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No. ICC-01/05-01/13 OA 2
Date: 11 July 2014

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public document

Judgment
on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'"

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

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

Counsel for the Defence
Mr Ghislain M. Mabanga

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II entitled "Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'" of 14 March 2014 (ICC-01/05-01/13-259),

After deliberation,

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

Delivers the following

JUDGMENT

The "Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'" is confirmed. The appeal is dismissed.

REASONS

I. KEY FINDINGS

1. The Appeals Chamber emphasises that offences under article 70 of the Statute, while certainly serious in nature, are by no means considered to be as grave as the core crimes under article 5 of the Statute, being genocide, crimes against humanity, war crimes, and the crime of aggression, which are described in that provision to be "the most serious crimes of concern to the international community as a whole".

2. The Appeals Chamber considers that any decision on whether a person is detained pending his or her trial at this Court ought to be made based on the specific circumstances of the case, as relevant to an assessment of whether or not a suspect is likely to appear before the Court. Personal circumstances of the suspect such as the suspect's education, professional or social status may be relevant to assessing under article 58 (1) (b) (i) of the Statute whether or not a suspect will appear before the Court.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

3. On 19 November 2013, the Prosecutor filed the "Prosecution's Application for Warrant of Arrest"[1] (hereinafter: "Application for Warrants of Arrest"), seeking a warrant for the arrest of, *inter alia,* Mr Aimé Kilolo Musamba (hereinafter: "Mr Kilolo").[2]

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

5. Following his surrender to the Court, Mr Kilolo first appeared before the Pre-Trial Chamber on 27 November 2013.[4] He has been in detention at the Court since.

6. On 16 December 2013, Mr Kilolo filed the "Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba"[5] (hereinafter: "Application for Interim Release"), requesting, *inter alia*, that the Pre-Trial Chamber (i) convene a public hearing pursuant to rule 118 (3) of the Rules of Procedure and Evidence; and (ii) order Mr Kilolo's interim release; or, in the alternative (iii) order Mr Kilolo's conditional release pursuant to rule 119 of the Rules of Procedure and Evidence.[6]

7. On 17 December 2013, the Pre-Trial Chamber, its functions being exercised by Judge Cuno Tarfusser acting as single judge,[7] rendered the "Decisions [*sic*] requesting observations on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo

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[1] ICC-01/05-67-US-Exp. A confidential version of the Prosecutor's application was filed on 27 November 2013 as ICC-01/05-01/13-19-Conf.
[2] Application for Warrants of Arrest, para. 1.
[3] ICC-01/05-01/13-1-US-Exp-tENG. A redacted version of the French original warrant of arrest (ICC-01/05-01/13-1-US-Exp) was filed on 28 November 2013 as ICC-01/05-01/13-1-Red2.
[4] *See* "Decision setting the date for the first appearance of Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba and Fidèle Babala, and on issues relating to the publicity of the proceedings", 25 November 2013, ICC-01/05-01/13-11, p. 4; Transcript of 27 November 2013, ICC-01/05-01/13-T-1-ENG (CT WT), p. 4, lines 7-9, 15-19, 25, p. 5, lines 1-3.
[5] ICC-01/05-01/13-42, with 18 confidential annexes. *See also* "Addendum à la demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba introduite le 16 décembre 2013 (ICC-01/05-01/13-42)", 7 January 2014, ICC-01/05-01/13-69, with confidential annexes 19 to 36.
[6] Application for Interim Release, p. 20.
[7] *See* Transcript of 27 November 2013, ICC-01/05-01/13-T-1-ENG (CT WT), p. 3, line 22, to p. 4, line 2.

Musamba'"[8] (hereinafter: "Decision Requesting Observations") inviting submissions on Mr Kilolo's Application for Interim Release from the Prosecutor, the relevant authorities of the Kingdom of the Netherlands and the Kingdom of Belgium by Friday 3 January 2014.[9] At the request of the Kingdom of Belgium,[10] the Pre-Trial Chamber subsequently extended this time limit to Monday 13 January 2014.[11]

8. On 14 January 2014, the Registrar filed the "Report of the Registry on the 'Decisions [*sic*] requesting observations on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'"[12] (hereinafter: "Registry Report"), containing the observations of both the Kingdom of the Netherlands[13] and the Kingdom of Belgium[14] (hereinafter: "Belgian Authorities' Observations").

9. On 14 March 2014, the Pre-Trial Chamber rendered the "Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'"[15] (hereinafter: "Impugned Decision"), rejecting the Application for Interim Release.[16]

B. Proceedings before the Appeals Chamber

10. On 16 March 2014, Mr Kilolo filed the "Acte d'appel contre la '*Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba''* (ICC-01/05-01/13-259)"[17] (hereinafter: "Notice of Appeal"), submitting that the Appeals Chamber should reverse the Impugned Decision and order his interim release.[18]

11. On 24 March 2014, Mr Kilolo filed his "Brief in Support of the '*Acte d'appel contre la 'Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba' (ICC-01/05-01/13-259)'* (ICC-01/05-01/13-260)",[19] (hereinafter: "Document in Support of the Appeal"), requesting the Appeals Chamber to dismiss

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[8] ICC-01/05-01/13-46.
[9] Decision Requesting Observations, p. 4.
[10] *See* "Request by the Kingdom of Belgium for an extension of the deadline for submitting its observations on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'", 20 December 2013, ICC-01/05-01/13-59.
[11] "Decision granting an extension of time for submitting observations on 'Demande de mise en liberté provisoire de Maitre [*sic*] Aimé Kilolo Musamba'", 20 December 2013, ICC-01/05-01/13-60, p. 4.
[12] ICC-01/05-01/13-95.
[13] *See* ICC-01/05-01/13-95-Conf-Anx8.
[14] *See* ICC-01/05-01/13-95-Conf-Anx9.
[15] ICC-01/05-01/13-259.
[16] Impugned Decision, p. 21.
[17] Registered on 17 March 2014, ICC-01/05-01/13-260 (OA 2).
[18] Notice of Appeal, para. 4.
[19] ICC-01/05-01/13-290 (OA 2).

the Impugned Decision or, in the alternative, remand the case to the Pre-Trial Chamber on points of law determined by the Appeals Chamber.[20]

12. On 31 March 2014, the Prosecutor filed the "Prosecution's response to the Kilolo Defence's appeal against the Single Judge's Decision to continue his detention"[21] (hereinafter: "Response to the Document in Support of the Appeal"), requesting the Appeals Chamber to dismiss Mr Kilolo's appeal against the Impugned Decision.[22]

III. MERITS

13. Mr Kilolo presents three grounds of appeal. In his first ground of appeal, he submits that his continued detention is "a Manifest Injustice and a Blatant Violation of The Presumption of Innocence".[23] Under his second ground of appeal, Mr Kilolo argues that the Pre-Trial Chamber erred by conflating article 58 (1) (a) and article 58 (1) (b) of the Statute.[24] Under his third ground of appeal, Mr Kilolo contends that the Pre-Trial Chamber erred in finding that the conditions under article 58 (1) (b) of the Statute were met.[25]

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

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[20] Document in Support of the Appeal, para. 85.
[21] ICC-01/05-01/13-302 (OA 2).
[22] Response to the Document in Support of the Appeal, para. 20.
[23] Document in Support of the Appeal, p. 3, paras 4-21.
[24] Document in Support of the Appeal, paras 22-23.
[25] Document in support of the Appeal, paras 24-44.
[26] Rule 163 (2) of the Rules of Procedure and Evidence provides that "[t]he provisions of Part 2 [regarding the Court's jurisdiction, admissibility and applicable law], and any rules thereunder, shall not apply, with the exception of article 21". Rule 163 (3) of the Rules of Procedure and Evidence provides that "[t]he provisions of Part 10 [regarding enforcement], and any rules thereunder, shall not apply, with the exception of articles 103, 107, 109 and 111". Rule 165 (2) of the Rules of Procedure and Evidence pertaining to investigation, prosecution and trial stipulates that "[a]rticles 53 and 59, and any rules thereunder, shall not apply". With respect to the sanctions applicable, rule 166 (2) of the

60 of the Statute are applicable to offences charged under article 70 of the Statute, and thus to the present appeal.

A. Standard of review

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

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

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

Rules of Procedure and Evidence provides that with the exception of article 77 (2) (b), the provisions of article 77 and related rules shall not apply.

[27] *Prosecutor v. Bosco Ntaganda*, "Judgment on the appeal of Mr Bosco Ntaganda against the decision of the Pre-Trial-Chamber II of 18 November 2013 entitled 'Decision on the Defence's Application for Interim Release'", 5 March 2014, ICC-01/04-02/06-271-Red (OA) (hereinafter: "*Ntaganda OA Judgment*"), para. 29; *Prosecutor v. Callixte Mbarushimana,* "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the "Defence Request for Interim Release"'", 14 July 2011, ICC-01/04-01/10-283 (OA) (hereinafter: "*Mbarushimana OA Judgment*"), para. 15, citing *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", 2 December 2009, ICC-01/05-01/08-631-Red (OA 2) (hereinafter: "*Bemba OA 2 Judgment*"), para. 62.

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

17. In relation to alleged errors of law, the Appeals Chamber has previously held that it will not defer to the Trial (or Pre-Trial) Chamber's legal interpretation, but "will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law".[29]

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

19. It is also recalled that, in his or her document in support of appeal, "an appellant is obliged not only to set out an alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision".[31] Failure to do so may lead to the Appeals Chamber dismissing arguments *in limine,* without full consideration of their merits.

B. First ground of appeal

20. Under the first ground of appeal, Mr Kilolo raises three broad arguments in support of his claim that the Impugned Decision amounted to an injustice and violated the presumption of innocence: first, he submits that the Pre-Trial Chamber was biased against him (raising several arguments to support this claim);[32] second, he submits that the Pre-Trial Chamber erred when holding that offences under article 70 of the Statute are of "utmost gravity";[33] and finally, he submits that the Pre-Trial Chamber

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[29] *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'", 17 February 2012, ICC-02/05-03/09-295 (OA 2), para. 20 (in relation to errors of law generally).
[30] *Mbarushimana OA Judgment*, paras 21, 31.
[31] *Ntaganda OA Judgment*, para. 32; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'", 19 October 2010, ICC-01/05-01/08-962-Corr (OA 3) (hereinafter: "*Bemba OA 3 Judgment*"), para. 102, citing *Prosecutor v. Joseph Kony et al.*, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (OA 3) (hereinafter: "*Kony et al. OA 3 Judgment*"), para. 48.
[32] Document in Support of the Appeal, paras 5-13.
[33] Document in Support of the Appeal, paras 14-15.

disregarded that detention must be the exception and not the norm.[34] These three arguments will be addressed in turn.

1. Relevant part of the Impugned Decision

21. In the Impugned Decision, the Pre-Trial Chamber stated that it agreed with the submissions of Mr Kilolo that detention is an exceptional measure, and as such, must be necessary and proportionate.[35] The Pre-Trial Chamber noted, however, that while it is exceptional, it shall "unfailingly apply, when the relevant statutory requirements are satisfied".[36] It noted the Appeals Chamber's ruling that decisions taken under article 60 (2) of the Statute are not discretionary, but rather, "[d]epending upon whether or not the conditions of article 58(1) of the Statute continue to be met, the detained person shall [...] continue[...] to be detained or shall be released".[37]

22. In its assessment of the conditions under article 58 (1) (a) of the Statute, the Pre-Trial Chamber noted that, in its Arrest Warrant Decision, it found that there were reasonable grounds to believe that Mr Kilolo:

> i) 'made payments to Defence witnesses with funds made available by the Accused'; ii) attempted to tender into the record of the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* [hereinafter: "*Bemba* Case"] 'at least 14 documents which he knew to be false or forged'; iii) contacted several Defence witnesses in the [*Bemba*] Case, 'immediately before or after their appearance before the Trial Chamber, and, in some instances, during recesses between two phases of their in-court testimony'; iv) during such contact, 'explained to the witnesses which questions would be put to them and the responses they should give in court'.[38]

23. The Pre-Trial Chamber referred to the body of evidence it relied upon to conclude that reasonable grounds existed, notably the annexes to the Application for Warrants of Arrest,[39] and the two reports submitted by the Independent Counsel (hereinafter: "Independent Counsel Reports") on 25 October 2013[40] and on

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[34] Document in Support of the Appeal, paras 16-21.
[35] Impugned Decision, para. 3.
[36] Impugned Decision, para. 3.
[37] Impugned Decision, para. 3, referring to *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'", 13 February 2007, ICC-01/04-01/06-824 (OA 7) (hereinafter: "*Lubanga OA 7 Judgment*"), para. 134.
[38] Impugned Decision, para. 6, referring to Arrest Warrant Decision, para. 16.
[39] Impugned Decision, paras 7-9.
[40] "Premier rapport du Conseil Indépendant (période du 15 au 30 août 2013)", ICC-01/05-64-Conf-Exp. A confidential redacted version of the report was filed on 16 December 2013 as ICC-01/05-64-Conf-Red.

14 November 2013[41] (hereinafter: "Report of 14 November 2013").[42] The Pre-Trial Chamber noted that none of this material contained in the Application for Warrants of Arrest or in the Independent Counsel Reports was addressed by Mr Kilolo in his Application for Interim Release.[43] Rather, Mr Kilolo declined to challenge the factual basis of the warrant of arrest but indicated his intention, in due course, to prove the contrary through Defence arguments.[44]

24. The Pre-Trial Chamber noted that, "under these circumstances", it was still fully persuaded that, based on an "*ex novo*" assessment of these materials, reasonable grounds to believe continued to exist that Mr Kilolo committed the crimes alleged by the Prosecutor "and that, therefore, the requirements under article 58(1)(a) of the Statute continue to be satisfied".[45]

25. As to Mr Kilolo's request for a hearing under rule 118 (3) of the Rules of Procedure and Evidence, the Pre-Trial Chamber held that, due to the "abundance of the material available" to it, it would not be "necessary or appropriate to hold a hearing at this stage and for the purposes of the determination of [Mr] Kilolo's request for interim release".[46] Accordingly, the Pre-Trial Chamber rejected Mr Kilolo's request.[47]

26. The Pre-Trial Chamber also found that, in assessing the conditions underpinning article 58 (1) (b) (i) of the Statute, "[p]ersonal circumstances of education, professional or social status are *per se* neutral and inconclusive in respect of the need to assess the existence of flight risks".[48] Relatedly, the Pre-Trial Chamber held that the fact that an individual has never before been charged or found guilty of offences against the administration of justice "does not as such impact on the evaluation of the

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[41] "Deuxième rapport du Conseil Indépendant (période du 23 août au 16 octobre 2013)", registered on 15 November 2013, ICC-01/05-66-Conf-Exp. A confidential redacted version of the report was filed on 16 December 2013 as ICC-01/05-66-Conf-Red.
[42] Impugned Decision, paras 10-14.
[43] Impugned Decision, para. 15.
[44] Impugned Decision, para. 15, referring to Application for Interim Release, para. 15.
[45] Impugned Decision, para. 16.
[46] Impugned Decision, para. 47.
[47] Impugned Decision, para. 47.
[48] Impugned Decision, para. 23.

risks associated with the specific conduct which has led to his or her arrest, in the presence of other elements suitable to substantiate the existence of those risks".[49]

27. In the course of assessing the risk of Mr Kilolo absconding under article 58 (1) (b) (i) of the Statute, the Pre-Trial Chamber referred to its finding in the Arrest Warrant Decision that Mr Kilolo 'possessed identity documents which entitled him to travel freely, not only throughout the Schengen area, but also to non-States parties to Statute [*sic*], such as Cameroon, which are under no obligation to cooperate with the Court'.[50] The Pre-Trial Chamber also noted that "offences against the administration of justice are of the utmost gravity, even more so when proceedings relating to crimes as grave as those within the jurisdiction of the Court are at stake".[51] It held that the commission of such offences is so serious as it not only disrupts the present case itself, but "undermine[s] public trust in the administration of justice and the judiciary", a factor that is exacerbated when committed by lawyers, which is the case for Mr Kilolo, whose "professional mission is to serve, rather than disrupt, justice".[52]

2. *Mr Kilolo's submissions before the Appeals Chamber*

(a) Alleged bias of the Pre-Trial Chamber

28. Mr Kilolo submits under his first ground of appeal that the Pre-Trial Chamber's "Clear Bias Mutates the Presumption of Innocence into a Presumption of Guilt".[53] He argues that, contrary to this, the presumption of innocence is enshrined in the Rome Statute, as well as in international human rights and international criminal law more generally, and that to countervail this principle and presume guilt "is an error of law amounting to a manifest injustice".[54]

29. First, Mr Kilolo argues that bias on the part of the Pre-Trial Chamber is evidenced by a number of factors, including the denial of his request for a hearing.[55] Mr Kilolo submits that, as per his right, he requested a public hearing pursuant to rule 118 (3) of the Rules of Procedure and Evidence to discuss the possibility of interim

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[49] Impugned Decision, para. 23.
[50] Impugned Decision, para. 20.
[51] Impugned Decision, para. 23.
[52] Impugned Decision, para. 23.
[53] Document in Support of the Appeal, p. 4.
[54] Document in Support of the Appeal, para. 4.
[55] Document in Support of the Appeal, para. 5.

release and any potential conditions thereto.[56] He argues that he was prejudiced by the Pre-Trial Chamber's decision not to do so, as he was deprived of the opportunity to "have come to a mutual compromise and understanding as to the conditions" with the Belgian authorities of a potential conditional release to Belgium.[57]

30. Second, Mr Kilolo argues that the language of the Pre-Trial Chamber evidences bias insofar as, at times, it references the commission of crimes by Mr Kilolo as opposed to the "alleged" commission of offences.[58]

31. Third, Mr Kilolo argues that the Pre-Trial Chamber erred in refusing to take into real consideration any mitigating factors in terms of his personal circumstances (namely, education, professional or social status) as well as his lack of criminal record, and that dismissing these factors "without any real reason is to contravene judicial equity and presuppose guilt".[59]

32. Fourth, Mr Kilolo contends that the Impugned Decision lacks concrete and specific reasoning, despite the Pre-Trial Chamber's acknowledgment of the conditions of the Appeals Chamber that "[a]rticle 60(2) decisions on interim release must be accompanied by a full reasoning".[60] Mr Kilolo further avers that, in order to justify his detention, the Pre-Trial Chamber relied upon the material attached to the Application for Warrants of Arrest which constituted "highly tenuous and unsubstantiated evidence", thus demonstrating a prejudice amounting to a presumption of guilt on the part of the Pre-Trial Chamber.[61] He argues that "it cannot be assumed – on the basis of an [a]rticle 58(1)(a) arrest warrant issued against Mr Kilolo more than four months ago – that reasonable grounds for detention *continue* to exist, and it was erroneous for the [Pre-Trial Chamber] to simply refer to the materials listed in the [Arrest Warrant Decision] as justification for continued detention".[62] In particular, Mr Kilolo contests the Impugned Decision's reference to evidence underpinning his contact with Defence

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[56] Document in Support of the Appeal, para. 6.
[57] Document in Support of the Appeal, para. 6.
[58] Document in Support of the Appeal, paras 5, 7. *See also* Document in Support of the Appeal, paras 8, 41, 42.
[59] Document in Support of the Appeal, paras 5, 9, referring to Impugned Decision, para. 23. *See also* Document in Support of the Appeal, para. 45.
[60] Document in Support of the Appeal, para. 10, referring to Impugned Decision, para. 4. *See also* Document in Support of the Appeal, para. 5.
[61] Document in Support of the Appeal, paras 11-12.
[62] Document in Support of the Appeal, para. 12 (emphasis in original).

witnesses in the *Bemba* Case and his concomitant complaints regarding witnesses' statements, as well as Mr Kilolo's connection to purportedly forged documents.[63]

33. Fifth, Mr Kilolo argues that the Pre-Trial Chamber's conclusion that he may flee to Cameroon, despite the fact he "is a citizen of Belgium and was in possession only of Belgian identity and travel documents" evidences racial bias "on the basis of his skin colour".[64]

(b) Alleged error regarding the gravity of the offences

34. Mr Kilolo argues that the Pre-Trial Chamber erroneously classified offences under article 70 of the Statute as those of the "utmost gravity" when, pursuant to article 5 of the Statute, crimes of that ilk are limited to genocide, crimes against humanity, war crimes and the crime of aggression as the "'*most serious crimes of concern to the international community as a whole*'".[65]

(c) Alleged error regarding the principle of the exceptionality of detention

35. Mr Kilolo submits that, according to international law, and as affirmed by a decision on interim release of Pre-Trial Chamber I in the case of the *Prosecutor v. Laurent Gbagbo*,[66] detention ought to be the exception and not the rule, and therefore should "be used as a means of *last resort*".[67] Mr Kilolo argues further that detention should only ever be ordered in a fully reasoned decision and on the basis of "concrete and specific evidence" in relation to both the detained person's "guilt",[68] as well as the conditions underpinning article 58 (1) (b) of the Statute.[69] Further, such a decision should only be taken after consideration of "all relevant factors [...] considered together".[70] Mr Kilolo argues that the Pre-Trial Chamber displayed a presumption in favour of Mr Kilolo's guilt by ignoring his "various personal undertakings,

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[63] Document in Support of the Appeal, para. 11.
[64] Document in Support of the Appeal, para. 13. *See also* Document in Support of the Appeal, para. 5.
[65] Document in Support of the Appeal, paras 14-15 (emphasis in original). *See also* Document in Support of the Appeal, para. 45. The Appeals Chamber notes that this subsection appears to be the second limb of Mr Kilolo's first ground of appeal, despite being designated as "(a)".
[66] Document in Support of the Appeal, para. 16, referring to "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 13 July 2012, ICC-02/11-01/11-180-Red, para. 42.
[67] Document in Support of the Appeal, para. 16 (emphasis in original).
[68] Document in Support of the Appeal, para. 19 (emphasis in original omitted).
[69] Document in Support of the Appeal, para. 17.
[70] Document in Support of the Appeal, para. 18.

professional endorsements, lack of criminal record and willingness to work with the various authorities to negotiate conditions of an interim release".[71]

36. Mr Kilolo also contends that, pursuant to article 67 (1) (i) of the Statute, the Prosecutor bears the burden of proof in showing that the conditions set out in article 58 (1) (b) of the Statute have been satisfied.[72] Mr Kilolo notes two dissenting opinions in judgments of the Appeals Chamber that, in his view are critical of the shifting of the burden of proof onto the accused,[73] and avers that the phrasing "*continue to be met* [in article 60 (2) of the Statute]" indicates that any initial satisfaction of the conditions underpinning detention "does not necessarily continue in perpetuity".[74] Mr Kilolo argues further that, in the present case, the Pre-Trial Chamber wrongfully shifted the burden of proof onto the Defence by arguing that "the Defence's failure to address the material submitted by the Prosecutor fully persuades [it] as to the convincing nature of the materials".[75]

3. The Prosecutor's submissions before the Appeals Chamber

(a) Alleged bias of the Pre-Trial Chamber

37. The Prosecutor submits that, overall, Mr Kilolo's first ground of appeal "fail[s] to identify a discernible error in the [Pre-Trial Chamber]'s exercise of discretion and should be dismissed", because, *inter alia*, the Pre-Trial Chamber enunciated the "correct legal principles of the presumption of innocence and the exceptionality of detention", and noted that these do not preclude detention where the conditions of article 58 (1) (b) are satisfied.[76]

38. The Prosecutor avers that the denial of Mr Kilolo's request for a hearing was not arbitrarily decided by the Pre-Trial Chamber; rather the Pre-Trial Chamber

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[71] Document in Support of the Appeal, para. 19.
[72] Document in Support of the Appeal, para. 20.
[73] Document in Support of the Appeal, para. 20, referring to *Prosecutor v. Jean-Pierre Bemba Gombo*, "Dissenting opinion of Judge Georghios M. Pikis", para. 24 in "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*"); "Dissenting Opinion of Judge Anita Ušacka", para. 22 in *Gbagbo OA Judgment*.
[74] Document in Support of the Appeal, para. 20 (emphasis in original).
[75] Document in Support of the Appeal, para. 21 (emphasis in original omitted), referring to Impugned Decision, para. 15 (footnote omitted).
[76] Response to the Document in Support of the Appeal, para. 2.

correctly used its discretion in finding that the information referred to in the Impugned Decision made it 'not necessary or appropriate to hold a hearing'.[77]

39. The Prosecutor also argues that Mr Kilolo misread the Impugned Decision in arguing that its language 'impl[ied] guilt', as it refers to "the conduct in which the [Pre-Trial Chamber] found reasonable grounds to believe he engaged" rather than his 'actual conduct'.[78] She further avers that the Pre-Trial Chamber did not err when declining to consider Mr Kilolo's personal circumstances as 'mitigating' factors under article 58 (1) (b) (i) of the Statute because, *inter alia*, the Pre-Trial Chamber "provided detailed reasons for why [it] discounted these factors".[79] The Prosecutor also notes that, in reviewing these findings, the Appeals Chamber ought to accord the Pre-Trial Chamber a "margin of appreciation" whereby it will only intervene "'where it cannot discern how the Chamber's conclusion could have reasonably been reached'".[80]

40. In relation to Mr Kilolo's contention that the Impugned Decision is devoid of concrete and specific reasoning, the Prosecutor argues that Mr Kilolo merely disagrees with the Impugned Decision and does not "properly characterise any alleged error or clearly define the scope of his objection", and that regardless, the Impugned Decision indeed "provides detailed reasoning based on concrete evidence".[81] The Prosecutor also argues that Mr Kilolo's contention "resort to contesting generally the [Pre-Trial Chamber's] [a]rticle 58(1)(a) findings is insufficient" to support a ground of appeal attacking the reasoning of the Impugned Decision.[82]

41. The Prosecutor further contends that Mr Kilolo's contention of racial bias is "hyperbolic" and "unfounded", given the lack of evidentiary support in respect of such a claim.[83]

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[77] Response to the Document in Support of the Appeal, para. 3.
[78] Response to the Document in Support of the Appeal, para. 4.
[79] Response to the Document in Support of the Appeal, para. 5.
[80] Response to the Document in Support of the Appeal, para. 5.
[81] Response to the Document in Support of the Appeal, para. 6.
[82] Response to the Document in Support of the Appeal, para. 6.
[83] Response to the Document in Support of the Appeal, para. 7.

(b) Alleged error regarding the gravity of the offences

42. In relation to Mr Kilolo's contention that the Pre-Trial Chamber erred in characterising offences under article 70 of the Statute as crimes of utmost gravity, the Prosecutor avers that this finding was immaterial to the determination of the Appeals Chamber as the Pre-Trial Chamber did not rely on this finding when deciding to maintain his detention.[84]

(c) Alleged error regarding the principle of the exceptionality of detention

43. The Prosecutor argues that the allegation that the Pre-Trial Chamber violated the principle of the exceptionality of detention is not sustainable, as Mr Kilolo merely repeats his previous submissions and fails to demonstrate that the Pre-Trial Chamber erred in its exercise of discretion.[85] The Prosecutor avers that the Pre-Trial Chamber gave "adequate and detailed reasoning for not taking into account Kilolo's personal circumstances".[86]

44. Regarding Mr Kilolo's submission that the Pre-Trial Chamber reversed the burden of proof, the Prosecutor alleges that Mr Kilolo misrepresents the Pre-Trial Chamber's reasoning as it "laid out the circumstances" leading to its conclusion, by first turning to the evidence, before proceeding to assess "whether any Defence argument undermined [its] conclusion", which the Prosecutor argues, is in accordance with article 67 (1) (g) and (i) of the Statute.[87]

4. Determination by the Appeals Chamber

(a) Alleged bias of the Pre-Trial Chamber

45. The Appeals Chamber notes that with the first set of submissions raised under the first ground of appeal, Mr Kilolo contends that the Pre-Trial Chamber was biased against him. In doing so, Mr Kilolo raises numerous arguments which appear to allege errors of a procedural or legal nature. Accordingly, the Appeals Chamber will consider Mr Kilolo's submissions in light of its applicable standard of review for such errors.

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[84] Response to the Document in Support of the Appeal, para. 8.
[85] Response to the Document in Support of the Appeal, para. 9.
[86] Response to the Document in Support of the Appeal, para. 9.
[87] Response to the Document in Support of the Appeal, para. 10.

46. With regard to Mr Kilolo's contention that the Pre-Trial Chamber erred in not holding a hearing pursuant to rule 118 (3) of the Rules of Procedure and Evidence,[88] the Appeals Chamber recalls that the Pre-Trial Chamber found that "[i]n view [of] the abundance of the material available to [Mr Kilolo], a great amount of which has been referred to in [the Impugned Decision], makes it not necessary or appropriate to hold a hearing at this stage for the purposes of the determination of [Mr] Kilolo's request for interim release".[89]

47. The Appeals Chamber notes that under rule 118 (3) of the Rules of Procedure and Evidence the Pre-Trial Chamber may hold a hearing, "at the request of the Prosecutor or the detained person or on its own initiative", but is not obliged to do so. The Pre-Trial Chamber's decision to decline the convening of a hearing was thus an exercise of its discretion on a procedural issue. In relation to procedural errors, the Appeals Chamber has considered, in the *Kony et al. OA 3 Judgment,* such errors to be those that occurred in the "proceedings leading up to" an impugned decision.[90] In relation to discretionary decisions, the Appeals Chamber recalls that it "will not interfere with the Pre-Trial Chamber's exercise of discretion" merely because it "might have made a different ruling".[91] The Appeals Chamber's examination will be limited to establishing whether the Pre-Trial Chamber exercised its discretion incorrectly.[92] In relation to the convening of hearings specifically, the Appeals Chamber has held that the decision to convene a hearing is discretionary rather than obligatory, and that the question on appeal is therefore limited to assessing whether or not failure to convene a hearing amounted to abuse of the Trial Chamber's discretion.[93]

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[88] Document in Support of the Appeal, para. 6.
[89] Impugned Decision, para. 47.
[90] *See Kony et al. OA 3 Judgment*, para. 46. *See also Bemba OA 3 Judgment*, para. 101, in which the Appeals Chamber qualified an alleged error that occurred in the "preliminary proceedings" prior to the rendering of an impugned decision as procedural.
[91] *Kony et al. OA 3 Judgment*, para. 79.
[92] *See, e.g. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defence for Germian Katanga for a Declarartion on Unlawful Detention and Stay of Proceedings'", 12 July 2010, ICC-01/04-01/07-2259 (OA 10), para. 34.
[93] *Prosecutor v. Muthaura et al.*, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", 30 August 2011, ICC-01/09-02/11-274 (OA), para. 108.

48. In light of this standard of review, the Appeals Chamber considers that Mr Kilolo has not demonstrated that the Pre-Trial Chamber abused its discretion when deciding not to convene a hearing. Mr Kilolo had the opportunity to present written submissions in support of his Application for Interim Release. Furthermore, his contention that a hearing would have provided an opportunity to reach a "mutual compromise and understanding"[94] is unsubstantiated, speculative, and does not, in and of itself, disclose any error in the exercise of discretion. Accordingly, Mr Kilolo's argument in this regard is dismissed.

49. Mr Kilolo argues further that the language used in the Impugned Decision exhibited bias on the part of the Pre-Trial Chamber when it referenced "[his] actual commission of crimes as opposed to the *alleged* commission of *offenses*".[95] As argued by the Prosecutor,[96] the Appeals Chamber considers that the manner in which the Pre-Trial Chamber references Mr Kilolo's conduct must be understood in light of its analysis and eventual finding under article 58 (1) (a) of the Statute that the evidence establishes "reasonable grounds to believe" that Mr Kilolo "committed the crimes alleged by the Prosecutor".[97] Thus all references to Mr Kilolo's "conduct" must be read in this context. This reading is reinforced by the Pre-Trial Chamber's five other references in the Impugned Decision to the term "alleged".[98] The Appeals Chamber is therefore satisfied that the Pre-Trial Chamber did not exhibit bias in the Impugned Decision by using inappropriate language.

50. In relation to Mr Kilolo's argument that, when assessing the criteria to grant interim release, the Pre-Trial Chamber "refused to take into real consideration any mitigating factors", such as his personal circumstances,[99] the Appeals Chamber notes that, apart from asserting that such an omission "contravene[s] judicial equity and presuppose[s] guilt",[100] Mr Kilolo fails to substantiate how the alleged error amounts to bias in these circumstances. In the absence of such substantiation, the Appeals Chamber dismisses Mr Kilolo's argument. However, the Appeals Chamber will

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[94] Document in Support of the Appeal, para. 6.
[95] Document in Support of the Appeal, para. 7 (emphasis in original).
[96] *See* Response to the Document in Support of the Appeal, para. 4.
[97] *See* Impugned Decision, para. 16.
[98] *See* Impugned Decision, paras 5, 31, 37, 43.
[99] Document in Support of the Appeal, para. 9.
[100] Document in Support of the Appeal, para. 9.

consider the issue of personal circumstances[101] later in this judgment, insofar as it relates to Mr Kilolo's third ground of appeal.

51. In relation to Mr Kilolo's argument on the lack of concrete and specific reasoning of the Impugned Decision, the Appeals Chamber recalls that it has previously determined, in the context of disclosure decisions, that insufficient reasoning may amount to an error of law:

> 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 Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.[102]

52. The Appeals Chamber recalls that this issue was also considered by the Appeals Chamber in the context of reviewing a decision of interim release in the case of the *Prosecutor v. Laurent Gbagbo*.[103]

53. The Appeals Chamber finds that, in the present case, Mr Kilolo has failed to establish that the Impugned Decision was insufficiently reasoned. Indeed, while Mr Kilolo raises the purported lack of reasoning of the Impugned Decision to demonstrate that the Pre-Trial Chamber was biased against him,[104] the Appeals Chamber finds that he appears merely to be arguing against the compellability of the evidence relied upon by the Pre-Trial Chamber in finding "reasonable grounds to believe" he committed the crimes alleged, rather than the reasoning thereto.[105] Mr Kilolo therefore merely asserts the reasoning was insufficient without substantiating this claim further. Accordingly, Mr Kilolo's argument in relation to this issue is dismissed.

54. Turning to Mr Kilolo's argument that the Pre-Trial Chamber detained him, *inter alia*, in the "absence of any concrete evidence rendering detention suitable in this

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[101] *See* Document in Support of the Appeal, para. 9.
[102] *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), para. 20.
[103] "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 Gbabgo's detention pursuant to article 60(3) of the Rome Statute'", 29 October 2013, ICC-02/11-01/11-548-Red, paras 19-24.
[104] *See* Document in Support of the Appeal, para. 11.
[105] *See* Document in Support of the Appeal, para. 12.

case",[106] the Appeals Chamber notes that, in concluding that reasonable grounds existed under article 58 (1) (a) of the Statute, Mr Kilolo committed the crimes alleged by the Prosecutor, the Pre-Trial Chamber referenced in the Impugned Decision the specific evidence underpinning its findings under both counts in the Arrest Warrant Decision. Such evidence included the materials appended to the Application for Warrants of Arrest, as well as the Independent Counsel Reports.[107] The Appeals Chamber notes further that Mr Kilolo does not challenge this underlying material in his Application for Interim Release,[108] however; he does seek to contest the "compelling" nature of this evidence on appeal.[109] In so doing, Mr Kilolo fails, however, to identify the relevant evidentiary standard the Pre-Trial Chamber ought to have met.

55. In this connection, the Appeals Chamber notes that the relevant standard underpinning article 58 (1) (a) of the Statute is the least onerous of the progressively higher evidentiary thresholds required for confirmation of charges under article 61 (7) of the Statute ("substantial grounds to believe" that the person committed each of the crimes charged), or for conviction under article 66 (3) (in which the Court must be convinced of the guilt of the accused "beyond reasonable doubt"). In terms of what "reasonable grounds to believe" specifically entails, the Appeals Chamber recalls its finding in the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*[110] that:

> The belief must be founded upon grounds such as to warrant its reasonableness. Suspicion simpliciter is not enough. Belief denotes, in this context, acceptance of a fact (footnote omitted). The facts placed before the Chamber must be cogent to the extent of creating a reasonable belief that the person committed the crimes.[111]

56. In the present case, while the Pre-Trial Chamber voiced its doubts in relation to the utility of reviewing anew whether "reasonable grounds to believe" continue to exist that Mr Kilolo committed the crimes for which he was charged, it stated that it

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[106] Document in Support of the Appeal, para. 12.
[107] Impugned Decision, para. 16.
[108] *See* Application for Interim Release, para. 34.
[109] Document in Support of the Appeal, para. 11.
[110] "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*").
[111] *Ngudjolo OA 4 Judgment*, para. 18.

would "nevertheless refer to some of the materials relied upon in issuing the warrant (as well as their contents), all of which have been reconsidered and assessed *ex novo* for the purposes of this decision".[112] The Appeals Chamber notes that these materials included:

> a) translated excerpts of phone calls [*sic*] intercepts between Jean-Pierre Bemba [hereinafter: "Mr Bemba"] and Fidèle Babala, where [Mr] Kilolo is mentioned in connection with money transfers requested by or made to him (and to Jean-Jacques Mangenda); b) tables containing details of amounts of money transferred to and by [Mr] Kilolo, including to Defence witnesses in the [*Bemba*] Case; c) fourteen documents received by [Mr] Kilolo from Narcisse Arido for the purposes of being tendered into evidence in the [*Bemba*] Case, the authenticity of which is explicitly disputed by witnesses. [Footnotes omitted.][113]

57. Furthermore, the Pre-Trial Chamber referred specifically to materials submitted by the Prosecutor in relation to article 70 (l) (a) of the Statute, including a witness statement in the *Bemba* Case challenging the authenticity of a number of documents,[114] as well as materials made available by the Prosecutor in relation to article 70 (l) (c) of the Statute, purporting to show that Defence witnesses were contacted without authorisation during adjournments of their testimony, and that some amended their testimony.[115]

58. The Appeals Chamber notes that the Pre-Trial Chamber also referred to the Independent Counsel Reports,[116] which display evidence that witnesses were allegedly coached and corruptly influenced, including Mr Kilolo giving instructions in relation to what they ought to testify, as well as alleged fabrication of evidence.[117] The Pre-Trial Chamber also found the Independent Counsel Reports to point to money transfers involving Mr Kilolo,[118] as well as "conversations in which, inter alia, [Mr] Kilolo refers to instructions to be given to the witnesses, or makes comparisons between and complains about, witnesses' statements", collectively pointing to a 'scheme' of witness corruption in which Mr Kilolo "played a determinant role".[119]

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[112] *See* Impugned Decision, para. 4.
[113] Impugned Decision, para. 7.
[114] Impugned Decision, para. 8.
[115] Impugned Decision, para. 9.
[116] Impugned Decision, para. 10.
[117] *See* Impugned Decision, para. 11.
[118] *See* Impugned Decision, para. 12.
[119] Impugned Decision, para. 13 (footnotes omitted).

59. The Pre-Trial Chamber therefore clearly articulated the evidence establishing Mr Kilolo's alleged conduct which led the Pre-Trial Chamber to find that there were "reasonable grounds to believe" that the crimes alleged had been committed by Mr Kilolo. On the basis of this evidence, and in light of the requirement that this evidence need only at this stage of the proceedings support the standard of "reasonable grounds to believe", the Appeals Chamber can discern no clear error in the Pre-Trial Chamber's findings under article 58 (1) (a) of the Statute in relation to Mr Kilolo, and accordingly finds no evidence that the Pre-Trial Chamber was biased.

60. The Appeals Chamber now turns to Mr Kilolo's contention that it was erroneous for the Pre-Trial Chamber to have merely "refer[ed] to the materials listed in the arrest warrant as justification for continued detention" to support its finding under article 58 (1) (a) of the Statute, insofar as "it cannot be assumed – on the basis of an article 58 (1) (a) arrest warrant issued against Mr Kilolo more than four months ago – that reasonable grounds for detention continue to exist".[120] The Appeals Chamber finds this argument to be legally incorrect. In the *Gbagbo OA Judgment*, the Appeals Chamber held that, "in a decision under article 60 (2) of the Statute, a Pre-Trial Chamber may refer to the decision on the warrant of arrest, without this affecting the *de novo* character of the Pre-Trial Chamber's decision".[121] Accordingly, the Pre-Trial Chamber in the instant case was at liberty to refer to the materials underpinning the Arrest Warrant Decision to support its finding under article 58 (1) (a) of the Statute, as assessed *de novo*. Accordingly, Mr Kilolo's argument in this regard is dismissed.

61. Turning to Mr Kilolo's argument concerning purported racial bias on the part of the Pre-Trial Chamber in the Impugned Decision, the Appeals Chamber notes that Mr Kilolo refers to the Pre-Trial Chamber's finding in the Arrest Warrant Decision that there was a risk that he may flee to Cameroon,[122] which the Pre-Trial Chamber recalled in the Impugned Decision.[123] He also avers that the Pre-Trial Chamber referred to an African country as a possible destination only because of the colour of

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[120] Document in Support of the Appeal, para 12 (emphasis in original omitted).
[121] *Gbagbo OA Judgment*, para. 27.
[122] *See* Document in Support of the Appeal, para. 13.
[123] Impugned Decision, para. 20.

his skin.[124] However, the Appeals Chamber finds that an examination of the record of the case reveals that this argument is evidently unfounded. In that regard, there were submissions in the Application for Interim Release and the confidential version of the Application for Warrants of Arrest that specifically referred to Cameroon.[125] Therefore this finding on the part of the Pre-Trial Chamber was clearly contextualised, being based both on the Application for Warrants of Arrest as well as the Application for Interim Release. Accordingly, the Appeals Chamber can discern no bias on the part of the Pre-Trial Chamber, and accordingly dismisses Mr Kilolo's argument in this regard.

(b) Alleged error regarding the gravity of the offences

62. The Appeals Chamber now turns to Mr Kilolo's argument in relation to the Pre-Trial Chamber's observation in the Impugned Decision that offences under article 70 of the Statute are "of the utmost gravity", which he avers "amounts to an unprecedented upgrading and equating of *offenses* (conviction of which is subject to a maximum of five years) to those heinous *crimes* punishable by life in prison".[126] Mr Kilolo submits that the gravity of the alleged offences against him are not "so heinous as to justify protracted detention".[127]

63. The Appeals Chamber recalls that it has previously ruled that the gravity of crimes, and the concomitant sentence that may be imposed upon conviction, are relevant considerations in assessing the risk that a person may not appear at trial.[128]

64. However, in the present case, the Pre-Trial Chamber's description of offences against the administration of justice as those "of the utmost gravity" is concerning. The Appeals Chamber emphasises that offences under article 70 of the Statute, while certainly serious in nature, are by no means considered to be as grave as the core crimes under article 5 of the Statute, being genocide, crimes against humanity, war crimes, and the crime of aggression, which are described in that provision to be "the most serious crimes of concern to the international community as a whole". The

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[124] Document in Support of the Appeal, para. 13.
[125] *See* Application for Interim Release, para. 25; Application for Warrants of Arrest, para. 89.
[126] Document in Support of the Appeal, para. 14 (emphasis in original).
[127] Document in Support of Appeal, para. 15.
[128] *See Gbagbo OA Judgment*, para. 54; *Mbarushimana OA Judgment*, para. 21; *Bemba OA 2 Judgment*, para. 70; *Bemba OA Judgment*, para. 55; *Ngudjolo OA 4 Judgment*, para. 21; *Lubanga OA 7 Judgment*, para. 136.

language used by the Pre-Trial Chamber in describing the offences for which Mr Kilolo was charged to be "of the utmost gravity" is therefore problematic, as it may give rise to a perception that the Pre-Trial Chamber accorded too much weight to the seriousness of the alleged offences in assessing the risk under article 58 (1) (b) (i) of the Statute.

65. Notwithstanding, the Appeals Chamber notes that the Pre-Trial Chamber's observation in relation to the gravity of the offences allegedly committed by Mr Kilolo is supported by three reasons: (i) that offences against the administration of justice "threaten or disrupt the overall fair and efficient functioning of the justice in the specific case to which they refer"; (ii) that such offences "ultimately undermine the public trust in the administration of justice and the judiciary"; and (iii) that "[s]uch seriousness is only enhanced" when committed by those whose "professional mission is to serve, rather than disrupt, justice".[129] These reasons support the logic that the commission of offences against the administration of justice, as a discrete category, may have specific and serious ramifications (that is, on the case at hand and on the administration of justice more broadly). Therefore, given the detailed reasons put forward by the Pre-Trial Chamber for its observations, which are specific to offences under article 70 of the Statute, the Appeals Chamber does not consider that the Pre-Trial Chamber actually sought to equate such offences with those under article 5 of the Statute, despite the language it used. Therefore, notwithstanding the concerns outlined above, the Appeals Chamber does not find any clear error in this regard.

(c) Alleged error regarding the principle of the exceptionality of detention

66. In relation to Mr Kilolo's argument that the Pre-Trial Chamber violated the principle of the exceptionality of detention, the Appeals Chamber notes that, under the heading "General Principles" in the Impugned Decision, the Pre-Trial Chamber explicitly recalled the exceptional nature of the detention.[130] It then noted that, where the relevant statutory requirements are satisfied, "the presumption of innocence does not *per se* prevent detention".[131] The Appeals Chamber finds that, in so finding, the

[129] Impugned Decision, para. 23.
[130] *See* Impugned Decision, para. 3.
[131] Impugned Decision, para. 3.

Pre-Trial Chamber was guided by the correct legal standard in making its decision under article 60 (2) of the Statute.

67. In this regard, the Appeals Chamber recalls that it has previously recognised that "[t]he provisions of the Statute relevant to detention, like every other provision of it, must be interpreted and applied in accordance with 'internationally recognised human rights'".[132] The exceptionality of detention and the presumption of innocence, as "internationally recognised human rights" under article 21 (3) of the Statute, are therefore relevant to the interpretation of articles 58 (1) and 60 (2) of the Statute. However, the thrust of decisions on interim release is the concrete assessment of whether "reasonable grounds to believe" the suspect committed the alleged crimes continues to exist and that the conditions under article 58 (1) (b) are met. Therefore, if the conditions underpinning article 58 (1) are satisfied, detention of a suspect will be justifiable and consonant with internationally recognised human rights principles. The Appeals Chamber also notes that article 60 (4) of the Statute provides that "[t]he Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions".

68. In light of these considerations, the Appeals Chamber finds that pre-trial detention, whilst to be ordered exceptionally, does not breach internationally recognised human rights or criminal law principles such as the presumption of innocence where it is justified under articles 58 (1) and 60 (2) of the Statute, and can therefore discern no clear error on the part of the Pre-Trial Chamber in finding the conditions underpinning article 58 (1) of the Statute were met.

69. In relation to Mr Kilolo's argument that the Pre-Trial Chamber reversed the burden of proof by finding that "the Defence's failure to address the material submitted by the Prosecutor fully persuades [it] as to the convincing nature of the materials",[133] the Appeals Chamber finds that Mr Kilolo misrepresents the process by which the Pre-Trial Chamber concluded the conditions underpinning article 58 (1) (a)

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[132] *Ngudjolo OA 4 Judgment*, para. 15, referring to *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006, ICC-01/04-01/06-772 (OA 4), para. 36 (footnote omitted).
[133] Document in Support of the Appeal, para. 21.

of the Statute continued to be met. The Pre-Trial Chamber clearly stated that, for the purposes of Mr Kilolo's Application for Interim Release, it had assessed the evidence before it "*ex novo*", notwithstanding the fact that Mr Kilolo elected not to address said evidence.[134] The Appeals Chamber finds that conducting a new assessment militates against any allegation of a burden-shifting to Mr Kilolo, given that it demonstrates that the Pre-Trial Chamber followed the correct procedure under article 60 (2) of the Statute, notwithstanding the dearth of further submissions before it in relation to the said material. The Appeals Chamber therefore finds nothing to suggest that the Pre-Trial Chamber reversed the burden of proof, and consequently dismisses Mr Kilolo's argument on this point.

70. Accordingly, the Appeal Chamber dismisses Mr Kilolo's first ground of appeal.

C. Second ground of appeal

71. Under his second ground of appeal, Mr Kilolo submits that the Pre-Trial Chamber erroneously assessed "*ex novo*" the conditions underpinning article 58 (1) (a) of the Statute in its consideration of interim release under article 60 (2) of the Statute, namely, whether reasonable grounds existed to believe that Mr Kilolo committed the offences alleged, rather than focusing on those underpinning article 58 (1) (b) of the Statute.[135]

1. Relevant part of the Impugned Decision

72. In the Impugned Decision, the Pre-Trial Chamber noted that in "referring to 'article 58, paragraph 1', article 60(2) of the Statute seems to require the Pre-Trial Chamber to proceed anew to an assessment of both the existence of reasonable grounds to believe that the crimes alleged by the Prosecutor have been committed by the arrested person (article 58(1)(a)[)], and of the existence of one or more of the risks listed under article 58(1)(b)".[136] Notwithstanding, it queried "to what extent a Pre-Trial Chamber (namely, the same Pre-Trial Chamber who has issued the warrant of arrest) can be meaningfully called upon reassessing the existence of reasonable grounds to believe that a crime has been committed in the context of an application

[134] Impugned Decision, paras 15-16.
[135] Document in Support of the Appeal, paras 22-23.
[136] Impugned Decision, para. 5.

for interim release" under article 58 (1) (a) of the Statute.[137] The Pre-Trial Chamber further noted that the practice of most Chambers of the Court in making decisions on interim release "seems, most appropriately, to have rather focussed on the determination as to whether one or more of the risks listed under letter b of article 58(1) still exist".[138]

73. However, regardless of these observations, the Pre-Trial Chamber stated that it would nonetheless assess the "persisting existence" of reasonable grounds to believe that Mr Kilolo had committed the crimes alleged, as articulated below.[139]

74. Having noted that Mr Kilolo had elected not to address any of the materials attached to the Application for Warrants of Arrest, nor the Independent Counsel Reports underpinning its findings under article 58 (1) (a) of the Statute,[140] the Pre-Trial Chamber found that, "under these circumstances", it was still fully persuaded that, based on an "*ex novo*" assessment of these materials, reasonable grounds continued to exist that Mr Kilolo committed the crimes alleged by the Prosecutor "and that, therefore, the requirements under article 58(1)(a) of the Statute continue to be satisfied".[141]

75. The Pre-Trial Chamber then went on to consider separately the conditions underpinning article 58 (1) (b) of the Statute, ultimately concluding that the conditions of each of the subparagraphs in article 58 (1) (b) (i) to (iii) were met.[142]

2. Mr Kilolo's submissions before the Appeals Chamber

76. Mr Kilolo argues that decisions on interim release are "premised on the existence of those risks posed in [a]rticle 58(1)(b)" of the Statute.[143] Mr Kilolo avers that the Pre-Trial Chamber erred in its "reiteration of the Prosecutor's unsubstantiated evidence in her [a]rticle 58(1)(a) Application for an arrest warrant"[144] given that "[a]rticle 58(1)(b) is the applicable rule" in taking a decision on an application for

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[137] Impugned Decision, para. 5.
[138] Impugned Decision, para. 5.
[139] Impugned Decision, para. 5.
[140] Impugned Decision, para. 15.
[141] Impugned Decision, para. 16.
[142] Impugned Decision, paras 17-40.
[143] Document in Support of the Appeal, para. 22.
[144] Document in Support of the Appeal, para. 22.

interim release.[145] He posits that contesting the Prosecutor's allegations in an interim release request would be a "clear conflation of two distinct legal rules under [a]rticle 58(1) and would amount to a mini-trial" prior to any charges having been confirmed.[146] Mr Kilolo avers further that such a conflation means that, once the warrant of arrest under article 58 (1) (a) of the Statute has been issued, the conditions of article 58 (1) (b) of the Statute would be satisfied automatically, thus "negating the purpose of an *ex novo* review" and as a result, precluding Mr Kilolo "from successfully arguing for interim release".[147]

77. He argues that interim release requests are not an appropriate avenue to challenge decisions on warrants of arrest, and that, by considering the materials supporting the warrant of arrest in deciding whether to release him, the Pre-Trial Chamber "effectively precludes Mr Kilolo from successfully arguing for interim release".[148]

3. Prosecutor's submissions before the Appeals Chamber

78. The Prosecutor submits that Mr Kilolo's argument that the Pre-Trial Chamber inappropriately assessed "*ex novo*" whether reasonable grounds existed to believe that Mr Kilolo committed the offences alleged "is legally incorrect".[149] She notes that article 60 (2) of the Statute requires the Pre-Trial Chamber to satisfy itself of both of the conditions under article 58 (1) (a) and (b) of the Statute, and accordingly, that in assessing the factors relating to both provisions, the Pre-Trial Chamber "upheld Kilolo's right to have the evidentiary basis for his detention reviewed in light of any changed circumstances".[150]

4. Determination by the Appeals Chamber

79. The Appeals Chamber finds Mr Kilolo's argument in relation to the irrelevance of article 58 (1) (a) of the Statute to a decision on interim release to be legally incorrect. Article 60 (2) of the Statute provides that "[i]f the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained". Therefore, it is clear that the conditions underpinning

[145] Document in Support of the Appeal, para. 23.
[146] Document in Support of the Appeal, para. 23 (emphasis in original omitted).
[147] Document in Support of the Appeal, para. 23.
[148] Document in Support of the Appeal, para. 23 (emphasis in original omitted).
[149] Response to the Document in Support of the Appeal, para. 11.
[150] Response to the Document in Support of the Appeal, para. 11.

both article 58 (1) (a) and (b) of the Statute must continue to be satisfied in order to maintain the detention of a suspect. Indeed, this reflects the well-established practice in the jurisprudence of the Court relating to article 60 (2) of the Statute.[151]

80. Furthermore, the Appeals Chamber considers Mr Kilolo's argument that an "*ex novo*" assessment of article 58 (1) (a) of the Statute would unduly require the suspect to contest the Prosecutor's allegations before any charges have been confirmed, to be misguided.[152] Indeed, proceedings under article 60 (2) of the Statute constitute an early opportunity, following the arrest of a suspect, to make submissions in relation to the charges alleged. Thus, requiring the Pre-Trial Chamber to assess anew whether "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court",[153] exists, not only safeguards the right of the suspect to be heard on and to challenge this fundamental question at a very early stage of the proceedings, but also ensures the legality of his detention.

81. Accordingly, the Appeals Chamber dismisses Mr Kilolo's second ground of appeal.

D. Third ground of appeal

82. Under his third ground of appeal, Mr Kilolo submits that the applicable standard in the assessment of the conditions set out in article 58 (1) (b) of the Statute entails the establishment of "specific and concrete elements", which according to Mr Kilolo, establishes a "two-prong test whereby the risk must be (i) *concrete* and (ii) *specific*".[154] In particular, Mr Kilolo argues that the Pre-Trial Chamber erred in its assessment of the conditions of article 58 (1) (b) of the Statute that: (i) he poses a risk of absconding; (ii) would obstruct or endanger the Court proceedings; or (iii) would commit future related crimes.[155] The Appeals Chamber will address Mr Kilolo's arguments challenging each limb of article 58 (1) (b) of the Statute in turn.

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[151] *See, e.g., Ngudjolo OA 4 Judgment*, paras 12, 18; *Gbagbo OA Judgment*, paras 25, 27.
[152] Document in Support of the Appeal, para. 23.
[153] Article 58 (1) (a) of the Statute.
[154] Document in Support of the Appeal, para. 24 (emphasis in original).
[155] Document in Support of the Appeal, paras 25-44.

1. Relevant part of the Impugned Decision

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

83. With respect to whether the detention appears necessary to ensure Mr Kilolo's appearance at trial, the Pre-Trial Chamber found that although Mr Kilolo handed over his passport to the Court's authorities, this did not "detract from the risks of flight which are inherent in the very connection of [Mr] Kilolo to the network of [Mr] Bemba and to the ensuing likelihood that he might be made available resources enabling him to abscond from the jurisdiction of the Court".[156] It noted Mr Kilolo's request to be released to Belgium, a State in the Schengen area, where it is possible to travel without the need to show identification papers, and the Belgian Authorities' Observations with regard to the configuration of the country and the close proximity of Mr Kilolo's residence to a national airport.[157]

84. In terms of Mr Kilolo's connection to Mr Bemba and his network, the Pre-Trial Chamber did not consider that Mr Kilolo's withdrawal as lead counsel for Mr Bemba in the *Bemba* Case necessarily involved "the severance of all of his ties to [Mr Bemba]'s vast network and hence to the concrete risk that resources be made available to him for the purpose of evading justice".[158] The Pre-Trial Chamber was of the view that even if Mr Kilolo had not had any close contacts with Mr Bemba since 6 December 2013, this did not imply that "the long-established relationship between Mr Bemba and Mr Kilolo by virtue of the latter's role as lead counsel in the [*Bemba*] Case ha[d] ceased to exist" and that "the absence of documents witnessing to the existence of a [personal relationship] between the two cannot be considered as mitigating or otherwise affecting this conclusion [in relation to the concrete risk of flight]".[159]

85. The Pre-Trial Chamber noted also the advanced stage of the disclosure process in the *Bemba* Case, a factor that was considered relevant in "weighing the likelihood

[156] Impugned Decision, para. 22.
[157] Impugned Decision, para. 22.
[158] Impugned Decision, para. 24.
[159] Impugned Decision, para. 24.

of the risk of flight, due to its resulting in enhancing the suspect's knowledge of the Prosecutor's case".[160]

86. In the Impugned Decision, the Pre-Trial Chamber further noted Mr Kilolo's personal circumstances, and also recalled "the statements of individuals variously connected to [Mr] Kilolo and his family, witnessing to his personal and professional qualities".[161] The Pre-Trial Chamber went on to observe that "the personality of a suspect is not one of the reasons on the basis of which the Chamber can or should determine whether detention is or continues to be necessary".[162] The Pre-Trial Chamber considered that "[p]ersonal circumstances of education, professional or social status are *per se* neutral and inconclusive in respect of the need to assess the existence of flight risks".[163] It added that "the fact that an individual has never *in the past* been charged or found guilty of offences against the administration of justice, or of any other nature, does not as such impact on the evaluation of the risks associated with the specific conduct which has led to his or her arrest, in the presence of other elements suitable to substantiate the existence of those risks".[164] The Pre-Trial Chamber recalled that Mr Kilolo's "personal commitment not to abscond from the proceedings" although "commendable [...] is not and cannot be *per se* decisive but should rather be assessed and appreciated in light of all other relevant factors".[165]

87. With respect to Mr Kilolo's contention about the prejudices caused by his detention to his personal and professional life, the Pre-Trial Chamber found that "they are neither a factor which [...] might *per se* influence the determination under article 60(2) of the Statute".[166] In addition, the Pre-Trial Chamber considered that the "reliability of some of Mr Kilolo's statements in this context appear[ed] significantly weakened by the results of the on-site searches conducted by the Belgian authorities", in relation to his legal practice being limited to a very small number of pending cases,

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[160] Impugned Decision, para. 28.
[161] Impugned Decision, para. 23.
[162] Impugned Decision, para. 23.
[163] Impugned Decision, para. 23.
[164] Impugned Decision, para. 23 (emphasis in original).
[165] Impugned Decision, para. 29.
[166] Impugned Decision, para. 32.

his participation in Congolese political activities in 2006 and to his aged parents not being lodged at his residence.[167]

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

88. In relation to the risk of Mr Kilolo obstructing or endangering the investigation or the Court proceedings, the Pre-Trial Chamber noted that the material attached to the Application for Warrants of Arrest and the Independent Counsel Reports indicated "several instances of conducts by [Mr] Kilolo directly aimed at influencing the content of the testimony to be given by witnesses in the [*Bemba*] Case".[168] It further noted that the Report of 14 November 2013 included "an element suitable to signal to Mr Kilolo's readiness to take action in respect of the ongoing investigation and these proceedings".[169]

89. The Pre-Trial Chamber was then satisfied that "these objective elements are serious and univocal enough as to adequately substantiate [its] assessment of the persisting existence of a risk that obstruction or endangerment of the proceedings does exist, both in respect of this case and of the [*Bemba*] Case, and that none of the arguments submitted by [...] Mr Kilolo is suitable to weaken or otherwise affect this conclusion".[170] Indeed, the Pre-Trial Chamber underlined that neither the fact that the testimonies of witnesses in the *Bemba* Case are completed, nor the fact that the Prosecutor declared that her investigations in the present case were almost completed, nor further that "items of evidence seized by the relevant national authorities upon their arrest are now beyond the suspects' reach, can be considered as decisive *vis-à-vis* the determination of the persisting existence of a risk that the course of justice be obstructed or interfered with".[171] The Pre-Trial Chamber noted the possibility of the *Bemba* Case being reopened and that "future and related crimes [...] might also be committed by the suspect in respect to these proceedings".[172]

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

90. With regard to the necessity of detention to prevent Mr Kilolo from continuing with the commission of related offences, the Pre-Trial Chamber recalled the standard

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[167] Impugned Decision, paras 27, 32.
[168] Impugned Decision, para. 34.
[169] Impugned Decision, para. 34.
[170] Impugned Decision, para. 35.
[171] Impugned Decision, para. 36.
[172] Impugned Decision, para. 36.

stated in the jurisprudence of the Court that the "risk relating to the possible commission of related crimes, by its very nature, is such as to make it impossible to specify in detail what the nature of such crimes might be, or the context in which they might be committed".[173] The Pre-Trial Chamber found in the Impugned Decision that the nature of the offences in the present case was "such as to create a great degree of overlapping between the risk that the investigation be obstructed or endangered and the risk that the commission of the crimes be continued or that related crimes be committed".[174] It further held, on the basis of intercepts of Mr Kilolo's conversations, that "it is likely that he might take additional action, similar in nature to that mirrored in [the] Independent Counsel [R]eports, in respect of other evidentiary items which might be outstanding".[175] The Pre-Trial Chamber recalled its observations in relation to the risks that the investigation or the court proceeding be obstructed or endangered "in light of the conducts carried out by [Mr] Kilolo [...] prior to his arrest, [were] still outstanding" and relevant to its assessment under article 58 (1) (b) (iii) of the Statute.[176] The Pre-Trial Chamber was therefore satisfied that "a concrete risk that [Mr] Kilolo might commit crimes related to, or of the same nature of, those underlying the [Application for Warrants of Arrest] and the [Arrest Warrant Decision] continues to exist unabated".[177]

2. *Mr Kilolo's submissions before the Appeals Chamber*

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

91. Mr Kilolo submits that the Pre-Trial Chamber erred in finding that he is part of Mr Bemba's network "in the absence of any concrete or specific ties between [himself] and Mr Bemba's network" and that the Pre-Trial Chamber's "assumption" that he is "'*an associate*' of Mr Bemba is baseless" and lacks reasoning.[178] He contends that there is no evidence showing a personal relationship between Mr Bemba and himself outside of a professional one.[179] In that regard, he maintains that their two-year professional relationship cannot constitute "concrete evidence of a personal

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[173] Impugned Decision, para. 39, referring to *Gbagbo OA Judgment*, para. 70.
[174] Impugned Decision, para. 39.
[175] Impugned Decision, para. 36.
[176] Impugned Decision, para. 39.
[177] Impugned Decision, para. 40.
[178] Document in Support of the Appeal, paras 25, 27.
[179] Document in Support of the Appeal, para. 26.

relationship or involvement in a client's network".[180] Mr Kilolo adds that there is no "***clear and irrefutable showing*** that Mr Bemba would finance the getaway of a *professional acquaintance* and a showing that he would do so for Mr Kilolo *specifically*, [...] such scenario [...] cannot be used as a factual basis on which to satisfy legal criteria".[181]

92. As to his ability to travel, Mr Kilolo avers that, since he does not have any identification documents that would allow him to travel freely within or outside the Schengen area, in particular to the DRC or Cameroon, he cannot abscond from the jurisdiction of the Court.[182] Mr Kilolo further submits that his participation in Congolese politics by running for political office eight years ago cannot constitute concrete evidence of a risk of flight, as he cannot enter the DRC without the required travel authorisation and visas, which he does not possess.[183] He argues that his request to be released in Belgium, a State Party to the Rome Statute and his place of residence, militates against any "real risk of flight".[184] As for the Belgium Authorities' Observations that "the structure of Belgium is such as to enable a quick getaway, especially in light of the proximity of a national airport to Mr Kilolo's residence", Mr Kilolo contends that these observations fall short of showing a concrete or specific risk of flight as he is no longer in possession of any travel documents.[185]

93. Mr Kilolo further argues that the Pre-Trial Chamber erred in stating that 'the prejudices allegedly entailed by the protracted detention to Mr Kilolo's personal and professional life...are [not]...a factor which might *per se* influence the determination under article 60(2) of the Statute'.[186] Mr Kilolo submits that his strong ties to Belgium would mitigate his flight risk.[187] In particular, Mr Kilolo contends that his entire personal and professional activities are in Belgium, that he needs to resume his professional activities as he is the source of revenue for his family and that he would never compromise his career in Belgium or the well-being of his family by

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[180] Document in Support of the Appeal, para. 27.
[181] Document in Support of the Appeal, para. 28 (emphasis in original).
[182] Document in Support of the Appeal, paras 29-33.
[183] Document in Support of the Appeal, para. 30.
[184] Document in Support of the Appeal, para. 32.
[185] Document in Support of the Appeal, para. 33.
[186] Document in Support of the Appeal, para. 34.
[187] Document in Support of the Appeal, paras 34-37.

absconding.[188] Mr Kilolo further challenges the Belgian Authorities' Observations that his legal practice in Belgium comprises only of a small number of pending cases by arguing that he was merely adhering to his obligations imposed by the Court to maintain a "residence and nucleus of professional activity in The Hague" for the purpose of his cases before the Court, and that he cannot now be reprimanded for complying with these obligations.[189]

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

94. Mr Kilolo alleges that there is no evidence to support the Pre-Trial Chamber's finding that he may obstruct or endanger ongoing investigations or Court proceedings and that the Pre-Trial Chamber failed to provide reasoning as to the "concrete and specific risk" in that regard.[190] In support of his submission, Mr Kilolo submits that since he is no longer the lead counsel of Mr Bemba in the *Bemba* Case, he is therefore not privy to privileged, confidential information or contact details of witnesses thereto.[191] He adds that all materials in the *Bemba* Case have now been disclosed to the new lead counsel.[192]

95. Furthermore, Mr Kilolo submits that, whilst in detention, he is able to communicate with third parties by telephone, as well as with the other detained suspects.[193] In contrast, he argues that, if released, he would have limited contact with Mr Bemba and other persons since he would not appear on Mr Bemba's phone list of privileged persons allowed to communicate with him from the outside world.[194]

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

96. Mr Kilolo contends that the Pre-Trial Chamber "failed [...] to demonstrate a '*concrete risk*'" that he might commit further offences.[195] In support of his contention, Mr Kilolo argues that the terms used by the Pre-Trial Chamber such as he 'might',

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[188] Document in Support of the Appeal, paras 34-35, 37.
[189] Document in Support of the Appeal, para. 36.
[190] Document in Support of the Appeal, para. 39.
[191] Document in Support of the Appeal, para. 39.
[192] Document in Support of the Appeal, para. 39.
[193] Document in Support of the Appeal, para. 40.
[194] Document in Support of the Appeal, para. 40.
[195] Document in Support of the Appeal, para. 42 (emphasis in original). Mr Kilolo's arguments relating to the Pre-Trial Chamber's language showing his presumed guilt at paragraphs 41 and 42 of the Document in Support of the Appeal are addressed in the above sub-section "Alleged bias of the Pre-Trial Chamber" under his first ground of appeal.

'likely' or 'could' commit further offences do not amount to concrete risk.[196] He further alleges that the Pre-Trial Chamber erred in holding that future crimes are "by their very nature 'impossible to specify in detail'" as this contravenes the 'concrete and specific' standard set out in article 58 (1) (b) of the Statute.[197]

3. The Prosecutor's submissions before the Appeals Chamber

97. At the outset, the Prosecutor argues that Mr Kilolo's arguments should be dismissed as they amount to mere disagreement with the Pre-Trial Chamber's findings, and fail to show any error in the Pre-Trial Chamber's consideration of the conditions under article 58 (1) (b) of the Statute.[198] The Prosecutor further challenges Mr Kilolo's submission that the Pre-Trial Chamber "misapplied the legal standard used to assess risk", which the Prosecutor argues is the "'possibility, not the inevitability' test" and his proposed test where "'possible' means 'likely' is contrived, and not supported by the jurisprudence of this Court or by the words' plain meaning".[199]

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

98. The Prosecutor refutes Mr Kilolo's contention in relation to his association with Mr Bemba as the Pre-Trial Chamber provided a "clear and detailed reasoning" on their continued association and its relevance to the assessment of the condition under article 58 (1) (b) (i) of the Statute.[200] The Prosecutor avers that Mr Kilolo does not show why the Prosecutor should "make 'a clear and irrefutable showing' of Mr Bemba financing Mr Kilolo's getaway rather than the 'possibility' threshold applicable at this stage of the proceedings.[201] According to the Prosecutor, there is "a wealth of evidence tying [Mr] Kilolo to [Mr] Bemba outside of a strictly professional relationship, including criminal conduct and political activities".[202]

99. The Prosecutor further argues that Mr Kilolo fails to demonstrate that the Pre-Trial Chamber erred in relying on his ability to travel in Europe without a passport as

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[196] Document in Support of the Appeal, para. 43, referring to Impugned Decision, para. 36.
[197] Document in Support of the Appeal, para. 44, referring to Impugned Decision, para. 39.
[198] Response to the Document in Support of the Appeal, para. 12.
[199] Response to the Document in Support of the Appeal, para. 13.
[200] Response to the Document in Support of the Appeal, para. 15.
[201] Response to the Document in Support of the Appeal, para. 15.
[202] Response to the Document in Support of the Appeal, para. 15 (footnotes omitted).

this reliance is "consistent with Chambers in other cases".[203] She contends that Mr Kilolo's claim regarding the possibility for him to travel to Cameroon, "mischaracterises" the Impugned Decision as the Pre-Trial Chamber simply repeated its findings made in the Arrest Warrant Decision.[204] The Prosecutor adds that Mr Kilolo merely seeks to re-litigate the Impugned Decision when responding to the Prosecutor's arguments and repeating his personal guarantee.[205]

100. The Prosecutor adds that Mr Kilolo also attempts to re-litigate the flight risk issue by repeating previous submissions relating to his personal and professional circumstances in Belgium without identifying an error in the Impugned Decision.[206]

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

101. The Prosecutor submits that Mr Kilolo's allegation that the Pre-Trial Chamber's reasoning on article 58 (1) (b) (ii) of the Statute being "'conspicuously absent' from the [Impugned] Decision is broad, unsupported, and amounts to a disagreement with the [Pre-Trial Chamber]'s conclusion rather than an identification of a discernible error".[207] The Prosecutor emphasises that six paragraphs in the Impugned Decision are devoted to the assessment of the underlying evidence.[208] The Prosecutor adds that Mr Kilolo's argument that if released his contact with Mr Bemba would be more limited is "internally inconsistent" as he simultaneously submits that "those in the ICC Detention Centre are allowed 'unimpeded contact with the external world'".[209]

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

102. The Prosecutor contends that Mr Kilolo's characterisation of the Impugned Decision as being too 'general' and "not 'concrete'" is unsubstantiated since the applicable test is the 'possibility, not the inevitability, of a future occurrence'.[210] In that regard, the Prosecutor argues that Mr Kilolo's test of a 'concrete risk' "conflates

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[203] Response to the Document in Support of the Appeal, para. 16, referring to *The Prosecutor v. Bosco Ntaganda*, "Decision on the Defence's Application for Interim Release", 18 November 2013, ICC-01/04-02/06-147, para. 53; *The Prosecutor v. Callixte Mbarushimana*, "Decision on the 'Defence Request for Interim Release'", 19 May 2011, ICC-01/04-01/10-163, para. 57.
[204] Response to the Document in Support of the Appeal, para. 16.
[205] Response to the Document in Support of the Appeal, para. 16.
[206] Response to the Document in Support of the Appeal, para. 17.
[207] Response to the Document in Support of the Appeal, para. 18.
[208] Response to the Document in Support of the Appeal, para. 18, referring to Impugned Decision, paras 33-38.
[209] Response to the Document in Support of the Appeal, para. 18.
[210] Response to the Document in Support of the Appeal, para. 19.

two distinct concepts" and explains that the Pre-Trial Chamber's finding that "future crimes were 'impossible to specify in detail' did not contravene the separate 'concrete and specific' standard because the *risk* of the commission of crimes, which must be established based on concrete evidence, is separate from the *nature of the crime* being 'impossible to specify in detail'".[211]

4. Determination by the Appeals Chamber

103. The Appeals Chamber will assess in turn Mr Kilolo's arguments in relation to the Pre-Trial Chamber's conclusion that his continued detention appeared necessary under article 58 (1) (b) of the Statute.

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

104. With respect to Mr Kilolo's argument regarding the lack of evidence showing a personal relationship between Mr Kilolo and Mr Bemba, or that he could use Mr Bemba's network to abscond, the Appeals Chamber recalls that the Pre-Trial Chamber relied on its findings made in the Arrest Warrant Decision regarding Mr Kilolo's connection to Mr Bemba's network and that his access to Mr Bemba's financial resources could allow him to abscond.[212] The Pre-Trial Chamber rejected the argument that, given that Mr Kilolo is no longer Mr Bemba's counsel, it cannot be said that Mr Kilolo still has ties to Mr Bemba's network.[213] In that same vein, the Pre-Trial Chamber's finding regarding Mr Kilolo's connection to Mr Bemba's network appears to stem from the nature and the alleged organised character of the offences charged against him.[214] The Appeals Chamber recalls that when reaching a decision under article 60 (2) of the Statute, "the Pre-Trial Chamber has to 'inquire anew into the existence of facts justifying detention'; the Pre-Trial Chamber's power is 'not conditioned by its previous decision to direct the issuance of a warrant of arrest'".[215] The Pre-Trial Chamber may rely on evidence that was already before it when it issued the warrant of arrest, "as long as it is persuaded that the evidence, at the time of the decision under article 60 (2) of the Statute, justifies the finding in question".[216]

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[211] Response to the Document in Support of the Appeal, para. 19 (emphasis in original).
[212] Impugned Decision, para. 20, referring to Arrest Warrant Decision, para. 22.
[213] *See* Impugned Decision, para. 24.
[214] *See* Impugned Decision, paras 6-7, 13; Arrest Warrant Decision, para. 13.
[215] *Gbagbo OA Judgment*, para. 23; *Ngudjolo OA 4 Judgment*, para. 10..
[216] *See Gbagbo OA Judgment*, para. 69.

105. The Appeals Chamber is not persuaded by Mr Kilolo's argument in relation to his access to Mr Bemba's network of supporters. While it is true that the Impugned Decision and the Arrest Warrant Decision do not refer to the evidence when making the relevant findings, the Appeals Chamber notes that the Prosecutor submitted in the Application for Warrants of Arrest that people close to Mr Bemba had previously provided him with large amounts of money.[217] The Appeals Chamber infers that this is what the Pre-Trial Chamber was referring to when stating its findings in terms of access to a network.[218] Accordingly, while the Impugned Decision in this respect is somewhat unclear, the Appeals Chamber nevertheless can discern how the Pre-Trial Chamber reached the findings it did, based on the totality of the evidence before it. In the view of the Appeals Chamber, it was not unreasonable for the Pre-Trial Chamber to conclude that, given that there was an indication that supporters of Mr Bemba had previously made money available to Mr Kilolo, they could also do so to allow him to evade justice.

106. With respect to Mr Kilolo's contention that his participation in Congolese politics in 2006 cannot constitute concrete evidence of a flight risk as this was eight years ago, and further, that he cannot enter the DRC without the required travel documents,[219] the Appeals Chamber finds that Mr Kilolo misreads the Pre-Trial Chamber's statement regarding his political activities in the DRC in 2006. The Pre-Trial Chamber referred to information obtained from the Belgian Authorities that he created a political party in the DRC and ran as a candidate of that party for the DRC presidential elections in 2006 in the context of Mr Kilolo's claim that he was living only in the "judicial sphere".[220] The Pre-Trial Chamber found that this claim "appear[ed] significantly weakened by the results of the on-site searches conducted by the Belgian authorities".[221] Thus, the Pre-Trial Chamber did not rely on his political activities as evidence for a flight risk, but referred to it in the context of Mr Kilolo's

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[217] Application for Warrants of Arrest, para. 54. While the Prosecutor cites at this paragraph no evidence in support of her submission, it appears that she is referring to allegations made at paragraph 46 of the Application for Warrants of Arrest which cites evidence relating to money transfers. *See* annexes B.4., B.6. and C.3. to Application for Warrants of Arrest: ICC-01/05-01/13-19-Conf-AnxB.4., ICC-01/05-01/13-19-Conf-AnxB.6., ICC-01/05-01/13-19-Conf-AnxC.3.
[218] *See especially*, Impugned Decision, para. 20.
[219] Document in Support of the Appeal, para. 30.
[220] The French original reads "univers judiciaire". *See* Impugned decision, para. 27.
[221] Impugned Decision, para. 32.

claims as to his personal circumstances. Accordingly, Mr Kilolo's argument is dismissed.

107. Turning to Mr Kilolo's contention that he could not travel without any identification documents within or outside the Schengen area, the Appeals Chamber finds that the Pre-Trial Chamber's reliance on the Belgian Authorities' Observations as additional information pertaining to the risk of flight was not unreasonable. The Appeals Chamber recalls that the detention of the suspect "must 'appear' to be necessary" which implies that "the question revolves around the possibility, not the inevitability of a future occurrence".[222] In that regard, the Appeals Chamber notes that the Pre-Trial Chamber was aware of the fact that Mr Kilolo was no longer in possession of his passport, and noted the possibility that, if released in Belgium, Mr Kilolo could travel within the Schengen area without the need of identification documents.[223] It further noted the Belgian Authority's Observations that the configuration of the country, as well as the fact that his residence was located near a national airport could provide him with the possibility to leave the country quickly, with the consequence that such a situation would require the issuance of a new warrant of arrest by the Pre-Trial Chamber, which could render Mr Kilolo's interception almost impossible.[224] What was at issue was not whether Mr Kilolo was legally required to be in possession of a travel document when travelling within the Schengen area, but whether he would likely be able to do so without such documents. The Appeals Chamber finds that it was not unreasonable for the Pre-Trial Chamber to conclude that if released in Belgium, Mr Kilolo could possibly travel within the Schengen area without his passport and thus this could increase the risk of absconding from the jurisdiction of the Court.

108. With respect to Mr Kilolo's contention that the Pre-Trial Chamber erred in finding that prejudices resulting from the continued detention of Mr Kilolo are irrelevant, the Appeals Chamber considers that the Pre-Trial Chamber's finding as such cannot be faulted. The Pre-Trial Chamber addressed the arguments raised by Mr Kilolo as to his personal circumstances from the perspective of whether the

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[222] *Ngudjolo OA 4 Judgment*, para. 21. *See also Mbarushimana OA Judgment*, para. 60; *Bemba OA Judgment*, para. 55.
[223] Impugned Decision, para. 22.
[224] Impugned Decision, para. 22.

prejudice caused by the detention, in particular to his family life, could be a factor in deciding to grant interim release.[225] In the view of the Appeals Chamber, the finding that such prejudice could not be a factor is unassailable. Any detention of a suspect pending investigation and trial is likely to cause prejudice to the person concerned and those close to him. It is for that reason that under the Statute, the detention of a suspect is possible only under strict conditions, as set out in article 58 (1) of the Statute. Nevertheless, the prejudice caused is in and of itself not a relevant consideration for a determination on interim release.

109. Furthermore, the Appeals Chamber is not convinced by Mr Kilolo's contention regarding the Belgian Authorities' Observations about his legal practice in Belgium. The Appeals Chamber finds that the Pre-Trial Chamber, by noting that the reliability of Mr Kilolo's statements "appeared significantly weakened by the results of the on-site searches conducted by the Belgian authorities" on the situation of his professional activities in Belgium, was simply assessing the accuracy of his submission.[226] In that regard, Mr Kilolo even appears to confirm Belgian Authorities' Observations when stating that he had the obligation imposed by the Court to maintain "a residence and nucleus of professional activity in The Hague".[227] Accordingly, Mr Kilolo's argument on this point is dismissed.

110. Additionally, the Appeals Chamber notes that Mr Kilolo also questions the way in which the Pre-Trial Chamber dealt with the arguments pertaining to his personal circumstances (namely, "education, professional or social status") and how they related to article 58 (1) (b) (i) of the Statute. In this regard, the Appeals Chamber recalls that under his first ground of appeal, Mr Kilolo argues that the Pre-Trial Chamber failed to consider his personal circumstances and failed to provide "any real reason" for doing so.[228] The Appeals Chamber recalls that the Pre-Trial Chamber noted Mr Kilolo's personal circumstances such as "education, professional or social status" were "*per se* neutral and inconclusive in respect of the need to assess the existence of flight risks".[229] The Pre-Trial Chamber also found that the absence of a criminal record "did not as such impact on the evaluation of the risks associated" with

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[225] *See* Impugned Decision, para. 32 (emphasis added).
[226] Impugned Decision, para. 32.
[227] Document in Support of the Appeal, para. 36.
[228] Document in Support of the Appeal, paras 5-9.
[229] Impugned Decision, para. 23.

Mr Kilolo's conduct for which he was arrested, "in the presence of other elements suitable to substantiate the existence of those risks".[230]

111. In relation to the relevance of personal circumstances in other courts and *ad hoc* tribunals, the Appeals Chamber notes that the European Court of Human Rights (hereinafter: "ECtHR") has developed an approach to the assessment of the flight risk, which does take into consideration the personal and professional circumstances of the suspect.[231] In that regard, the approach of the ECtHR is that the risk of absconding must be assessed in light of a number of relevant factors including those relating to the "person's character, his morals, home, occupation, assets, family ties" in addition to the expected length of the sentence and the weight of evidence.[232] The Appeals Chamber also observes that Chambers of the International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY"), in comparable cases, also took into account the suspects' personal circumstances.[233] Consequently, while recognising that such factors were not ultimately afforded much weight in the ICTY decisions on interim release, the Appeals Chamber considers that any decision on whether a person is detained pending his or her trial at this Court ought to be made based on the specific circumstances of the case, as relevant to an assessment of whether or not a suspect is likely to appear before the Court. Personal circumstances of the suspect such as the suspect's education, professional or social status may be relevant to assessing whether or not a suspect will appear before the Court.

112. In the present case, the Appeals Chamber notes that at paragraph 29 of the Impugned Decision, the Pre-Trial Chamber stated it was "not persuaded that these factors", being factors supporting the existence of a risk of absconding "can be

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[230] Impugned Decision, para. 23.
[231] *See, e.g.*, ECtHR, *Aleksandr Novikov v. Russia*, "Judgment", 11 July 2013, application no. 7087/04 (hereinafter: "*Novikov Judgment*"), para. 46; ECtHR, *Sefilyan v. Armenia*, "Judgment", 2 October 2012, application no. 22491/08, paras 86, 90; ECtHR, *Samoylov v. Russia*, "Judgment", 24 January 2012, application no. 57541/09, para. 107; ECtHR, *Shenoyev v. Russia*, "Judgment", 10 June 2010, application no. 2563/06, para. 54; ECtHR, *Mamedova v. Russia*, "Judgment", 1 June 2006, application no. 7064/05, para. 76; ECtHR, *Becciev c. Moldova*, "Judgment", 4 October 2005, application no. 9190/03 (hereinafter: "*Becciev Judgment*"), para. 58.
[232] *Novikov Judgment*, para. 46; *Becciev Judgment*, para. 58.
[233] *See, e.g.*, ICTY, Trial Chamber, *Prosecutor v. Astrit Haraqija and Bajrush Morina*, "Decision on Defence application for provisional release of the accused Bajrush Morina", 15 September 2008, IT-04-84-R77.4, para. 9; Trial Chamber, ICTY, *Prosecutor v. Baton Haxhiu*, "Decision on provisional release of Baton Haxhiu", 23 May 2008, IT-04-84-R77.5, para. 11; ICTY, Trial Chamber, *Prosecutor v. Astrit Haraqija and Bajrush Morina*, "Decision on Defence motion for provisional release of the accused Bajrush Morina", 13 May 2008, IT-04-84-R77.4, para. 13.

outweighed either by any of the '[material changes]' identified as relevant by [Mr Kilolo], or by his personal commitment not to abscond". These alleged "material changes" are outlined in Mr Kilolo's Application for Interim Release, and several pertain to Mr Kilolo's personal circumstances, including, *inter alia*, "education, professional or social status".[234] The Appeals Chamber notes that the Pre-Trial Chamber initially qualified "education, professional or social status" to be "*per se* neutral and inconclusive in respect of the need to assess the existence of flight risks",[235] a statement which the Appeals Chamber considers to be ambiguous in meaning.

113. Nevertheless, and as reflected in the Pre-Trial Chamber's statement at paragraph 29 of the Impugned Decision, it appears that the Pre-Trial Chamber went on to assess such factors, as framed in Mr Kilolo's Application for Interim Release, in making its assessment under article 58 (1) (b) (i) of the Statute. The same applies to Mr Kilolo's lack of criminal record, which the Appeals Chamber finds, was not considered irrelevant by the Pre-Trial Chamber, but was rather assessed as not impacting on its evaluation of "the risks associated" with Mr Kilolo's conduct for which he was arrested, "in the presence of other elements suitable to substantiate the existence of those risks".[236] Therefore, in light of this, the Appeals Chamber finds the Pre-Trial Chamber considered these factors in weighing up the risks under article 58 (1) (b) (i) of the Statute. Thus, the Appeals Chamber can discern no clear error in the Pre-Trial Chamber's concomitant findings.

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

114. For the reasons that follow, the Appeals Chamber is not persuaded by the arguments advanced by Mr Kilolo in respect of article 58 (1) (b) (ii) of the Statute. In respect of Mr Kilolo's argument that there is no evidence showing he will obstruct or endanger the court proceedings since he is no longer the lead counsel of Mr Bemba and that disclosure in the *Bemba* Case is completed, the Appeals Chamber finds no error in the Pre-Trial Chamber's finding that it could not "be excluded that the

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[234] *See* Application for Interim Release, paras 19-24 (relevant to "social status"), paras 42-43 (relevant to "social status", in particular "criminal record"), para. 50 (relevant to "social status" and "professional status").
[235] Impugned Decision, para. 23.
[236] Impugned Decision, para. 23.

[*Bemba*] Case is reopened".[237] In that regard, the Appeals Chamber notes that Mr Kilolo only ceased to be Mr Bemba's lead counsel when the disclosure of evidence in the *Bemba* Case reached an advanced stage. Therefore, Mr Kilolo already had acquired an enhanced knowledge of the Prosecutor's investigation and the evidence in that case. As to the potential for obstruction in relation to the case against Mr Kilolo himself, the Appeals Chamber recalls that the Pre-Trial Chamber elsewhere in the Impugned Decision noted that the disclosure process had started, enhancing Mr Kilolo's knowledge of the Prosecutor's case.[238] Given that the Pre-Trial Chamber had found reasonable grounds to believe that Mr Kilolo was responsible for offences under article 70 of the Statute,[239] the Appeals Chamber cannot find that the Pre-Trial Chamber's conclusion that his continued detention appeared necessary to prevent him from obstructing or endangering the investigation or court proceedings was unreasonable.

115. As regards Mr Kilolo's contention that he will be less likely to interfere with the court proceedings, if released, because he would have limited contact with Mr Bemba and other persons, the Appeals Chamber finds that this amounts to a mere disagreement with the Pre-Trial Chamber's finding that fails to show a clear error therein. Mr Kilolo's argument is therefore rejected.

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

116. The Appeals Chamber finds Mr Kilolo's challenge to the Pre-Trial Chamber's finding that "risk relating to the possible commission of related crimes, by its very nature, is such as to make it impossible to specify in detail what the nature of such crimes might be"[240] as contravening the "'concrete and specific' standard" to be without merit.[241] In the *Gbagbo OA Judgment*, the Appeals Chamber held that article 58 (i) (b) (iii) of the Statute provides that the necessity for detention is to prevent the risk that further crimes may be committed; therefore "the issue is *future* crimes, which

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[237] Impugned Decision, para. 36.
[238] *See* Impugned Decision, para. 28.
[239] *See* Impugned Decision, para. 37.
[240] Impugned Decision, para. 39.
[241] Document in Support of the Appeal, para. 44.

by their nature cannot be specified in detail".[242] Accordingly, Mr Kilolo's argument is wrong in law, and is consequently dismissed.

117. Turning to Mr Kilolo's contention that the Pre-Trial Chamber's conclusion amounts to "generalities" and fails to demonstrate the "concrete" risk that he will commit further crimes, the Appeals Chamber recalls that the question of the determination of whether detention appears necessary revolves "around the possibility, not the inevitability, of a future occurrence".[243] On the basis of the available evidence, the Pre-Trial Chamber will weigh such evidence and make "a prediction as to the likelihood of future events".[244] The Appeals Chamber finds that the Pre-Trial Chamber correctly articulated this standard.[245] Furthermore, it referred to the material attached to the Application for Warrants of Arrest and the Independent Counsel Reports to bolster its conclusion that Mr Kilolo might commit further crimes of a similar nature as to those charged against him.[246] Notably, the Pre-Trial Chamber clearly considered the "possibility" of further crimes being committed when finding that in light of the "pattern of conduct emerging from the intercepts of [Mr] Kilolo's conversations over the period [of] August-October 2013, it is likely that he might take additional action, similar in nature to that mirrored in [the] Independent Counsel [R]eports, in respect of other evidentiary items which might be outstanding, whether in relation to the [*Bemba*] Case or to these proceedings".[247] In the result, the Appeals Chamber cannot discern any clear error in the Pre-Trial Chamber's conclusion, and accordingly dismisses Mr Kilolo's argument.

IV. APPROPRIATE RELIEF

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

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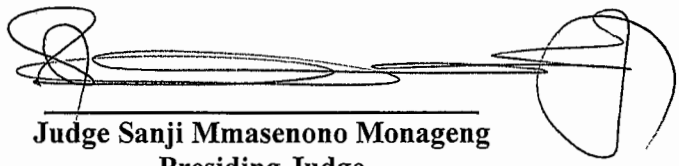
[242] *Gbagbo OA Judgment*, para. 70 (emphasis in original).
[243] *Ngudjolo OA 4 Judgment*, para. 21. *See also Bemba OA Judgment*, para. 55; *Mbarushimana OA Judgment*, para. 60.
[244] *Mbarushimana OA Judgment*, para. 60.
[245] *See* Impugned Decision, para. 19.
[246] *See* Impugned Decision, paras 34, 39.
[247] Impugned Decision, para. 36.

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

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



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 11th day of July 2014
At The Hague, The Netherlands

Dissenting Opinion of Judge Erkki Kourula

1. I agree with the Majority's findings at paragraphs 79-81 of the Judgment that the second ground of the appeal must be dismissed, and that there is no error in the finding of the Pre-Trial Chamber that the conditions of article 58 (1) (a) of the Statute continue to be met, being the existence of "reasonable grounds to believe" that Mr Kilolo committed the offences for which he has been charged. I also agree with the Majority's conclusion in relation to the first ground of appeal, at paragraphs 45-57 and 61, that the Pre-Trial Chamber was not biased against Mr Kilolo.

2. In addition, I agree with the Majority's observations at paragraph 64 of the Judgment that the Pre-Trial Chamber's description of offences against the administration of justice as those "of the utmost gravity" is highly concerning, and that offences under article 70 of the Statute, while undeniably serious, cannot be considered to be as grave as the core crimes under article 5 of the Statute.

3. However, while the Majority considered the Pre-Trial Chamber's treatment of the gravity of the offences to be a discrete issue, in my view, this critically impacted upon the Pre-Trial Chamber's determination of whether the conditions under article 58 (1) (b) (i), (ii) and (iii) of the Statute continue to be met. In my view, the language used by the Pre-Trial Chamber in describing the offences for which Mr Kilolo was charged to be "of the utmost gravity" is an indication that it gave too much weight to the seriousness of the alleged offending in finding that the conditions under article 58 (1) (b) of the Statute continue to be met. This was compounded by the Pre-Trial Chamber's finding that the personal circumstances of Mr Kilolo, such as "education, professional or social status", were "*per se* neutral and inconclusive in respect of the need to assess the existence of flight risks", which I consider to mean that it gave little consideration to these factors. In my view, this is a further indication that the entire weighing exercise under article 58 (1) (b) of the Statute, conducted by the Pre-Trial Chamber, was tainted by its findings in relation to the gravity of the offences, and that it gave too much weight to factors favouring detention over those in favour of release. Indeed, I consider that Mr Kilolo's personal circumstances ought to have been given greater weight, given that the offences for which he has been charged are not at the higher end of the scale of seriousness.

4. Accordingly, I would have reversed the Impugned Decision and remanded the assessment of the grounds for detention under article 58 (1) (b) of the Statute, in their entirety, to the Pre-Trial Chamber.

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

Judge Erkki Kourula

Dated this 11th day of July 2014
At The Hague, The Netherlands

Dissenting Opinion of Judge Anita Ušacka

1. I respectfully dissent from the decision of the majority of the Appeals Chamber to confirm the Impugned Decision. For the reasons that follow, I am of the view that the Pre-Trial Chamber did not consider every part of the relevant applicable law (pursuant to article 21 (1) (a) of the Statute, in the first place, the Statute and the Rules of Procedure and Evidence) and therefore failed to properly interpret the legal framework for its decision when assessing Mr Kilolo's Request for Interim Release. This error taints the Impugned Decision as a whole. I would therefore reverse the Impugned Decision and remand the matter to the Pre-Trial Chamber for a new decision.

I. RELEVANT LEGAL FRAMEWORK AND CONTEXT

2. This is one of the first appeals[1] relating to proceedings in respect of offences against the administration of justice under article 70 of the Statute. For that reason, it is convenient to recall the legal framework in that regard.

3. Article 70 (1) (a) to (f) sets out the specific offences against the administration of justice over which the Court shall have jurisdiction. It is noteworthy that the 1994 Draft Statute of the International Law Commission[2] did not give the Court jurisdiction over such offences. Rather, its article 44 (2) provided for an obligation of the States Parties to extend their perjury laws to perjury committed before the Court. The International Law Commission noted that "[t]he statute does not include a provision making it a crime to give false testimony before the court. On balance the Commission thought that prosecutions for perjury should be brought before the national courts".[3]

4. This position changed in the further drafting process of the Rome Statute and it was agreed to give the Court, alongside States, jurisdiction over perjury etc.

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[1] The other appeals raising the same questions are the appeals *Bemba et al.* OA 3 and OA 4.
[2] International Law Commission, *Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994)*, UN Doc. A/49/10 (hereinafter: "1994 Draft Statute"), pp. 20 *et seq.*
[3] 1994 Draft Statute, p. 59.

committed in the proceedings before the Court.[4] However, at the Rome Conference, no agreement could be reached as to the procedure to be applied by the Court in respect of the investigation and prosecution of offences against the administration of justice. In particular, there was a debate as to whether the procedure applicable to the investigation and prosecution of the "core crimes", i.e. the genocide, crimes against humanity, war crimes and the crime of aggression, should also regulate the investigation and prosecution of offences against the administration of justice.[5] For that reason, the decision as to the applicable procedure was left to be decided in the Rules of Procedure and Evidence.[6]

5. The Rules of Procedure and Evidence include a separate Chapter 9 on "Offences and misconduct against the Court", the first section of which is devoted to "Offences against the administration of justice under article 70 of the Statute".[7] Rules 162 to 167 contain specific procedural provisions regarding the investigation and prosecution of such offences, which in many respects differ from those applicable to the investigation and prosecution of core crimes. It is only "[u]nless otherwise provided" that the procedural provisions in relation to core crimes also apply to offences against the administration of justice.[8]

6. The drafting process of article 70 of the Statute and the Rules of Procedure and Evidence demonstrates that offences against the administration of justice are not comparable to core crimes. Rather, the Court's jurisdiction over such offences is distinct.[9] Importantly, the gravity of offences against the administration of justice is in no way equivalent to the gravity of core crimes. The latter are, in the words of the Statute's Preamble, among "the most serious crimes of concern to the international community as a whole", amounting to "unimaginable atrocities that deeply shock the

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[4] *See* D.K. Piragoff, "Article 70 Offences against the administration of justice", in: O. Trifferer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edition), pp. 1337 *et seq.* (hereinafter: "Trifferer-Piragoff, Article 70"), at margin numbers 3-4.
[5] Trifferer-Piragoff, Article 70, margin number 4.
[6] *See* article 70 (2) of the Statute, which provides as follows: "The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State."
[7] On the drafting of this Chapter *see* H. Friman, "Chapter 11 - Offences and misconduct against the Court", in: R. S. Lee (ed.), *The International Criminal Court/Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 605 *et seq.* (hereinafter: "Friman").
[8] Rule 163 (1) of the Rules of Procedure and Evidence.
[9] *See* Friman, p. 606.

conscience of humanity".[10] In contrast, while offences under article 70 of the Statute are undoubtedly directed against an important value – the proper and efficacious administration of international criminal justice – their gravity does not even come close to that of the core crimes.

7. The significant difference in gravity finds expression not least in the relevant provisions regarding the sentences that may be imposed. For core crimes the maximum sentence is 30 years of imprisonment, or life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person".[11] In contrast, for offences under article 70, the maximum sentence is five years of imprisonment or a fine.[12] The difference in gravity also finds expression in the fact that, while there is no prescription period for core crimes,[13] offences under article 70 of the Statute are subject to a period of limitation of merely five years.[14]

8. In this regard, the practice of the *ad hoc* international criminal tribunals and internationalised courts is also of relevance. It shows that the sanctions imposed for "contempt of court" (the equivalent of "offences against the administration of justice" at the International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY") and the International Criminal Tribunal for Rwanda) in comparable cases are often relatively lenient.[15] For instance, in the *Tadić* case, in one of the first cases of contempt of court adjudicated before the ICTY, that tribunal imposed a fine of 15.000 Dutch Guilders against the former counsel of Mr Tadić,[16] a decision that was confirmed on appeal.[17] The former counsel was found to have put forward a case on appeal which he knew was false and to have manipulated witnesses; it is noteworthy that he was not placed in detention during the proceedings against him. At the Special

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[10] Preamble of the Statute, paras 4 and 2.
[11] Article 77 (1) of the Statute.
[12] Article 70 (3) of the Statute.
[13] *See* article 29 of the Statute.
[14] Rule 164 (2) of the Rules of Procedure and Evidence.
[15] At the ICTY, the applicable punishment for "contempt of court" is set out in rule 77 of the Rules of Procedure and Evidence. This rule has undergone several changes. In its original version (IT/32, 14 March 1994), rule 77 (A) provided for imprisonment not exceeding six months or a fine not exceeding 10.000 US Dollars. Both the maximum term of imprisonment and the fine were subsequently augmented. In its current version (IT/32/Rev. 49, 22 May 2013), rule 77 (G) of the ICTY Rules of Procedure and Evidence provides for imprisonment not exceeding seven years or a fine not exceeding 100.000 Euros, or both.
[16] ICTY, *Prosecutor v. Duško Tadić,* Appeals Chamber, "Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin". 31 January 2000, IT-94-1-A-R77.
[17] ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić,* "Appeal Judgement on Allegations of Contempt of Court Against Prior Counsel, Milan Vujin", 27 February 2001, IT-94-1-A-AR77.

Court for Sierra Leone (hereinafter: "SCSL"), an internationalised jurisdiction, in the case of *Independent Counsel v. Hassan Papa Bangura, Samuel Kargbo, Santigie Borbor Kanu and Brima Bazzy Kamara,* relating to contempt of court for bribing witnesses or inducing them to recant testimony, the accused were sentenced to prison terms between eighteen months and two years; in relation to one of the accused, the sentence was suspended.[18]

9. Similarly, several national jurisdictions domesticating offences under article 70 of the Statute consider them to be only of moderate or low gravity, as expressed in the maximum sanction. In *Germany*, the relevant offences (perjury etc.) under general criminal law are also applicable if committed before an international court.[19] Most of the relevant offences are classified as "Vergehen", i.e. they are less serious offences carrying a minimum penalty of less than a year of imprisonment or a fine.[20] They are punishable by fines or imprisonment of, depending on the offence in question, a maximum of three to five years.[21] Similarly, in *England and Wales*, the International Criminal Court Act 2001[22] makes the relevant domestic offences applicable if committed before the Court.[23] With respect to perjury, the maximum prison sentence is two years.[24] In *The Netherlands*, domestic provisions on perjury were equally made applicable to cases of perjury before the Court.[25] The maximum sentence here is a term of imprisonment of no longer than six years.[26] The *Italian* Criminal Code includes separate provisions domesticating offences under article 70 of the Statute into Italian law, stipulating maximum prison sentences between three and six years.[27]

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[18] Special Court for Sierra Leone, Trial Chamber II, "Sentencing Judgement in Contempt Proceedings", 11 October 2012 (filed 16 October 2012), SCSL-11-02-T; available at: http://www.rscsl.org/Documents/Decisions/Contempt/2011-02/071/SCSL-11-02-T-071.pdf

[19] *See* section 162 (1) of the German Criminal Code; available at http://www.gesetze-im-internet.de/stgb/.

[20] *See* section 12 of the German Criminal Code.

[21] Sections 153-154, 156, 160-161 of the German Criminal Code.

[22] http://www.legislation.gov.uk/ukpga/2001/17/contents (hereinafter: "United Kingdom ICC Act").

[23] *See* sections 54 and 61 of the United Kingdom ICC Act.

[24] *See* United Kingdom Perjury Act 1911, article 1 (1), available at http://www.legislation.gov.uk/ukpga/Geo5/1-2/6.

[25] *See* The Netherlands, Acts Amending Provisions of the Penal Code, articles 200, 208A, 361, as referred to in G. Sluiter, "The Netherlands", in: C. Kress et al. (eds), *The Rome Statute and Domestic Legal Orders: Constitutional Issues, Cooperation and Enforcement*, Volume II (Nomos Verlagsgesellschaft, 2005), pp. 203 *et seq.* at pp. 229-230.

[26] *See* article 207A of the Dutch Criminal Code; available at http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelIX/Artikel207a/geldigheidsdatum_30-06-2014.

[27] *See* articles 368, 371-*bis*, 372, 374-*bis*, 377, 378 and 380 of the Italian Criminal Code; available at http://www.altalex.com/index.php?idnot=36764

In *Belgium*, the maximum sentence for offences against the administration of justice is six years of imprisonment.[28] While this is by no means meant to be an exhaustive comparative analysis, and while there are also jurisdictions that provide for higher maximum sentences for the domesticated article 70 offences,[29] the practices in Germany, England and Wales, The Netherlands, Italy and Belgium amply demonstrate that those domestic jurisdictions consider offences against the administration of justice not to be of the highest gravity.

10. The above may be summarised as follows: offences against the administration of justice are distinct from core crimes. While they are directed against an important value, they are significantly less serious than core crimes. Under the Rules of Procedure and Evidence, specific procedural rules apply to the investigation and prosecution of such offences, and the procedural rules applicable to core crimes apply only "[u]nless otherwise provided".

II. THE APPROACH IN THE IMPUGNED DECISION

11. Against this background I shall now turn to the approach adopted in the Impugned Decision, which, for the reasons further elaborated below, failed to appreciate the distinct character of offences against the administration of justice.

12. At the outset, it is of note that the Pre-Trial Chamber failed to identify the full legal basis for the Impugned Decision. While the Pre-Trial Chamber referred to articles 58 (1) and 60 (2) of the Statute, it failed to mention, except in passing and indirectly in the section of the Impugned Decision dealing with article 58 (1) (a) of the Statute, that at issue were offences against the administration of justice under article 70 (1) of the Statute and not core crimes.[30] Critically, the Pre-Trial Chamber also

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[28] *See* article 41 of the *Loi concernant la coopération avec la Cour pénale internationale et les tribunaux pénaux internationaux* of 29 March 2004 (entry into force: 1 April 2004), available at http://www.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/4C99B5CC190A33DBC1256EF5004E807F/TEXT/Belgium%20-%20ICC%20Cooperation%20Law%2C%202004.pdf

[29] *See*, for instance, Australia, where perjury before the Court carries a maximum prison sentence of ten years, other offences against the administration of justice carry penalties of imprisonment between five and ten years, *see International Criminal Court (Consequential Amendments) Act*, 2002, para. 268.102 *et seq.*, available at: http://www.comlaw.gov.au/Details/C2004A00993; and Canada, where the domesticated offences under article 70 of the Statute are punishable by maximum prison terms of up to fourteen years, *see* article 16-23 of the Crimes Against Humanity and War Crimes Act, available at:http://laws-lois.justice.gc.ca/eng/acts/C-45.9/page-8.html#h-8.

[30] Impugned Decision, paras 6, 7.

failed to refer to, and analyse, rule 163 (1) of the Rules of Procedure and Evidence, without which articles 58 (1) and 60 (2) of the Statute would not even be applicable to the case at hand. This omission is a clear indication that the Pre-Trial Chamber considered Mr Kilolo's Request for Interim Release just as any other request for interim release by a suspect who is alleged to be criminally responsible for core crimes.

13. This is also evidenced by the fact that the Pre-Trial Chamber relied, without any critical analysis, on previous decisions and judgments of the Court – including of the Appeals Chamber – that deal with interim release in the context of alleged core crimes. For instance, the Pre-Trial Chamber referred to, and relied on, judgments of the Appeals Chamber issued in the *Lubanga* case,[31] the *Gbagbo* case,[32] the *Bemba* case[33] and the *Katanga* case.[34] Yet the suspects in these cases were alleged to have committed crimes against humanity or war crimes – crimes that are, as set out above, in no way comparable to offences against the administration of justice, which Mr Kilolo is alleged to have committed. In addition, several of the suspects were already detained before being surrendered to the Court based on allegations of very serious crimes.

14. Most problematic in the Pre-Trial Chamber's approach is its uncritical reliance on previous judgments of the Court – made in the context of alleged core crimes – when discussing whether the continued detention of Mr Kilolo appeared necessary for any of the three reasons listed in article 58 (1) (b) of the Statute. For instance, as to the risk of the commission of future crimes, the Pre-Trial Chamber referred to a judgment by the Appeals Chamber in the *Gbagbo* case.[35] The Pre-Trial Chamber, however, did not consider whether the fact that in the *Gbagbo* case the "future crimes" at issue were core crimes had any impact on the transferability of the holdings of the Appeals Chamber to the case at hand.

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[31] *See* Impugned Decision, footnotes 13, 14, 36, 63, referring to ICC-01/04-01/06-824, paras 124, 134, 136, 138, 139.
[32] *See* Impugned Decision, footnotes 10, 11, 14, 58, 78, referring to ICC-02/11-01/11-278-Red, paras 23, 26, 27, 49, 70.
[33] *See* Impugned Decision, footnotes 35, 63, referring to ICC-01/05-01/08-631-Red, para. 60; ICC-01/05-01/08-323, para. 56.
[34] *See* Impugned Decision, footnotes 38, 66, referring to ICC-01/04-01/07-572, paras 21, 24.
[35] *See* Impugned Decision, para. 39, referring to ICC-02/11-01/11-278-Red, para. 70.

15. In relation to the risk of absconding, at paragraph 26 of the Impugned Decision, the Pre-Trial Chamber noted that "[b]oth the Appeals Chamber and the Pre-Trial Chambers of the Court have previously found the existence of a network of supporters behind a suspect to be a relevant factor in the determination of the existence of a risk of flight, because it might indeed facilitate absconding".[36] In the same paragraph, the Pre-Trial Chamber recalled that it had recently found in the *Ntaganda* case that the availability of financial means through a network was a relevant factor in determining whether there was a flight risk. Similarly, the Pre-Trial Chamber referred to jurisprudence of the Appeals Chamber finding that the gravity of the crime the suspect is alleged to have committed and the likely duration of the potential sentence are relevant for the determination of whether there is a risk of absconding.[37] Yet the Pre-Trial Chamber failed to refer to the fact that the offences Mr Kilolo is alleged to have committed carry a significantly lower maximum sentence than core crimes. If the sentencing practice of the ICTY and SCSL is taken as a yardstick, it is likely that, even if Mr Kilolo were found guilty and convicted, the actual sentence imposed could remain significantly below the maximum penalty of five years.

16. For the above reasons, the principles developed and interpretations adopted in relation to articles 58 (1) and 60 (2) of the Statute in the context of alleged core crimes cannot simply be transferred to the context of alleged offences against the administration of justice. Rather, it has to be carefully assessed whether they are applicable in the specific circumstances of this case, or whether alternative principles and interpretations ought to be developed and adopted. This type of careful analysis is entirely lacking in the Impugned Decision, which contended itself with finding that it would decide Mr Kilolo's "request for interim release in light of those principles which are now consolidated in the case-law of the Appeals Chamber of the Court and have constantly been upheld by this Chamber".[38] This gives the impression that based its decision on an inappropriate and improper analogy.[39]

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[36] Footnote omitted.
[37] *See* Impugned Decision para. 31, referring to ICC-01/04-01/07-572, paras 21, 24; and ICC-01/04-01/06-824, para. 136.
[38] Impugned Decision, para. 1.
[39] *See* in this regard also article 22 of the Statute, which establishes the principle of legality and, at paragraph (2), specifically prohibits the extension of the definition of a crime by way of analogy.

17. Article 21 (2) of the Statute gives the Chambers of this Court the power to "apply principles and rules of law as interpreted in its previous decisions". Yet this must not be done out of context and without a careful evaluation as to whether the previous jurisprudence regarding interim release of suspects alleged to have committed core crimes are actually comparable to the case at hand.[40]

18. I also recall that, pursuant to article 21 (3) of the Statute, the Statute must be applied and interpreted "consistent with internationally recognized human rights". The Impugned Decision rejected Mr Kilolo's request to be released from pre-trial detention, thereby affecting his most fundamental right to personal liberty. When assessing questions of pre-trial detention, a Chamber is obliged to ensure that continued detention is actually justified and reasonable *in the circumstances of the case*. Factors that may be relevant to detention in cases of alleged core crimes may have less or no relevance if considered in the context of offences against the administration of justice. The overarching consideration must always be that continued detention is not unreasonable or leads to an arbitrary or disproportionate outcome.[41]

III. CONCLUSION

19. For the reasons set out above, I am of the view that the Pre-Trial Chamber failed to appreciate sufficiently that the matter at hand concerned allegations of offences against the administration of justice and not core crimes. By relying extensively on jurisprudence and the test developed in relation to core crimes, the Pre-Trial Chamber did not give sufficient consideration to the fact that offences against the administration of justice are in no way comparable to core crimes, and that this necessarily impacts on the analysis as to whether continued detention is justified. In addition, the Pre-Trial Chamber's approach bears the inherent risk of undue reliance

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[40] In this regard, *see Prosecutor v. Laurent Gbagbo,* "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the "Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo"'", 26 October 2012, ICC-02/11-01/11-278-Red, pp. 37 *et seq.*, "Dissenting Opinion of Judge Anita Ušacka" (hereinafter: "Gbagbo Dissenting Opinion"), para. 13, emphasising that "where a detention decision is at issue that requires a risk analysis based on the facts before the Chamber, this risk analysis may not only be based on abstract factors, but must be supported by concrete evidence and relate specifically to the circumstances of the person who was arrested."

[41] *See*, for example, European Court of Human Rights, *Khodorkovskiy v. Russia*, "Judgment", 31 May 2011, application no. 5829/04, para. 136; *see* also *Ladent v. Poland*, "Judgment", 18 March 2008, application no. 11036/03, paras 55-56.

on abstract factors and formulistic language, as opposed to a proper assessment of the concrete circumstances of the case.[42]

20. In my view, this error of the Pre-Trial Chamber taints the entire Impugned Decision. It is therefore unnecessary to address the further and more detailed arguments raised in Mr Kilolo's Document in Support of the Appeal. As the Pre-Trial Chamber did not consider every part of the relevant applicable law and therefore failed to properly interpret the legal framework for its decision, it could well be that the conclusion it reached was erroneous and that Mr Kilolo should have been released. However, the present appeal is not the opportune occasion to consider the merits of Mr Kilolo's Request for Interim Release. Rather, the Pre-Trial Chamber should reconsider the matter. For that reason, I would reverse the Impugned Decision and remand the matter to the Pre-Trial Chamber for a new decision on Mr Kilolo's Request for Interim Release.

21. Finally, I would like to recall my separate concurring opinion to the recent decision of the Plenary of Judges on the application for the disqualification of Judge Cuno Tarfusser from the present case.[43] At footnote 11, I stated as follows:

> It is noted that for the purposes of considering the Waiver Application, the Presidency was composed of three Judges of the Appeals Chamber, Judges Song, Monageng and Kuenyehia, which could be problematic for the purpose of future related appeals.

22. I note that in their capacity of being members of the Presidency, these three Judges have issued three decisions that are related to the present case.[44] In light of this

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[42] *See* Gbagbo Dissenting Opinion, para. 39.
[43] "Decision of the Plenary of Judges on the Defence Applications for Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*", dated 20 June 2014 and registered on 23 June 2014, ICC-01/05-01/13-511-Anx, paras 45-49.
[44] *See Situation in the Central African Republic,* "Decision on the urgent application of the Single Judge of Pre-Trial Chamber II of 19 November 2013 for the waiver of the immunity of lead defence counsel and the case manager for the defence in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*", 20 November 2013, ICC-01/05-68; ICC-01/05-70-US-Exp (note that no public version of that decision is presently available); and *Prosecutor v. Jean-Pierre Bemba et al.,* "Decision on the 'Defence Request for the Automatic Temporary Suspension of the Single Judge Pending Decision on Defence Submission ICC-01/05-01/13-372'", 19 May 2014, ICC-01/05-01/13-407.

fact, I regret that my colleagues did not request to be recused from sitting on the present appeal.[45]

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

Judge Anita Ušacka

Dated this 11th day of July 2014

At The Hague, The Netherlands

[45] *See* article 41 (2) (a) of the Statute, which reads in relevant part as follows: "A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court […]".