Document in Support of the Appeal](#), para. 15.

<sup>158</sup> [Prosecutor's Response to the Document in Support of the Appeal](#), para. 16.

<sup>159</sup> [Prosecutor's Response to the Document in Support of the Appeal](#), paras 17-18.

<sup>160</sup> [Prosecutor's Response to the Document in Support of the Appeal](#), para. 18.

<sup>161</sup> [Prosecutor's Response to the Document in Support of the Appeal](#), paras 18-21.

<sup>162</sup> [Victims' Response to the Document in Support of the Appeal](#), paras 54-56.

<sup>163</sup> [Decision on Redactions](#), paras 7-8.

the specific instructions contained therein, and (ii) decisions of Pre-Trial and Trial Chambers which Mr Gbagbo fails to identify.<sup>164</sup> As a result of this non-compliance with the Appeals Chamber's directions, the Prosecutor and the victims were unable to address important arguments supporting the second ground of Mr Gbagbo's appeal.

85. The Appeals Chamber recalls that in its determination of the scope of information which Mr Gbagbo was permitted to withhold from the Prosecutor and the victims, it was mindful of the sensitive nature of the information in issue and it had due regard to the level of confidentiality applied to the proceeding to which the information relates.<sup>165</sup> The Appeals Chamber also took into consideration the scope of Mr Gbagbo's appeal.<sup>166</sup> The Appeals Chamber recalls that pursuant to regulation 64 (5) of the Regulations of the Court, participants are entitled to file a response to the document in support of the appeal. In order to be able to fully respond to the grounds of appeal set out in the document in support of the appeal, the participants must be provided with an unredacted version of the document, unless there are compelling reasons to withhold such information.

86. This is of particular significance in the present case, where the information which Mr Gbagbo withheld from the Prosecutor and the victims relates to a procedure aimed at the imposition of conditions restricting liberty. Rule 119 (3) of the Rules of Procedure and Evidence requires that before imposing such conditions the competent Chamber "shall seek the views of the Prosecutor, the person concerned, any relevant State and victims that have communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a release or conditions imposed". The Prosecutor's and the victims' ability to present such views, including in the appellate proceedings concerning conditional release, is restricted when the person concerned withholds relevant information from them.

87. By way of analogy, the Appeals Chamber recalls that while "[i]t is commonly understood that the right to a fair trial/fair hearing in criminal proceedings, first and foremost, inures to the benefit of the accused", the Prosecutor has duties with respect

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<sup>164</sup> [Observations on Decision on Redactions](#).

<sup>165</sup> [Decision on Redactions](#), para. 7.

<sup>166</sup> [Decision on Redactions](#), para. 7.

to the objective of establishing the truth and she may raise errors in appellate proceedings alleging that her ability to present her case has been violated.<sup>167</sup> The Appeals Chamber further recalls that for purposes of the periodic review under article 60 (3) of the Statute, the Prosecutor “must [...] provide information to enable the Chamber to satisfy itself that continued detention is warranted”.<sup>168</sup> Her ability to provide information relevant to that review will be impeded if she is not given full access to the arguments made by the accused person within the framework of such review. The Appeals Chamber further notes that if participants in appellate proceedings are unable to respond to certain arguments of the appellant, those arguments are precluded from the scrutiny of the participants which in turn may affect the Appeals Chamber’s determination of the issues on appeal.

88. In view of the foregoing, the Appeals Chamber considers that Mr Gbagbo’s non-compliance with the Decision on Redactions significantly impeded the Prosecutor’s and the victims’ ability to file specific responses to some of the arguments he makes under the second ground of his appeal. Having regard to the fact that Mr Gbagbo deliberately failed to comply with the Appeals Chamber’s directions, the Appeals Chamber considers it appropriate to decline to consider arguments relying on information which Mr Gbagbo withheld from the Prosecutor and the victims in contravention of the Decision on Redactions. The Appeals Chamber will only consider the remaining arguments.

89. Turning to the merits of the second ground of appeal, the Appeals Chamber notes that in its previous decisions regarding the periodic review of the ruling on detention the Trial Chamber referred to conditional release. In the Seventh Detention Review Decision, the Trial Chamber noted that it could not rule on the issue of conditional release “in a manner that would be consistent with its obligations under Rule 119(3) of the Rules”, as “the proposal of conditional release for medical reasons [was] being finalised by the Defence and Registry [...] and [...] the parties and participants [had] yet to have the opportunity to make submissions”.<sup>169</sup> The Trial Chamber postponed the determination of the matter until the receipt of a joint report

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<sup>167</sup> [Ngudjolo A Judgment](#), paras 255-257.

<sup>168</sup> [Bemba OA 4 Judgment](#), para. 50.

<sup>169</sup> [Seventh Detention Review Decision](#), para. 74.

of the Registry and Mr Gbagbo on their consultations and of submissions of the parties, participants and any relevant State.<sup>170</sup>

90. In the Eighth Detention Review Decision, the Trial Chamber acknowledged the receipt of the above-mentioned report and noted that Mr Gbagbo and the Registry “indicated that a ninth joint report [(hereinafter: “Ninth Joint Report”)] would be filed in due course that would have more conclusive options in this regard”.<sup>171</sup> The Trial Chamber concluded that it was not in a position to assess the possibility of conditional release at that point.<sup>172</sup>

91. In his order seeking observations for purposes of the ninth review under article 60 (3) of the Statute, the Single Judge acknowledged the receipt of the Ninth Joint Report and invited the parties and participants “to submit any observations on Mr Gbagbo’s continued detention or release (with or without conditions), including the existence of any changed circumstances”.<sup>173</sup> The Single Judge indicated that “[t]he Ninth Joint Report [would] be considered in this context”.<sup>174</sup> Neither in Mr Gbagbo’s Submissions, nor in Mr Gbagbo’s Further Submissions, did Mr Gbagbo discuss the possibility of conditional release on the basis of the Ninth Joint Report.

92. In view of the foregoing, the Appeals Chamber is not persuaded by Mr Gbagbo’s arguments. The Appeals Chamber notes that in the Seventh Detention Review Decision, the Trial Chamber recalled its obligation under rule 119 (3) of the Rules of Procedure and Evidence to seek the views of, *inter alia*, the Prosecutor and the victims before imposing conditions restricting liberty.<sup>175</sup> The Appeals Chamber also notes that the relevant consultations regarding conditional release were conducted by Mr Gbagbo and the Registry without the Trial Chamber’s direct involvement. The Trial Chamber thus appears to have expected Mr Gbagbo to make a proposal for conditional release based on the Ninth Joint Report and consistent with the order for submissions. As Mr Gbagbo failed to raise the issue in his submissions made in the context of his detention review under article 60 (3) of the Statute, neither the

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<sup>170</sup> [Seventh Detention Review Decision](#), para. 75.

<sup>171</sup> [Eighth Detention Review Decision](#), para. 7.

<sup>172</sup> [Eighth Detention Review Decision](#), para. 40.

<sup>173</sup> [Order Requesting Submissions](#), p. 5.

<sup>174</sup> [Order Requesting Submissions](#), para. 4.

<sup>175</sup> [Seventh Detention Review Decision](#), paras 74-75.

Prosecutor, nor the victims were in a position to discuss it in their submissions. In the circumstances, and having regard to the procedure set out in rule 119 (3) of the Rules of Procedure and Evidence, the Appeals Chamber considers that Mr Gbagbo has not demonstrated an error in the Trial Chamber's conclusion that it was not seized with a request for conditional release and its indication that Mr Gbagbo may seek conditional release at any time. The second ground of Mr Gbagbo's appeal is therefore rejected.

#### IV. APPROPRIATE RELIEF

93. On an appeal pursuant to article 82 (1) (b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case the Appeals Chamber has rejected the grounds of appeal raised by Mr Gbagbo and, in consequence, the Impugned Decision is confirmed.

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



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**Judge Piotr Hofmański**  
**Presiding Judge**

Dated this 8<sup>th</sup> day of September 2015

At The Hague, The Netherlands