

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/11-01/15

Date: 16 June 2017

**THE APPEALS CHAMBER**

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

**SITUATION IN CÔTE D'IVOIRE**

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

**Public**

**Public redacted version of "Response to Laurent Gbagbo's appeal against the  
'Decision on Mr Gbagbo's Detention'", 27 March 2017, ICC-02/11-01/15-865-Conf  
OA 10**

**Source:** Office of the Prosecutor

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## Introduction

1. The appeal filed by the Defence of Laurent Gbagbo<sup>1</sup> (“Defence”) against the Majority of Trial Chamber I’s “Decision on Mr Gbagbo’s Detention”<sup>2</sup> should be dismissed.
2. The Defence raises six Grounds of Appeal, challenging both the Majority’s conclusion that the circumstances have not changed to such an extent as to warrant Mr Gbagbo’s release,<sup>3</sup> and that there is currently no realistic proposal that would permit the conditional release of Mr Gbagbo.<sup>4</sup> However, none of these Grounds shows any error in the Decision. In particular, the Decision was neither predicated on baseless speculations, nor was it driven by the Majority’s subjective “fear” that Mr Gbagbo will evade justice.<sup>5</sup> Rather, the Majority properly considered all arguments and facts before it and based its Decision on credible information. It correctly reviewed the Trial Chamber’s decision of 2 November 2015<sup>6</sup> pursuant to the procedure under article 60(3).
3. Judge Tarfusser in his Dissenting Opinion conceded that the Majority Decision was consistent with both the wording of the relevant legal texts and with the existing case law of the Appeals Chamber.<sup>7</sup> However, bearing in mind the “magnitude of the principles at stake”, as well as “the specific circumstances both of the accused Laurent Gbagbo and of these proceedings as a whole”, Judge Tarfusser would have taken a “different, more case-tailored” approach.<sup>8</sup> In any event, irrespective of whether such an alternative approach was reasonable in the circumstances of this case, none of Judge Tarfusser’s arguments support the

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<sup>1</sup> ICC-02/11-01/15-857-Conf OA10 (“Appeal”).

<sup>2</sup> ICC-02/11-01/15-846 (“Decision”). Judge Tarfusser issued a dissenting opinion: ICC-02/11-01/15-846-Anx (“Dissenting Opinion”).

<sup>3</sup> Ground 1 (Appeal, paras. 15-19); Ground 2 (Appeal, paras. 20-23); Ground 3 (Appeal, paras. 24-41); Ground 4 (Appeal, paras. 42-52); Ground 5 (Appeal, paras. 53-59) all challenge the Majority’s findings with respect to the continued existence of the risks under article 58(1)(b)(i) and (ii) (Decision, paras.11-20).

<sup>4</sup> Ground 6 (Appeal, paras. 60-71), challenging Decision, paras. 21-22.

<sup>5</sup> Appeal, para. 14.

<sup>6</sup> ICC-02/11-01/15-328 (“Tenth Decision”).

<sup>7</sup> Dissenting Opinion, para. 1.

<sup>8</sup> Dissenting Opinion, para. 1.

Defence's submission that the Majority committed appealable errors in its Decision.

### **Confidentiality**

4. Pursuant to regulation 23*bis*(2) this document is filed confidential because it responds to the Appeal, which was filed "Confidential".

### **Submissions**

#### **A. Preliminary matter**

5. The Defence's notice of appeal contains a lengthy procedural background,<sup>9</sup> which fails to completely and objectively identify matters related to the Appeal. In addition, some references are to *ex parte* filings, excluding the Prosecution. As the Appeals Chamber has previously held, arguments of a party to an appeal must be fully contained within that party's filing—in this case the Appeal—without requiring reference to arguments made by that participant elsewhere.<sup>10</sup> Accordingly, any factual claims contained solely in the Defence's notice of appeal should be disregarded for the purpose of adjudicating the merits of this Appeal.

#### **B. First Ground of Appeal: The Majority properly considered the Defence's arguments**

6. The Defence's submission that the Majority failed to consider some relevant Defence arguments<sup>11</sup> does not correctly represent the Decision and should therefore be dismissed.

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<sup>9</sup> ICC-02/11-01/15-858-Conf OA10.

<sup>10</sup> ICC-01/04-01/06-774 OA6, para. 29.

<sup>11</sup> Appeal, paras. 15-19.

7. In particular, the Majority did not fail to consider the Defence's arguments regarding the "ongoing existence of a pro-Gbagbo network".<sup>12</sup> The Majority merely declined to entertain the Defence's "*general submissions* arguing that the Prosecutor has failed to establish the ongoing existence of the pro-Gbagbo network", because they repeated arguments that the Chamber had already addressed in previous decisions, and therefore could not establish "changed circumstances" pursuant to article 60(3).<sup>13</sup> This approach is consistent with the jurisprudence of the Appeals Chamber—including in this case<sup>14</sup>—and the Defence does not to demonstrate any error in this part of the Decision. In fact, the Defence's arguments amount to an ongoing disagreement with previous determinations of the Chamber regarding the existence of a pro-Gbagbo network.
8. The Defence further argues that the Majority failed to consider the "past reality" of the pro-Gbagbo network, but does not identify which additional arguments or facts it should have taken into consideration. In fact, this argument appears to misappreciate the scope of a review of a prior decision on detention under article 60(3). The Appeals Chamber has consistently held that the periodic review of a ruling on detention under article 60(3) "does not require the Chamber to make a decision on detention *ab initio*. The Chamber does not have to enter findings on the circumstances already decided upon in the ruling on detention."<sup>15</sup> Rather, the Chamber must consider whether there are "changed circumstances". If there are changed circumstances, the Chamber will need to consider their impact on the factors that formed the basis for its decision to keep the person in detention. If, however, the Chamber finds that there are no

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<sup>12</sup> Appeal, paras. 16-17.

<sup>13</sup> Decision, para. 12 (emphasis added).

<sup>14</sup> ICC-02/11-01/11-548-Red OA4, paras. 59, 112; ICC-01/05-01/08-1019 OA4, para. 53; ICC-01/05-01/08-1626-Red OA7, para. 60;

<sup>15</sup> ICC-01/05-01/08-1019 OA4, para. 53; ICC-01/05-01/08-1626-Red OA7, para. 60; ICC-02/11-01/11-548-Red OA4, paras. 52, 94. ICC-01/05-01/13-969 OA 5, OA 6, OA 7, OA 8, OA 9, para. 51.

changed circumstances, it “is not required to further review the ruling on release or detention”.<sup>16</sup>

9. In any event, the Majority carefully considered the Defence’s specific arguments, as well as the additional information<sup>17</sup> on the existence of the pro-Gbagbo network and on the question whether “the network is still operational.”<sup>18</sup> In particular the Majority addressed questions about the nature and purpose of the network,<sup>19</sup> the activities of the network,<sup>20</sup> the impact of the network’s activities on the Court’s proceedings,<sup>21</sup> and the network’s link to Mr Gbagbo.<sup>22</sup>
10. The Defence’s First Ground of Appeal is unsupported and should therefore be dismissed.

### **C. Second Ground of Appeal: The Majority properly took into account the length of Mr Gbagbo’s pre-trial detention**

11. The Majority properly took into account the period that Mr Gbagbo has already spent in detention when assessing whether there has been a change in circumstances, and in particular Mr Gbagbo’s right to liberty.<sup>23</sup>
12. Contrary to the Defence’s premise that the time between the two detention decisions by definition constitutes a change of circumstances,<sup>24</sup> the Appeals Chamber has held that, “the lapse of time in detention cannot be considered on its own to be a changed circumstance within the meaning of article 60(3)”.<sup>25</sup> This is because the review of an individual’s detention under article 60(3) is based on whether the conditions of article 58(1)(a) and (b) have changed such that

<sup>16</sup> ICC-01/05-01/08-2151-Red OA10, paras. 1, 31; ICC-02/11-01/11-548-Red OA4, paras. 40, 51.

<sup>17</sup> Decision, paras. 9, 20.

<sup>18</sup> Decision, paras. 13-16, 18-20.

<sup>19</sup> Decision, para. 14.

<sup>20</sup> Decision, para. 15.

<sup>21</sup> Decision, para. 15.

<sup>22</sup> Decision, para. 16.

<sup>23</sup> *Contra*, Appeal, paras. 20-23.

<sup>24</sup> Appeal, para. 20.

<sup>25</sup> ICC-01/05-01/13-969 OA5 OA6 OA7 OA8 OA9, para. 44.

detention is no longer justified.<sup>26</sup> Accordingly, the lapse of time is only relevant to the extent that it has an impact on a risk under article 58(1)(b) that has been established in a prior decision of detention. The lapse of time must be balanced against those risks, and it may be determinative if “all factors being considered, the continued detention ‘stops being reasonable’”.<sup>27</sup>

13. The Majority correctly followed this approach. It noted the Defence’s argument that Gbagbo has already spent “almost six years” in detention,<sup>28</sup> and then assessed whether there was still an operational network that could help Mr Gbagbo to abscond or obstruct the trial proceedings,<sup>29</sup> and whether there were other factors impacting on the likelihood that Mr Gbagbo could attempt to abscond or obstruct the proceedings.<sup>30</sup> The Majority, “having reviewed the submissions and all material before it”, concluded that the circumstances have not changed to such an extent as to warrant Mr Gbagbo’s release”.<sup>31</sup>
14. Judge Tarfusser appears to agree in general terms with the approach enunciated by the Appeals Chamber,<sup>32</sup> except that he would have balanced the relevant factors in this case differently, in particular by giving more weight to the fact that Mr Gbagbo has already spent almost six years in pre-trial detention.<sup>33</sup> This difference of opinion, however, does not show any appealable error in the Decision.
15. Based on the above, the Defence’s Second Ground of Appeal should be dismissed.

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<sup>26</sup> ICC-01/05-01/13-969 OA5 OA6 OA7 OA8 OA9, para. 44.

<sup>27</sup> ICC-01/05-01/13-969 OA5 OA6 OA7 OA8 OA9, paras. 3, 45. This judgment of the Appeals Chamber is consistent with another recent judgment, in which the Appeals Chamber held, in the context of reviewing the conditions of detention, that “the passing of time alone will not necessarily require the lifting or adjustment of the measures imposed. [...] [T]he passage of time is but one factor that may influence either finding.” (ICC-01/04-02/06-1817-Conf OA4, paras. 71-72).

<sup>28</sup> Decision, para. 9.

<sup>29</sup> Decision, paras. 13-16.

<sup>30</sup> Decision, para. 17-19.

<sup>31</sup> Decision, para. 20.

<sup>32</sup> Dissenting Opinion, para. 8

<sup>33</sup> Dissenting Opinion, paras. 6-7, 10.

**D. Third Ground of Appeal: The Majority properly substantiated its findings on the ongoing existence of the pro-Gbagbo network**

16. Under its Third Ground of Appeal, the Defence argues that the Majority erred by finding that there existed a pro-Gbagbo network of supporters without pointing to concrete evidence to support its finding.<sup>34</sup> Like the First Ground of Appeal, this Ground is nothing but a mere disagreement with the Trial Chamber's previous findings on the existence of a pro-Gbagbo network. Once again, the Defence misappreciates the scope of the review of a prior decision on detention under article 60(3), which is not to make a new decision *ab initio* on detention—including on the relevant factors that justified detention—but merely to ascertain whether there are “changed circumstances” that warrant modifying the prior ruling.
17. Rather than challenging the Majority's findings that the circumstances relevant to the existence of a pro-Gbagbo network have not changed in such a way, or at all, to warrant Mr Gbagbo's release,<sup>35</sup> the Defence simply repeats arguments made throughout these proceedings<sup>36</sup> and submits that the Pre-Trial Chamber and the Trial Chamber have erred on this matter “since the beginning of the case”.<sup>37</sup> The Defence thus concedes that it is effectively challenging *prior decisions* on the pro-Gbagbo network (which are not under appeal).<sup>38</sup> These arguments do not demonstrate an error in the appealed Decision.<sup>39</sup>
18. In fact, the Defence's arguments—and some of Judge Tarfusser's findings<sup>40</sup>—appear to disregard that in their prior article 60(3) review decisions, both the

<sup>34</sup> Appeal, paras. 24-41.

<sup>35</sup> Decision, paras. 13-19.

<sup>36</sup> The Defence explicitly referred to its prior submissions, *see* for instance Appeal fns. 12-20.

<sup>37</sup> Appeal, para. 24.

<sup>38</sup> *See* Appeal, paras. 27-41.

<sup>39</sup> *See* ICC-02/11-01/11-454, para. 40; ICC-01/05-01/08-1626-Red OA7, para. 55; ICC-01/05-01/08-1019 OA4, para. 53.

<sup>40</sup> *See* for instance, Dissenting Opinion, paras. 17-19, 21.



Pre-Trial Chamber and the Trial Chamber have already considered and dismissed,<sup>41</sup> the Defence's arguments on the existence and criminal nature of the pro-Gbagbo network,<sup>42</sup> its structure and means,<sup>43</sup> and on the network's intention to assist Mr Gbagbo to evade justice.<sup>44</sup> The Defence is now re-litigating its position also before the Appeals Chamber. However, as noted above, the Majority was not required to entertain Defence submissions that merely repeated arguments already addressed by the Chamber in previous decisions.<sup>45</sup> Such repetitive arguments show no more than the Defence's ongoing disagreement with those prior decisions.

19. In any event, the Majority correctly analysed whether there had been changed circumstances since its last article 60(3) decision—the Tenth Decision—regarding the pro-Gbagbo network, and in particular “whether the network is still operational and whether it could have the wherewithal to help Mr Gbagbo abscond or to obstruct the trial proceedings”.<sup>46</sup> It then assessed whether any such change would impact on the Tenth Decision, so as to warrant Mr Gbagbo's release.<sup>47</sup> In so doing, the Majority properly considered all the relevant facts and arguments before it.<sup>48</sup>
20. In fact, the Majority identified some relevant changes in relation to the pro-Gbagbo network, namely the activities of some of its members which impacted on the conduct of the trial.<sup>49</sup> However, in the Majority's view, those changes simply reinforced its conclusion in the Tenth Decision on the pro-Gbagbo

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<sup>41</sup> See for instance ICC-02/11-01/15-328 (“Tenth Decision”) paras. 10, 12, 15; ICC-02/11-01/15-127 (“Ninth Decision”) paras. 5, 7-11; ICC-02/11-01/11-808 (“Eighth Decision”), paras. 12, 30-32, 39; ICC-02/11-01/11-718, (“Seventh Decision”) paras. 54-60; ICC-02/11-01/11-668, (“Sixth Decision”) paras. 27, 30-31; ICC-02/11-01/11-633 (“Fifth Decision”), paras. 24-26; ICC-02/11-01/11-454 (“Third Decision”), paras. 23, 38-44; ICC-02/11-01/11-417 (“Second Decision”), paras. 16, 35-39; ICC-02/11-01/11-291 (“First Decision”), paras. 25, 54-59; ICC-02/11-01/11-180 (“Article 60(2) Decision”), paras. 60, 62.

<sup>42</sup> *Contra* Appeal, paras. 27-33.

<sup>43</sup> *Contra* Appeal, paras. 34-35.

<sup>44</sup> *Contra* Appeal, paras. 36-41.

<sup>45</sup> ICC-02/11-01/11-548-Red OA 4, paras. 59, 112; ICC-01/05-01/08-1019 OA4, para. 53; ICC-01/05-01/08-1626-Red OA7, para. 60;

<sup>46</sup> Decision, paras. 13-16.

<sup>47</sup> Decision, para. 11.

<sup>48</sup> Decision, para. 20.

<sup>49</sup> Decision, paras. 15-16.

network, which warranted Mr Gbagbo's continued detention under articles 58(1)(b)(i) and (ii) to ensure his appearance at trial and that he does not obstruct or endanger the proceedings.<sup>50</sup>

21. Based on the above, the Defence's Third Ground of Appeal should be dismissed.

**E. Fourth Ground of Appeal: The Majority properly considered Mr Gbagbo's age and state of health**

22. The Defence's Fourth Ground of Appeal<sup>51</sup> relies heavily on Judge Tarfusser's Dissenting Opinion,<sup>52</sup> which weighed Mr Gbagbo's age and state of health differently, and assessed such factors as decisive for warranting the provisional release of Mr Gbagbo. However, irrespective of whether such an alternative approach was reasonable or not, none of Judge Tarfusser's arguments support the Defence's submission that the Majority committed appealable errors by having given no decisive weight to Mr Gbagbo's age and state of health when determining that there continued to be a risk that Mr Gbagbo could abscond or interfere with the proceedings, if released. The Fourth Ground of Appeal should therefore be dismissed.

(i) The Majority did not err by failing to expressly consider Mr Gbagbo's state of health

23. Contrary to the Defence's argument,<sup>53</sup> the Majority was not required, as a matter of law, to expressly refer to the impact of Mr Gbagbo's state of health on its assessment of ongoing risks under article 58(1)(b)(i) and (ii). However, it did so

<sup>50</sup> Tenth Decision (ICC-02/11-01/15-328), para. 15.

<sup>51</sup> Appeal, paras. 42-52.

<sup>52</sup> Dissenting Opinion, paras. 13-16, 19.

<sup>53</sup> Appeal, paras. 42-46.

implicitly, when assessing the impact of Mr Gbagbo's age on those risks. In any event, any error would not materially affect the Decision.

24. As the Defence correctly notes,<sup>54</sup> the Appeals Chamber has held that "the medical condition of a detained person *may* have an effect on the risks under article 58 (1) (b) of the Statute, for instance on his or her ability to abscond, potentially negating those risks."<sup>55</sup> It further emphasised that a Chamber "enjoys discretion when deciding on conditional release" and that "the ill health of a detained person *may* be a factor in the exercise of its discretion."<sup>56</sup>
25. Consideration of this factor is discretionary—as opposed to mandatory—because there is no provision in the Court's legal texts that specifically provides for the interim or conditional release of a detained person on health grounds. Regulation 103 of the Regulations of the Court assumes that medical problems of detained persons are treated within the detention centre and that, in case of hospitalisation, the detained person should remain continuously detained. Accordingly, articles 58 and 60, and rule 119, do not refer to the medical condition of a detained person when a Chamber addresses interim or conditional release.<sup>57</sup>
26. The Defence, in its submissions before the Trial Chamber on whether Mr Gbagbo should continue to be detained,<sup>58</sup> merely referred to facts that were already before the Chamber when it had determined that Mr Gbagbo was fit to attend trial proceedings,<sup>59</sup> shortly after its Tenth Decision.<sup>60</sup> The Majority did not explicitly refer to these facts when assessing whether circumstances had changed as to warrant Mr Gbagbo's interim release—and it was not required by law to do so. The Chamber's omission also stems from the Defence's apparent

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<sup>54</sup> Appeal, para. 46.

<sup>55</sup> ICC-02/11-01/11-278-Red OA, paras. 2, 87 (emphasis added).

<sup>56</sup> ICC-02/11-01/11-278-Red OA, paras. 2, 87 (emphasis added).

<sup>57</sup> ICC-02/11-01/11-278-Red OA, para. 86.

<sup>58</sup> ICC-02/11-01/15-793-Conf., paras. 34-36.

<sup>59</sup> ICC-02/11-01/15-349, p. 26.

<sup>60</sup> Decision, paras. 1-2.

choice to argue for Mr Gbagbo's release based on his state of health on compassionate grounds, instead of explaining how Mr Gbagbo's health would concretely impact on the risks under article 58(1)(b).<sup>61</sup>

27. In any event, the Majority implicitly considered Mr Gbagbo's health as part of its findings that there had been no change of circumstances with respect to the risks under article 58(1)(b)(i) and (ii). It found that "Mr Gbagbo's age is [...] not decisive, in this regard".<sup>62</sup> According to the Defence's own submission, Mr Gbagbo's state of health is intrinsically linked to his age.<sup>63</sup> Because the Chamber heard extensive submissions about Mr Gbagbo's health throughout the proceedings,<sup>64</sup> it must be assumed that it had also considered this factor when assessing the relevance of Mr Gbagbo's age for the purposes of its article 60(3) review.
28. Even if, *arguendo*, the Majority was required to make express findings with respect to Mr Gbagbo's state of health in its article 60(3) review Decision, such an error would not materially affect the Decision.<sup>65</sup> Because Mr Gbagbo's state of health is intrinsically linked to his age, it logically follows that if the latter factor could not have had a decisive impact on the Majority's Decision, neither could the former. In addition, the Majority's conclusions about the ongoing risks under article 58(1)(b) were primarily predicated on the continued existence of a pro-Gbagbo network that could assist him in both absconding and interfering with the proceedings. Indeed, any physical limitations imposed upon Mr Gbagbo by his state of health and his age could be easily overcome through the support of his network.

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<sup>61</sup> ICC-02/11-01/15-793-Conf., paras. 34-36.

<sup>62</sup> Decision, para. 17.

<sup>63</sup> ICC-02/11-01/15-793-Conf., paras. 34-36; Appeal, paras. 48, 51.

<sup>64</sup> ICC-02/11-01/15-349, paras. 2-22.

<sup>65</sup> See by analogy: ICC-02/11-01/11-278-Red OA, para. 90.

29. Similarly, the Majority was not required to expressly consider Mr Gbagbo's health to assess whether "interim release with conditions" was justified.<sup>66</sup> The Majority correctly noted that there is currently only one tentative proposal for conditional release, but that it is far from clear how it would work in practice and was ultimately inadequate to effectively mitigate the identified risks under article 58(1)(b).<sup>67</sup> Had the Chamber also considered Mr Gbagbo's health, it would have reached the same conclusion, especially since [REDACTED], if released to another country.<sup>68</sup> Accordingly, any error of the Majority in this respect could not materially affect the Decision.

*(ii) The Majority did not err by failing to consider Mr Gbagbo's age*

30. Contrary to the Defence's contention,<sup>69</sup> the Majority did consider Mr Gbagbo's age, but concluded that it was not decisive in its determination that the circumstances requiring his detention had not changed so as to order his release.<sup>70</sup> The Defence disagrees with the Majority's conclusion and simply re-litigates their prior arguments,<sup>71</sup> without showing an error in the Decision. The Defence's arguments regarding Mr Gbagbo's age should be dismissed on this basis alone.

31. While the Prosecution agrees with the Defence that Mr Gbagbo's age and his state of health are intrinsically linked,<sup>72</sup> this does also show any error in the Decision. To the contrary, it underscores that the Majority did not fail to consider relevant factors.<sup>73</sup>

<sup>66</sup> ICC-02/11-01/11-278-Red OA, paras. 2, 87.

<sup>67</sup> Decision, para. 22.

<sup>68</sup> Decision, para. 22.

<sup>69</sup> Appeal, paras. 47-52.

<sup>70</sup> Decision, para. 17.

<sup>71</sup> Appeal, para. 48.

<sup>72</sup> ICC-02/11-01/15-793-Conf., paras. 34-36; Appeal, paras. 48, 51.

<sup>73</sup> See paras. 27-28 above.

32. Further, the Majority did not err by finding that Mr Gbagbo's elevated age could give him an incentive to abscond, considering the potentially high sentence that he could face, if convicted.<sup>74</sup> The Appeals Chamber has held that the prospect of a high sentence may properly be taken into account to assess an accused's incentive to abscond.<sup>75</sup> Accordingly, the Majority correctly considered the severity of a potential sentence, in the context of Mr Gbagbo's personal circumstances and his subjective perception of the consequences of a possible conviction. Such a subjective assessment allowed the Majority to draw an inference as to Mr Gbagbo's incentive to abscond. This approach did not violate the principle of "human compassion" or the presumption of innocence.<sup>76</sup>
33. The Defence—relying on Judge Tarfusser's Dissenting Opinion<sup>77</sup>—further argues that the advancing age of a suspect and his health condition should automatically constitute a factor that will diminish his ability and willingness to abscond. This argument effectively suggests that a suspect's age and state of health should be considered in the abstract and irrespective of the specific facts that may be determinative in assessing the risks that a suspect may abscond or interfere with the proceedings.<sup>78</sup> However, this argument fails to consider that a Chamber must make a holistic assessment of all relevant facts and determine whether there continues to be a risk under article 58(1)(b) that justifies detention.
34. As noted above, an accused's age and [REDACTED] health could perhaps be given more weight when assessing his or her ability to abscond, if the accused had no means and no meaningful connections that could assist him or her to abscond or to interfere with the proceedings. But in a case like the present one, where the Majority has verified that Mr Gbagbo has the support of a "large group of persons" who have previously created a "serious risk to the integrity of

<sup>74</sup> Appeal, paras. 49-50, challenging Decision, para. 17.

<sup>75</sup> ICC-01/05-01/08-631-Red OA 2, para. 70; *see also* paras. 67-69.

<sup>76</sup> *Contra* Appeal, para. 50, relying on Dissenting Opinion, para. 14.

<sup>77</sup> Dissenting Opinion, para. 15.

<sup>78</sup> Appeal, para. 51.

these proceedings and to the safety of the witnesses” and who are willing to assist Mr Gbagbo “in any way possible”,<sup>79</sup> the Majority correctly balanced Mr Gbagbo’s age against those and other factors, and concluded that it was not a decisive factor in its Decision to keep Mr Gbagbo in detention.<sup>80</sup>

35. Based on the above, the Defence’s Fourth Ground of Appeal should be dismissed.

**F. Fifth Ground of Appeal: The Majority properly relied on the “extreme gravity of the charges” and the fact that Mr Gbagbo denies responsibility**

36. The Appeals Chamber has previously held that the length of sentence that an accused is likely to serve, if convicted, is a factor that may be taken into consideration when assessing the accused’s incentive to abscond, and accordingly any risk of flight under article 58(1)(b)(i).<sup>81</sup> In this very case, the Chamber’s decisions under article 58, article 60(2) and article 60(3) are consistently based on this factor, amongst others.<sup>82</sup>
37. Bearing in mind the concrete charges that Mr Gbagbo is facing in this case, especially the scale, nature, manner of commission and impact of the charged crimes, the Majority did not need to define the concept of “extreme gravity” in the abstract or to distinguish it from the gravity threshold under article 17(1)(d).<sup>83</sup> What matters, for the purposes of the Decision, is that Mr Gbagbo, if convicted of these crimes, would indeed face a lengthy sentence—a fact that the Defence does not dispute—which in turn could impact on his incentive to abscond, particularly given his age. The Majority made no error in following this chain of reasoning.

<sup>79</sup> Decision, paras. 15-16.

<sup>80</sup> Decision, para. 17, p. 12.

<sup>81</sup> ICC-01/05-01/08-631-Red OA2, para. 70; *see also* paras. 67-69.

<sup>82</sup> ICC-02/11-01/11-9-Red (“Arrest Warrant Decision”), para. 84; Article 60(2) Decision, para. 56; Seventh Decision, paras. 34, 36, 46.

<sup>83</sup> *Contra* Appeal, paras. 55-56. *See also* Dissenting Opinion, paras. 11-12.

38. The Defence misreads the Decision when challenging the Majority's finding that there is "no specific evidence before it that Mr Gbagbo has any intention of absconding or obstructing the trial proceedings".<sup>84</sup> The Majority's finding merely acknowledges that there is no *direct* or otherwise concrete evidence to that effect. Nevertheless, the Majority was not wrong to infer the continuation of the risks under article 58(1)(b) from *circumstantial* evidence, including the potentially severe sentence Mr Gbagbo could face, if convicted, and the impact that such a sentence could have on his personal life.<sup>85</sup>
39. The Defence further misreads the Majority's finding that Mr Gbagbo "denies responsibility".<sup>86</sup> The Majority made this finding when assessing the length of the sentence that Mr Gbagbo could potentially face, and the impact of such a sentence on his risk of flight. Because Mr Gbagbo denies any responsibility over the crime—thereby exercising his rights under article 66(1) and 67(1)—he is less likely to benefit from the substantial reduction of sentence that the Chamber might otherwise grant.<sup>87</sup> This does not mean, however, that no accused claiming his or her innocence may be granted provisional release.<sup>88</sup> Nor does this violate Mr Gbagbo's presumption of innocence or his defence rights.<sup>89</sup>
40. Based on the above, the Defence's Fifth Ground of Appeal should be dismissed.

### **G. Sixth Ground of Appeal: The Majority properly considered the option of conditional release**

41. The Majority did not refuse to consider the option of conditional release.<sup>90</sup> In fact, the Majority said that it was "not, in principle, opposed to conditionally

<sup>84</sup> Appeal, para. 53, challenging Decision, para. 17. *See also* Dissenting Opinion, para. 19.

<sup>85</sup> Decision, para. 17.

<sup>86</sup> Appeal, paras. 54, 57-58, referring to Decision, para. 17.

<sup>87</sup> *See* ICC-01/12-01/15-171, paras. 98-100.

<sup>88</sup> *Contra* Appeal, paras. 54, 57.

<sup>89</sup> *Contra* Appeal, paras. 58-59.

<sup>90</sup> *Contra* Appeal, paras. 60-71.



releasing Mr Gbagbo”,<sup>91</sup> but correctly recalled that conditional release must be based on “specific and enforceable conditions”.<sup>92</sup> In this case, it was not satisfied that such conditions were available. Indeed, it held that the only available proposal for conditional release was not “realistic” and failed to clearly demonstrate how it would work in practice. The Majority also observed that practical difficulties remained unresolved, including logistical and financial considerations to ensure Mr Gbagbo’s presence during the trial if he were to be released to a different country.<sup>93</sup>

42. The Defence’s further challenge to the Majority’s finding that the Court is not obliged to “make excessive expenditures in order to facilitate the conditional release of an accused”<sup>94</sup> is unsupported and should be rejected. As noted by the Appeals Chamber, the Court exercises its functions and powers on the territories of States Parties and as such is dependent on State cooperation, both in accepting a person who has been conditionally released and ensuring that the conditions imposed by the Court are enforced.<sup>95</sup> Accordingly, the Majority’s finding, if read in its proper context, is more a matter of State cooperation than a “budgetary argument”.<sup>96</sup> Because the scope and modalities of State cooperation with respect to a potential provisional release of Mr Gbagbo have yet to be resolved, it was not unreasonable for the Majority to have found that “the Court does not have an obligation to make excessive expenditures” to facilitate the conditional release of Mr Gbagbo.<sup>97</sup>

43. Nor did the Majority err by finding that “there is currently no realistic proposal that would permit the conditional release of Mr Gbagbo”.<sup>98</sup> While the Majority

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<sup>91</sup> Decision, para. 22.

<sup>92</sup> Decision, para. 21. *See also* ICC-01/05-01/08-631-Red OA2, para. 106; ICC-01/05-01/08-1626-Red OA7, para. 48.

<sup>93</sup> Decision, para. 22.

<sup>94</sup> Appeal, paras. 62-67, challenging Decision, para. 22.

<sup>95</sup> ICC-01/05-01/08-631-Red OA2, para. 107.

<sup>96</sup> Appeal, para. 62.

<sup>97</sup> Decision, para. 22.

<sup>98</sup> Appeal, para. 68, challenging Decision, para. 22.

observed that there is “currently only one tentative proposal available for conditional release”,<sup>99</sup> [REDACTED].<sup>100</sup> [REDACTED].<sup>101</sup> [REDACTED]<sup>102</sup>— [REDACTED].

44. [REDACTED],<sup>103</sup> [REDACTED],<sup>104</sup> [REDACTED],<sup>105</sup> [REDACTED],<sup>106</sup> [REDACTED].<sup>107</sup> On 18 January 2013, Pre-Trial Chamber I rejected [REDACTED] offer because the necessary medical treatment could also be provided in The Netherlands.<sup>108</sup> [REDACTED]. Accordingly, it was reasonable for the Majority to have disregarded such prior offers for the purposes of its present Decision.
45. In relation to the offer [REDACTED], the Prosecution does not currently have full access to the relevant information, as many relevant filings remain classified *ex parte* from the Prosecution. [REDACTED].<sup>109</sup> [REDACTED].<sup>110</sup> [REDACTED].<sup>111</sup> [REDACTED].<sup>112</sup> [REDACTED].<sup>113</sup>
46. While the Prosecution is not in a position to comment [REDACTED], the above shows that some matters appear to have been left outstanding. In addition, and contrary to both the Defence’s submission<sup>114</sup> and Judge Tarfusser’s Dissenting Opinion,<sup>115</sup> it appears that the Registry, under the Chamber’s supervision, actively engaged [REDACTED].

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<sup>99</sup> Decision, para. 22.

<sup>100</sup> Appeal, para. 68.

<sup>101</sup> Appeal, para. 68.

<sup>102</sup> Decision, para. 22; see also ICC-01/05-01/08-1626-Red OA7, paras. 1, 55.

<sup>103</sup> See ICC-02/11-01/11-105-Conf-Anx9.

<sup>104</sup> See ICC-02/11-01/11-105-Conf-Anx10.

<sup>105</sup> See ICC-02/11-01/11-130-Conf-Anx4.

<sup>106</sup> See ICC-02/11-01/11-285-Conf-Anx10.

<sup>107</sup> See ICC-02/11-01/11-306-Conf-Anx2.

<sup>108</sup> ICC-02/11-1/11-362-Red, para. 36.

<sup>109</sup> See, generally ICC-02/11-01/15-858-Conf, paras. 35-45.

<sup>110</sup> See ICC-02/11-01/15-734-Conf, para. 2, fn 2; and ICC-02/11-01/15-793-Conf, para. 66, both referring to ICC-02/11-01/11-681-Conf-Exp-Anx4.2.

<sup>111</sup> See ICC-02/11-01/15-793-Conf, paras. 66-68, referring to ICC-02/11-01/11-681-Conf-Exp-Anx4.1; ICC-02/11-01/11-681-Conf-Exp-Anx4.3; ICC-02/11-01/11-734-Conf-Exp-Anx9, paras. 4, 6 and 7; ICC-02/11-01/11-734-Conf-Exp-Anx9; and ICC-02/11-01/15-23-Conf-Exp-Anx1.

<sup>112</sup> See ICC-02/11-01/15-793-Conf, para. 69, referring to ICC-02/11-01/15-23-Conf-Exp, para. 7.

<sup>113</sup> See ICC-02/11-01/15-793-Conf, para. 70, referring to ICC-02/11-01/15-23-Conf-Exp, para. 8.

<sup>114</sup> Appeal, paras. 61, 67.

<sup>115</sup> Dissenting Opinion, paras. 22-23.

47. Finally, the Defence's arguments that the trial can be conducted without the physical presence of the accused are misguided.<sup>116</sup> The Appeals Chamber has clearly upheld the general principle under article 63(1) that the accused shall be present during the trial.<sup>117</sup> None of the exceptions to this principle stipulated by the Appeals Chamber or the amended rules 134*bis* to 134*quarter* apply to this case, not least (but not only) because Mr Gbagbo is not subject to a summons to appeal, but a warrant of arrest.

48. Based on the above, the Defence's Sixth Ground of Appeal should be dismissed.

### Conclusion

49. For all the reasons above, the Appeals should be rejected.




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Fatou Bensouda, Prosecutor

Dated this 16<sup>th</sup> June 2017

At The Hague, The Netherlands

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<sup>116</sup> Appeal, paras. 69-71.

<sup>117</sup> ICC-01/09-01/11-1066 OA5, para. 49.