

### **Dissenting Opinion of Judge Anita Ušacka**

1. I respectfully disagree with the decision of the majority to confirm the Impugned Decision. I find merit in Mr Gbagbo's first and second grounds of appeal on the basis that the Adjournment Decision, in my opinion, constituted changed circumstances that would have required the Pre-Trial Chamber to consider anew the basis of Mr Gbagbo's detention, as well as the reasonableness of the length of his detention. As I would have reversed the Impugned Decision, I would not have considered the third to tenth grounds of appeal.

2. This opinion is based on the following reasons.

#### **A. The confirmation of charges**

3. Article 61 of the Statute governs the process for the confirmation of the charges prior to trial. As noted in the Adjournment Decision,<sup>1</sup> under article 61 (7) of the Statute, the Pre-Trial Chamber has three options in determining "whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged". It may elect to *confirm* the charges for which there is sufficient evidence and commit the accused to trial (article 61 (7) (a)), *decline to confirm* the charges for which there is insufficient evidence (article 61 (7) (b)), or *adjourn the hearing* to request the Prosecutor to provide further evidence or conduct further investigation in relation to a particular charge (article 61 (7) (c) (i)), or amend a charge where the evidence submitted appears to establish a different crime within the jurisdiction of the Court (article 61 (7) (c) (ii)).

4. In the instant case, the Pre-Trial Chamber, by majority, did not consider that the evidence provided by the Prosecutor at the confirmation hearing met the standard of article 61 (7) of the Statute.<sup>2</sup> Therefore, it elected not to confirm the charges, meaning that the case did not automatically proceed to trial. In so finding, the Pre-Trial Chamber had two options as to how to proceed.

5. As a first option, the Pre-Trial Chamber could have declined to confirm the charges under article 61 (7) (b) of the Statute, in which case the warrant of arrest

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<sup>1</sup> Adjournment Decision, para. 12.

<sup>2</sup> Adjournment Decision, para. 15.

would have ceased to have effect pursuant to article 61 (10) of the Statute, and Mr Gbagbo would have been released. The Prosecutor subsequently would have the choice whether to request anew the confirmation of the same charges or part of the charges, "if the request is supported by additional evidence", as provided for in article 61 (8) of the Statute. If she decided to request anew the confirmation of charges, the Prosecutor would also have to decide whether to request a new warrant of arrest or a summons to appear in respect of the person charged.

6. The second option was chosen by the Pre-Trial Chamber, i.e. to adjourn the confirmation hearing pursuant to article 61 (7) (c) (i) of the Statute, and to ask the Prosecutor to consider "[p]roviding further evidence or conducting further investigation with respect to a particular charge". The adjournment was ordered with respect to *all* charges laid, not only with respect to "a particular charge". Indeed, in the Adjournment Decision, the Pre-Trial Chamber sought further evidence with respect to many of the legal elements of the crimes charged.<sup>3</sup>

7. In order to allow the Prosecutor to do so, the Pre-Trial Chamber established a time frame, whereby the Prosecutor is required to submit afresh, *inter alia*, an Amended Document Containing the Charges and an amended list of evidence by 15 November 2013.<sup>4</sup> Mr Gbagbo may submit his observations on the Prosecutor's evidence, disclose any evidence he wishes to present, and file an amended list of evidence by 16 December 2013.<sup>5</sup> Final written submissions in response to those of the Prosecutor and Victims are required from Mr Gbagbo by 7 February 2014.<sup>6</sup> Thereafter, the 60-day period for rendering the decision on the confirmation of charges "will start running anew as of the date of receipt of the last written submission".<sup>7</sup> In the course of the proceedings, Mr Gbagbo has the right to object to and challenge the evidence. In addition, an oral hearing will be held if requested or found necessary by the Pre-Trial Chamber.<sup>8</sup> This schedule set by the Pre-Trial Chamber follows the procedure for the confirmation of the charges as provided for in

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<sup>3</sup> Adjournment Decision, para. 44.

<sup>4</sup> Adjournment Decision, p. 23.

<sup>5</sup> Adjournment Decision, p. 24.

<sup>6</sup> Adjournment Decision, p. 24.

<sup>7</sup> Adjournment Decision, p. 24.

<sup>8</sup> Adjournment Decision, para. 47.

article 61 of the Statute, rules 121 and 122 of the Rules of Procedure and Evidence and regulation 53 of the Regulations of the Court.

8. Therefore, in adjourning the confirmation hearing in relation to the charges, rather than declining to confirm the charges, the Pre-Trial Chamber essentially initiated a “second confirmation phase” with a specified timeframe that foresees that the proceedings will take at least an additional 10 months.<sup>9</sup> This, in my view, is an extraordinary measure,<sup>10</sup> as it affords the Prosecutor a second chance to conduct further investigation and to present evidence in relation to the entirety of the charges.

9. I note that the Court’s legal texts, more specifically article 61 of the Statute, do not directly address the consequences on the detention of the charged person of a decision to adjourn the confirmation hearing with respect to all of the charges. In my view, when the Pre-Trial Chamber elects to adjourn the confirmation of charges hearing in relation to “all charges”, as in the instant case, it must, at the very least, examine the concomitant impact that such an adjournment has upon the rights of the detained person.

### **B. The rights of the detained person**

10. I note that the Adjournment Decision contains a section on the “Rights of the Defence”;<sup>11</sup> however, this section deals only with the right to be tried without undue delay as provided for in article 67 (1) (c) of the Statute. The question whether the

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<sup>9</sup> Calculated from the rendering of the Adjournment Decision (3 June 2013) to the end of the 60-day period required for the issuance of the decision on the confirmation of charges, which will begin to run from the date of receipt of the last written submission, due on 7 February 2014. *See* Adjournment Decision, p. 24.

<sup>10</sup> As a side note, and although not at issue in this appeal, I would like to raise my view that there exists a doubt regarding the compliance of the Adjournment Decision with the Statute. It could be argued that an adjournment should only be ordered when there were concrete reasons that lead a Pre-Trial Chamber to the conclusion that further evidence was required with respect to a “particular charge”, and not generally with respect to *all* charges. The formulation of article 61 (7) (c) (i) of the Statute and the existence of rule 127 of the Rules of Procedure and Evidence confirm the assessment that an adjournment for all charges should, as a rule, not be imposed. Furthermore, adjourning for the purposes of article 61 (7) (c) (i) of the Statute with respect to all charges could give the impression of a weak case that the Pre-Trial Chamber might wish to “save”. In addition, where a case is, at least in part, not sufficiently strong, it should not, considering the purpose of the confirmation phase, be referred to the Trial Chamber. In this context, I refer to K. Shibahara, “Article 61”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article* (Nomos Verlagsgesellschaft, 1st ed., 1999), para. 34: “Even if the Pre-Trial Chamber declines to confirm the charges, based on paragraph 8, the Prosecutor can request confirmation again with additional evidence. Therefore, it is not recommended for the Pre-Trial Chamber to make decision (c) (i). It should rather decline to confirm the charges and leave the Prosecutor to decide whether to conduct further investigation”.

<sup>11</sup> Adjournment Decision, paras 38-43.



delay affected or would affect Mr Gbagbo's rights *as a detained person* was not addressed in the Adjournment Decision,<sup>12</sup> nor was it addressed in the Impugned Decision.<sup>13</sup> In my view, this omission is problematic.

11. It is recalled that a detained person has certain rights that are woven into the fabric of the Statute via article 21 (3). Indeed, the Appeals Chamber has previously noted that "article 21 (3) of the Statute stipulates that the Statute must be interpreted and applied consistently with internationally recognised human rights",<sup>14</sup> and has held this to be specifically applicable to detained persons in relation to applications for interim release.<sup>15</sup> Article 9 (2) to (4) of the International Covenant on Civil and Political Rights, article 7 (4) to (6) of the American Convention on Human Rights, and Article 5 (Right to liberty and security) (2) to (4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "the European Convention") have been recognised by the Appeals Chamber as containing provisions applicable to the rights of detained persons.<sup>16</sup>

12. The European Convention specifically provides for the right of an accused person in detention to be tried within a reasonable period. Article 5 (3) states:

Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer

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<sup>12</sup> I note that a number of cases of, *inter alia*, the European Court of Human Rights are cited by the Pre-Trial Chamber in footnote 55 of the Adjournment Decision. However, these cases are based on article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Right to a fair trial") rather than article 5 (the "Right to liberty and security"), and therefore do not address the issue of the right to be tried with undue delay specifically in relation to detained persons. The Pre-Trial Chamber does refer in the same footnote to the Human Rights Committee, General Comment No. 32, 23 August 2007, CCPR/C/GC/32, para. 35, which states, *inter alia*, that "In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible". However, the issue of the right of detained persons to be tried expeditiously is not addressed in the substance of the Adjournment Decision.

<sup>13</sup> The Pre-Trial Chamber refers to "the passage of time" only in the context of Mr Gbagbo's state of health, when assessing the issue of conditional release – see Impugned Decision, para. 51.

<sup>14</sup> *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008'", 21 October 2008, ICC-01/04-01/06-1486, para. 46.

<sup>15</sup> See, for example, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release'", 16 December 2008, ICC-01/05-01/08-323 (OA) (hereinafter: *Bemba* OA Judgment), para. 28; *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" (hereinafter: "*Lubanga* OA 7 Judgment"), Separate Opinion of Judge Georgios M. Pikis, 13 February 2007, ICC-01/04-01/06-824 (OA 7).

<sup>16</sup> See *Bemba* OA Judgment, para. 28.



authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.<sup>17</sup>

13. The jurisprudence of the European Court of Human Rights (hereafter: "ECtHR") in relation to this provision may thus be illuminating in the instant case, in which the "second confirmation phase" initiated by the Pre-Trial Chamber has resulted in an additional delay that will prolong Mr Gbagbo's pre-trial detention by at least 10 months. The ECtHR has held in relation to article 5 (3) that it is incumbent on national authorities to ensure that "the pre-trial detention of an accused person does not exceed a reasonable time".<sup>18</sup> While what constitutes a "reasonable time" will depend on the particular circumstances of each case,<sup>19</sup> the ECtHR has held that there is a clear obligation to undertake a fresh review of the grounds underpinning detention after a certain period of time. The mere prevalence of a suspicion that a person has committed an offence in the jurisdiction of the Court is not enough where the period of detention is unduly protracted:

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but with the lapse of time this no longer suffices and the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty.<sup>20</sup>

14. Therefore, in making its decision on the confirmation of the charges against Mr Gbagbo, the Pre-Trial Chamber ought to have adverted to the reasonableness of the length of time that Mr Gbagbo had been in detention, given that the provisions of the Statute must be interpreted in a manner consistent with these principles by virtue of article 21 (3) of the Statute. Indeed, this obligation is reflected in the Rome Statute itself. For example, under article 61 (1) of the Statute, the Pre-Trial Chamber has an obligation to hold a confirmation hearing "within a reasonable time" after a person appears before the Court. Furthermore, article 60 (4) of the Statute obligates on the Pre-Trial Chamber to "ensure that a person is not detained for an unreasonable period

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<sup>17</sup> See *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, as amended by Protocols No. 11 and No. 14, 213 United Nations Treaty Series 970.

<sup>18</sup> ECtHR, Grand Chamber, *McKay v. The United Kingdom*, "Judgment", 3 October 2006, application no. 543/03, para. 43.

<sup>19</sup> ECtHR, Grand Chamber, *McKay v. The United Kingdom*, "Judgment", 3 October 2006, application no. 543/03, para. 45.

<sup>20</sup> ECtHR, Grand Chamber, *McKay v. The United Kingdom*, "Judgment", 3 October 2006, application no. 543/03, para. 44.



prior to trial”, albeit due to “inexcusable delay by the Prosecutor”. While article 60 (4) of the Statute casts an obligation on the Pre-Trial Chamber to ensure that an accused is not detained for an unreasonable period prior to trial only in the case of delay occasioned by the Prosecutor,<sup>21</sup> in my view, article 21 (3) of the Statute casts a broader obligation on the Pre-Trial Chamber to ensure the reasonableness of the period of pre-trial detention, including when deciding whether to adjourn the confirmation hearing or to decline to confirm the charges.

15. Given that Mr Gbagbo was transferred to the Court at the end of 2011, almost two years ago, concern about his rights as a detained person ought to be overwhelmingly pressing.

16. Indeed, these rights are crucial to an understanding of the purpose of article 61 of the Statute as a whole. A confirmation hearing serves as a “pre-trial ‘filter’ to ensure that the charges concern criminal acts falling within the Court’s jurisdiction and that only those soundly based on the evidence go to trial.”<sup>22</sup> In addition, “the Pre-Trial Chamber should not refer a weak case to the Trial Chamber, since this would infringe the rights of the accused”.<sup>23</sup> The rights of the charged person, including those of the detained person, also ought to be at the forefront of the entire confirmation process. Consequently, they also need to be taken into account by a Pre-Trial Chamber when confronted with the question whether to adjourn a confirmation hearing as a whole.

### C. The existence of “changed circumstances”

17. Having addressed these issues, I turn now to considerations stemming from the Impugned Decision itself. Article 60 (3) of the Statute provides that the Pre-Trial

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<sup>21</sup> See Separate Opinion of Judge Georghios M. Pikis, *Lubanga* OA 7 Judgment, para. 22, who held that warnings against undue delay such as those contained in article 60 (4) of the Statute must be interpreted in light of international human rights jurisprudence “bearing on the timeliness of the conduct of judicial proceedings. Ensuring that a person is tried within a reasonable time is a paramount duty of the Court. Delay in the proceedings cannot be at the expense of the detainee”; see also K. Khan, Article 60, para. 18, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article*, (Verlag C.H. Beck, second edition, 2008): “It will not matter to accused persons whether their detention for an “unreasonable period” is the fault of the Prosecutor, the judges, the Registry or any other third party. All the organs of the Court should be clearly prohibited from unnecessary, never mind inexcusable delays, and paragraph 4 suffers from the defect of only focusing on inexcusable delay on the part of the Prosecutor” ().

<sup>22</sup> H. Friman, et al., “Charges”, in G. Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013), p. 379, at p. 399.

<sup>23</sup> G. de Beco, “The Confirmation of Charges before the International Criminal Court: Evaluation and First Application”, 7 *International Criminal Law Review* (2007), p. 469, at p. 481.



Chamber may modify its ruling on detention “if it is satisfied that changed circumstances so require”. The Appeals Chamber has noted that “changed circumstances” have been found to exist where there is 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>24</sup> Where no changed circumstances are found to exist, “the Chamber is not required to further review the ruling on release or detention”.<sup>25</sup> Recalling that the existence of “changed circumstances” is assessed in relation to the first decision on interim release,<sup>26</sup> which in the present case was rendered on 13 July 2012, the question is whether the circumstances prevailing on this date have changed because of the Adjournment Decision.

18. The circumstances prevailing on 13 July 2012 changed for Mr Gbagbo when the Adjournment Decision was rendered. My reasons for this conclusion are twofold. Firstly, when interpreted in conjunction with article 21 (3) of the Statute, which incorporates the right of detained persons to be tried within a reasonable time, in my view, a far-reaching decision that prolongs pre-trial detention such as the Adjournment Decision ought to constitute “changed circumstances” for the purposes of article 60 (3) of the Statute. Mr Gbagbo now appears to be in the same place in July 2013 as he was in the summer of 2012, that is, at the stage before a document containing the charges had been filed, disclosure had taken place, oral and written submissions had been heard by the Pre-Trial Chamber, and finally, a decision under article 61 (7) of the Statute had been issued. The decision of the Pre-Trial Chamber to initiate a “second confirmation phase” and thus prolong Mr Gbagbo’s pre-trial detention is, in my view, a changed circumstance warranting the assessment of the factors underpinning article 58 (1) (b) *de novo*.

19. The second reason supporting the existence of “changed circumstances” in light of the rendering of the Adjournment Decision, was that, between 13 July 2012 and 3 June 2013, a confirmation hearing was held and the Pre-Trial Chamber scrutinized the

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<sup>24</sup> *Bemba* OA 2 Judgment, para. 60.

<sup>25</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’”, ICC-01/05-01/08-2151-Red (OA 10), 5 March 2012, para. 1.

<sup>26</sup> *Lubanga* OA 7 Judgment, para. 94.

entire evidentiary basis to assess whether the evidence met the threshold of article 61 (7) of the Statute. It was found to have fallen below this threshold. In light of this, the Adjudgment Decision directly puts in doubt whether the lower evidentiary threshold of article 58 (1) (a) of the Statute is still met, because the Pre-Trial Chamber adjourned the confirmation hearing with respect to *all* charges and requested further evidence with respect to *all* charges, when applying the evidentiary standard of article 61 (7) of the Statute.

20. It is the obligation of the Court to keep in detention only persons in respect of whom the prerequisites of article 58 (1) (a) and (b) of the Statute are met. If, at any given time, the prerequisites are not fulfilled, a detained person needs to be released. This is why the legal texts require the Pre-Trial Chamber to review periodically the detention that requires a Pre-Trial Chamber to newly assess those prerequisites if there are "changed circumstances". Where there is doubt about the evidentiary basis as a whole, these doubts necessarily extend to a lower evidentiary threshold. Therefore, where a decision pursuant to article 61 (7) (c) (i) of the Statute leads to an adjournment of the confirmation hearing in respect of *all* charges, the Pre-Trial Chamber ought to recognise this as "changed circumstances" in reviewing the detention of the accused, and advert specifically to the factors underpinning the detention of the detained person in a *de novo* manner.

21. A *de novo* review of detention places an obligation upon the Pre-Trial Chamber to comprehensively assess the currency and integrity of each of the factors underpinning detention. The rights of the detained person ought to be at the forefront of this process. Accordingly, the Pre-Trial Chamber must look at the factors underpinning detention in a detailed manner, and make a sufficiently reasoned ruling on whether it continues to find detention necessary under article 58 (1) of the Statute, or whether, in fact, the detained person ought to be released. In this connection, I reiterate my previous concerns, as outlined in my Dissenting Opinion in the *Gbagbo* OA Judgment, regarding the requirement for Chambers of this Court to indicate with sufficient clarity the grounds upon which they base their decisions,<sup>27</sup> particularly decisions that impact upon a charged person's right to liberty.

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<sup>27</sup> See *Gbagbo* OA Judgment, Dissenting Opinion of Judge Anita Ušacka, paras 8-14.



#### **D. Conclusion**

22. In sum, the Adjournment Decision established “changed circumstances”, and the Pre-Trial Chamber erred in finding that it did not. On this basis, I would have reversed the Impugned Decision and remanded the matter for fresh consideration that would have involved a *de novo* review of article 58 (1) (a) and (b) of the Statute. I would therefore have granted the first and second grounds of appeal.

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



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**Judge Anita Ušacka**

Dated this 29<sup>th</sup> day of October 2013

At The Hague, The Netherlands