Cour Pénale Internationale

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THE APPEALS CHAMBER

Before: **Judge Sanji Mmasenono Monageng, Presiding Judge**
Judge Silvia Fernández de Gurmendi
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public Document

Public redacted version of "Document in support of the appeal against the 'Decision on Mr Gbagbo's Detention' (ICC-02/11-01/15-846) of 10 March 2017" filed on 20 March 2017 (ICC-02/11-01/15-857-Conf)

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***Classification of this application*:**

1. The present document is filed as confidential pursuant to regulation 23 *bis*(2) as it refers to the content of various submissions themselves filed as confidential. The Defence will file a public redacted version.

I. Procedural background

2. The Defence refers to the procedural background set out in the notice of appeal of 20 March 2017.

II. Applicable law

3. The departure point for any discussion of detention is that, owing to the presumption of innocence, liberty is the rule and detention the exception. This principle has been reaffirmed by all the international tribunals created to protect human rights[1] and has been recognized by the ICC.[2]

4. Article 60(3) has meaning only on the basis of the assumption that the accused may exercise his or her right to liberty at any time, since detention is an exceptional measure. The very existence of the article constitutes an essential safeguard for the accused as it places the onus on the Bench to check, at regular intervals or at the request of the accused, whether it is currently necessary to continue detention.

5. To enable the Bench to release a person held in pre-trial detention, i.e. a person who has not been tried and who is, therefore, presumed innocent, the drafters of the Statute used the concept of "changed circumstances". It is for the Bench to assess these circumstances – thus, logically, to assess whether the factors that led to the *exceptional* decision to detain that person are still valid on the date of the application for release. This assessment is made on the basis of evidence presented by the Prosecution to the Bench and the Defence's response. The very concept of changed

[1] ICC-02/11-01/15-83, paras. 6-13.
[2] ICC-01/05-01/08-403, para. 36; ICC-01/04-01/07-426, para. 6; ICC-01/05-01/08-475, para. 36.

circumstances hence postulates – as does the concept of review – a current appraisal of the context in which the application for release is submitted. The Appeals Chamber has already considered that a Trial Chamber must "look at those circumstances […] and **determine whether they still exist**".[3]

6. The consequence of this is very simple: the conditions dictating the detention must exist *today*, at the time of the new decision on interim release. It is important to note the significance of the burden on the Prosecution to prove these conditions are current. It is a matter of basic logic. For example, if a decision taken in 2013 to place someone in detention is based on incidents that allegedly took place in 2013, a decision taken in 2017 must be founded on incidents that allegedly took place in 2017, since the "penalty" concerning the events which occurred in 2013 has already been pronounced. Showing "changed circumstances"[4] does not mean showing *a posteriori* that the analysis previously conducted was wrong or incomplete, but that it is no longer valid today.

7. It must be understood that the onus is on the Prosecution to show that what was true yesterday is still true today, in a different context. Logically, it is for the Prosecution requesting a measure to deprive a person of his or her liberty – the most serious measure of all – to substantiate this request and to demonstrate the **need** for it. Regarding the demonstration, objective criteria must be used by the Prosecution in its argumentation and by the Bench when taking its decision. This point is crucial because the **need** to continue detention cannot objectively be established without such objective criteria. Failure to use objective criteria would be akin to applying solely arbitrary criteria and refusing to consider how a specific element would warrant violating the principle that liberty is the rule. It is thus for the Prosecution to base its request on objective criteria that can be verified. Otherwise, the request to continue detention must be rejected.

[3] ICC-01/05-01/08-1019, para. 53.
[4] *Ibid*., para. 51.

8. Reversing the burden of proof onto the accused to demonstrate that his or her release is necessary is logically, and therefore legally, impossible since that would imply that detention is the rule and liberty the exception. In other words, to adopt such reasoning would be to deny the underlying foundation of any democratic and modern legal system: the presumption of innocence, the corollary of which is that pre-trial detention can only be exceptional and based on strict and verifiable criteria.

9. The Prosecution must demonstrate that a risk established in the past is still established on the day the application for release is reviewed, even if the context, by definition, has changed. If it cannot do so in an objective and verifiable manner, then there are "changed circumstances" within the meaning of the Statute. Therefore, the fact that what was true yesterday is no longer true today impels a review of the detention. The Bench may not replace a real demonstration with mere reference to what may have happened *in the past* to justify a detention *in the present*.

III. Discussion

10. In the impugned decision, when ruling on Mr Gbagbo's continued detention, the majority of the Trial Chamber took into account that: (1) Laurent Gbagbo has a "network of supporters" who might help him abscond; and (2) Laurent Gbagbo could have a "clear incentive to abscond".[5] It should be noted that the Chamber merely speculates on these two points.

11. Regarding the alleged existence of a network, the majority fails to advance any solid information to confirm the existence of such a network. It is unable to discuss the resources that the hypothetical members of the alleged network might have. The majority even states that it has no indication as to the intentions of the members of this "network", and yet it concludes, without ever referring to any specific, concrete

[5] ICC-02/11-01/15-846, para. 17.

and objective information, that "while there are no specific indications that his supporters are willing to break the law for Mr Gbagbo's sake, the Chamber cannot discount such a possibility".[6]

12. Similarly, as for Laurent Gbagbo's supposed motivation, the Chamber notes that it has "no specific evidence before it that Mr Gbagbo has any intention of absconding or obstructing the trial proceedings",[7] but later relies on the gravity of the alleged crimes, Laurent Gbagbo's age and the fact that he "denies any responsibility"[8] for what he is accused of, to conclude that Laurent Gbagbo "has a clear incentive to abscond".[9]

13. The majority of the Chamber therefore does not base the continued detention on any specific, concrete or objective element, but merely on suppositions that are not grounded in fact. At no point is there any demonstration based on an analysis of the current situation, anchored by objective and verifiable criteria. The majority has allowed subjective impressions to prevail over an objective demonstration, which demonstration is critical when reviewing the need for the continued detention of an elderly person who has endured traumatizing events and has been imprisoned for nearly six years since 11 April 2011. In acting thus, the majority has replaced law with opinion and legal evidence with arbitrariness, thereby prohibiting any scrutiny of the conditions under which detention is continued. In other words, the impugned decision does not state the law, but rather the majority's fear that the Accused will abscond, even if this fear is not based on any objective and verifiable information. Essentially, Laurent Gbagbo is being kept in detention "just in case".

14. Upholding the Trial Chamber's decision would mean allowing the detention to be founded on the Bench's simple fear, which is not rooted in actual fact, that an

[6] *Ibid*., para 16.
[7] *Ibid*., para. 17.
[8] *Idem*.
[9] *Idem*.

accused – presumed innocent – will abscond, and thereby conclusively precluding any hopes for the Accused to be granted interim release. This would amount to undermining an individual's right to freedom, a pillar of any modern and democratic criminal justice system.

1. First ground of appeal: The majority's refusal to examine the Defence submissions constitutes an error of law.

15. Rather than considering the merits of some of the Defence submissions, the Chamber deems that

> it is not required to "entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions". […] Accordingly, the Chamber shall not adjudicate the arguments as to the exceptional nature of detention or the general submissions arguing that the Prosecutor has failed to establish **the ongoing existence of a pro-Gbagbo network**.[10]

16. The Chamber has refused to examine the Defence submissions concerning the non-existence of a supposed network simply because they addressed the matter of the network. If the Chamber had taken the trouble to consider the Defence submissions on this point, it would have seen that it was not repeating arguments already presented, but introducing arguments that no such network currently existed. In other words, the Chamber based itself on the appearance of the argument – the issue of the existence of a network – and not on its substance.

17. By refusing to examine the Defence submissions, i.e. refusing to examine the current situation ("ongoing existence") and instead relying on past facts, the Chamber precludes any discussion of the current justification for continuing the detention, and therefore of the continued detention *per se*. Depriving the Accused of detailed discussions on the need for his detention is tantamount to depriving him of his right to see this detention reviewed and verified.

[10] ICC-02/11-01/15-127-Conf, para.6.

18. As the Prosecution has, since the beginning of the case, based its arguments for Laurent Gbagbo's continued detention on the alleged existence of an organized network which it claims would be willing to help Laurent Gbagbo abscond, the Defence is forced to undertake an analysis at each review to verify, using objective criteria, whether such a network exists at the time of the discussion.

19. The Trial Chamber has hence erred in law by not responding to the Defence's new submissions and by discounting them as a matter of principle.

2. Second ground of appeal: The Chamber erred in law by failing to consider the time spent in pre-trial detention.

20. Nowhere in the impugned decision does the majority consider the duration of the detention in assessing whether there are changed circumstances. Yet, the time that has elapsed between two decisions on continuing a person's detention constitutes, by definition, "changed circumstances". As time has passed, the context has changed, and it is for the Chamber to verify, as indicated above, that what was true yesterday is still true today.

21. In particular, for the period between a decision to continue detention and a new application for release, the Accused has been stripped of his right to liberty. Each decision to continue detention prolongs the imprisonment of a person who is, let us recall, presumed innocent. The more the detention is prolonged, the less, by definition, it is warranted with regard to an individual's right to freedom.

22. Not taking into account the length of detention as a factor constituting changed circumstances is equivalent to refusing to uphold the spirit of the Statute, as Presiding Judge Tarfusser pointed out in his dissenting opinion:

> The case law of this Court is generous in recalling that an accused is presumed innocent until proved guilty and in acknowledging that detention shall be the exception rather than the rule. […] However, if the amount of time spent in detention is not factored in as a significant element every time a concrete decision on detention pending trial is made, one may wonder whether those acknowledgements

> serve any purpose other than paying lip service to those lofty principles. The protracted deprivation of liberty for an individual who has to be presumed innocent until proved guilty is too consequential a measure to be taken merely on the basis of references to assessments made at an earlier stage in time and disregarding the time elapsed in the meantime.[11]

23. By failing to take account of the time elapsed between two decisions on continuing detention as changed circumstances, the Chamber erred in law, invalidating the impugned decision.

3. Third ground of appeal: The Chamber's majority relies on the alleged existence of a "network of supporters" without ever advancing specific information that could verify the actual existence of such a network, thereby invalidating the impugned decision.

24. Since the start of the case, the main argument advanced by the Prosecution, and subsequently the Trial Chamber when ruling on Laurent Gbagbo's continued detention, was that there was a clandestine network with criminal aims whose purpose was to help Laurent Gbagbo abscond. Laurent Gbagbo has been held in pre-trial detention since he arrived in The Hague on 30 November 2011, solely because the Bench considered that such a network exists.

25. What makes a network? A structure. Since Laurent Gbagbo has been imprisoned, the Prosecution has made no effort to specify – and therefore to prove – what comprises this network, its structure, chain of command, objectives, membership criteria, modus operandi or financial resources.

26. The Chamber might have been expected to ask the Prosecution to provide tangible details that would allow the contours of this network to be determined, its modus operandi to be understood, its leaders to be identified, and its decision-making process to be explained, or to require the Prosecution to describe its

[11] ICC-02/11-01/15-846-Anx, para. 7.

logistical and financial resources, give details of its backing and support, and so on. However, not only has the Prosecution failed to provide any specific details of this type, but also on every occasion that the Prosecution has dared – from the start of Laurent Gbagbo's incarceration – to put forward names, facts or figures, its statements have been belied by reality.

3.1 The Chamber's majority does not give any information about the structure and identity of the members of the alleged pro-Gbagbo network.

27. All of the circumstances that the Prosecution cited in 2012 in its attempt to demonstrate the existence of such a network have disappeared over time. The armed groups present in neighbouring countries?[12] They proved to be simple Ivorian farmers who had been driven off their land by the Burkinabé supporters of Alassane Ouattara.[13] The leaders of the network who were named by the Prosecution in 2012 and 2013?[14] Most of them have returned to Côte d'Ivoire, and some of them have been given posts by the new regime.[15] This state of affairs obliged the Prosecution to rework its arguments, making them less clear-cut. It had started out by claiming [REDACTED].[16] It then presented the network as no longer being a clandestine body operating abroad but instead as existing by virtue of the simple fact that there was a pro-Gbagbo political party in Côte d'Ivoire, the FPI.[17] In the Prosecution's view at that time, since the FPI had not broken off its ties with its founder, it was considered to be a potential network with criminal ends. During the seventh review, the Prosecution repeated what it had said during the previous review: "In its last submission, the Prosecution noted that the FPI had not cut its ties with Mr

[12] For example, ICC-02/11-01/11-T-9-FRA, p. 10-11, 23-17.
[13] For example, ICC-02/11-01/11-758-Conf-Exp, para. 32; ICC-02/11-01/11-758-Anx26.
[14] For example, Marcel Gossio, ICC-02/11-01/11-285-Anx1, Anx7; ICC-02/11-01/11-445-Conf-tENG, paras. 15-22.
[15] ICC-02/11-01/11-625-Conf, paras. 16-20.
[16] [REDACTED].
[17] ICC-02/11-01/11-661, paras. 9-11.

Gbagbo."[18] That formed the essence of its attempt to prove the existence of a clandestine network with criminal aims.

28. The FPI is the main Ivorian opposition party. Its leaders and all of its activists – like many Ivorians outside the party and many Africans – claim to be followers of President Gbagbo. Is that enough to "criminalize" the FPI? The response of representatives of the international community has been to legitimize the FPI as the main opposition force and to call on Ivorian leaders to organize a proper democratic debate that fully involves the FPI in particular and the opposition in general.[19]

29. As the Prosecution could not maintain the line of defence that consisted of "criminalizing" the FPI, it adopted a third line of argument, according to which some members of the FPI formed a network with criminal aims, such as seizing power by violent means or helping President Gbagbo escape.[20] It is this line of argument that is reflected in its 2015 submissions, where the Prosecution talks of "FPI hardliners",[21] without ever defining this term or substantiating its allegations.

30. In response to this argumentation, the Defence showed in 2015 that: (1) the circumstances presented by the Prosecution in support of its arguments that it claimed to be new and relevant were, in fact, related to events that had taken place much earlier (between 2002 and 2014). How can a man's continued detention be called for in July 2015 on the basis of events that took place years previously?; (2) the arrests in Côte d'Ivoire in 2014 and 2015 had not concerned so-called "FPI hardliners" as the Prosecution suggested, but members of the non-FPI opposition – including former Alassane Ouattara supporters – and had taken place in the context of the Government's deliberate policy of silencing the opposition before the

[18] ICC-02/11-01/11-696-Conf, para. 10.
[19] ICC-02/11-01/11-707-Conf, paras. 10-24.
[20] For example, ICC-02/11-01/11-696-Conf, para. 0.
[21] ICC-02/11-01/15-90-Conf, para. 13.

Presidential elections;[22] and (3) calls for Laurent Gbagbo's release had come from across the Ivorian political spectrum as well as from civil society.[23]

31. Today, all that remains of the Prosecution's original arguments concerning the existence of a pro-Gbagbo network are the calls from across the Ivorian political spectrum and civil society, as well as international calls (see the petition with 25 million signatures), for Laurent Gbagbo's release, in accordance with the law. The Prosecution has never provided the slightest shred of evidence that the people calling for Laurent Gbagbo's release have an intention that could be described as criminal and wish to help him evade justice.

32. It is so difficult today to prove the existence of a supposed criminal network with criminal aims that the Chamber's conclusion that one indeed exists is based on the fact that trial observers post their opinions on social media and that some of them attend the hearings.

33. Laurent Gbagbo therefore continues to be kept in detention simply because of his great popularity in Côte d'Ivoire, in Africa and throughout the world. As Laurent Gbagbo is the most prominent Ivorian figure, whom, as we have seen, many people even outside the FPI claim to support, the consequence is that should his popularity endure he will never be released according to the reasoning of the Prosecution and the Chamber. That is plainly not in the spirit of the Statute.

3.2. <u>The Chamber's majority does not adduce any information on the resources available to the members of the supposed network.</u>

[22] ICC-02/11-01/15-103-Conf, paras. 33-35.
[23] *Ibid*., paras. 41-43.

34. The Bench acknowledges in the impugned decision that the first step must be to verify the existence of this network and whether it "could have the wherewithal to help Mr Gbagbo abscond",[24] in order to rule on whether or not to continue the detention. Yet, the impugned decision contains absolutely no verification of the structure of such a network, the identity of its members or leaders, or any discussion of the resources the supposed members of this pro-Gbagbo network might have.

35. By not carrying out such an analysis, the Bench has erred in law, invalidating the impugned decision.

3.3. <u>The majority's claim that the members of the supposed network intend to help Laurent Gbagbo abscond is baseless.</u>

36. The Bench relies on the fact that trial observers speculated on social media as to the names of some witnesses[25] to state:

> Although there is no evidence before the Chamber that these groups or individuals have acted at the behest of Mr Gbagbo, there is little doubt concerning their willingness to assist him in any way possible. While there are no specific indications that his supporters are willing to break the law for Mr Gbagbo's sake, the Chamber cannot discount such a possibility.[26]

37. Firstly, what is the logical link between the observers' speculation as to the identity of witnesses and Laurent Gbagbo's interim release? How is the conduct of an observer wondering, for example, whether a witness may or may not be a police officer linked to the matter of Laurent Gbagbo's interim release? Here, the majority decided that all the observers could be members of a network with criminal aims merely because they expressed their opinions about the trial. By that reasoning, every student who has attended a hearing and later posted views on social media is a

[24] ICC-02/11-01/15-846, para. 13.
[25] *Ibid*., para. 15.
[26] *Ibid*., para. 16.

potential suspect. This is clearly not a satisfactory demonstration of the existence of a network with criminal aims. The majority's claim that expressing views on social media proves that "there is little doubt concerning their willingness to assist him in any way possible" is highly debatable. As Presiding Judge Tarfusser states in his dissenting opinion,

> it is one thing to adopt behaviour which might be disruptive of Court proceedings, or even to fail to comply with a Court's order on confidentiality: it is an entirely different thing to assist an accused for the purposes of evading justice. The first behaviour is deplorable, possibly conducive to sanctions and certainly justifies the adoption of measures aimed at preserving the orderly course of proceedings; however it has little if anything to do with the second, and substantive elements are required before the first can be linked to, or used as an indicia pointing to the existence of, the second.[27]

38. It is interesting to note that by refusing to examine precisely and materially whether such a network exists, the majority equates the observers with a network that would be capable of organizing an accused's escape. If the majority had given more thought specifically to what a network capable of organizing an escape should look like – its structure, its members, its command, its wherewithal – it would have had to acknowledge that such a network does not exist. Assisting a person in absconding requires gathering useful information from different sources; having the ability to synthesize and analyse this information; developing a strategy based on the resources available; organizing the logistics (escaping, fleeing, changing identities, organizing hiding places, successive transfers, pre-arranged shelters, etc.); all of which necessitate various expertise from professionals as well as substantial means. Bearing this in mind, it does not suffice to rely on the comments of a few bloggers. The conditions that the Chamber could have imposed on Laurent Gbagbo's interim release would no doubt have enabled it to avoid any risk, since a network would have had to comprise so many professionals and have so many resources at its disposal that it would be have been quite different from the mere contribution of a few bloggers.

[27] ICC-02/11-01/15-846-Anx, para. 18.

39. Secondly, not only does the majority neglect to make a logical connection between bloggers and network, but it also states that "there are no specific indications that his supporters are willing to break the law for Mr Gbagbo's sake".[28] Therefore, even assuming that there is a logical link between bloggers and network, the Chamber states that it is unable to determine whether the bloggers are willing to break the law. The conclusion that the Chamber cannot "discount such a possibility" (that Laurent Gbagbo's supporters would be willing to break the law to help him abscond) is not founded on any specific or tangible information. In making such a statement, the majority thereby left the realm of law and fact to enter one of purely speculative belief, which has no place in court. Laurent Gbagbo, and any other accused presumed innocent, cannot continue to be detained on the basis of speculation alone. If he could, then this detention could never be challenged since the realm of speculation, by definition, is infinite. If the detention was decided upon regardless of actual facts, then any escape scenario, even the most implausible, could be used to continue such detention *ad vitam aeternam*.

40. While it does not appear that the majority has obliged the Prosecution to demonstrate, for example, the alleged criminal intent of a single member of the supposed network, we note that the Bench places the onus on the Defence to demonstrate that none of the members of the supposed network has criminal intent. When the Defence pointed out that the 25 million signatories of a recent petition calling for Laurent's Gbagbo release could not be considered members of any sort of network aiming to help Laurent Gbagbo abscond because they are highly respectable people (such as the former South African President, Thabo Mbeki; the former Ghanaian President, Jerry Rawlings; and the Cameroonian opposition leader, John Fru N'dhi),[29] the Chamber responded: "In relation to the point about the

[28] ICC-02/11-01/15-846, para. 16.

[29] "*26 millions de signatures pour la libération de Gbagbo*", BBC Afrique, 29 December 2016.

respectability of some of Mr Gbagbo's supporters, this observation is not persuasive as the Defence is not claiming that all Mr Gbagbo's supporters fall into this category."[30]

41. In other words, in order to be heard by the majority, the Defence must provide evidence that each of the 25 million people who signed the petition has an irreproachable background and is "respectable" according to the Bench, meaning in the Judges' own view. Once again, failure to examine objective criteria leads to arbitrariness. The majority's request is unreasonable and the majority errs in law because it requires the Defence to prove the unprovable.

4. Fourth ground of appeal: The Chamber's majority erred by refusing to consider the Accused's age and state of health in determining his release.

42. Firstly, concerning Laurent Gbagbo's state of health:

43. Laurent Gbagbo's state of health is to be assessed by taking into account not only his age but also the traumatizing events he has endured and which have weakened him [REDACTED]. The Defence recalls that after 11 April 2011, he was detained for seven months in unsuitable conditions [REDACTED]. His condition had deteriorated to the point where [REDACTED] it was the transfer to the International Criminal Court that saved his life.[31] [REDACTED].[32] [REDACTED].[33]

44. Presiding Judge Tarfusser commented in his dissenting opinion:

> Laurent Gbagbo's state of health has been flagged as a matter requiring "heightened attention" as early as in November 2012, by then Pre-Trial Chamber I. Since then, he has not become any healthier, according to the reports submitted by the Detention Medical Officer as recently as on 26 August 2016. On the words of the Medical

[30] ICC-02/11-01/15-846, para. 19.
[31] ICC-02/11-01/11-644-Conf-Exp-Anx, para. 202.
[32] *Idem*.
[33] ICC-02/11-01/15-657-Conf-Exp-AnxII.

> Officer, Mr Gbagbo is "considered to be a fragile person", due to factors ranging from his age to the ailments and chronic conditions from which he suffers.[34]

45. [REDACTED].

46. Despite the seriousness of the matter of his health [REDACTED][35] [REDACTED],[36] the majority refused to take this issue into consideration, even though the Appeals Chambers had specified in 2012 in the instant case that "medical reasons can play a role in decisions on interim release".[37]

47. Secondly, concerning Laurent Gbagbo's age:

48. Not only should his state of health have been taken into consideration by the majority to rule on whether or not to continue his detention, but his age – 71, nearly 72 – should also have been a factor. First of all, his age in relation to his state of health should be considered – because Laurent Gbagbo's weakness from his afflictions is compounded by his advanced age – but so too should his age itself. [REDACTED].[38] Under these conditions, age is a major factor in any discussion on interim release. The majority nevertheless deemed that: "Mr Gbagbo's age is also not decisive, in this regard."[39] In so ruling, [REDACTED]. It departed from international and national practice, which dictates that age – in particular, advanced age, [REDACTED] – is a factor to be taken into consideration in any ruling on release.

49. Contrary to what is generally agreed, the majority deems that Laurent Gbagbo's age is in some way an aggravating circumstance in that it warrants the continuation of pre-trial detention:

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[34] ICC-02/11-01/15-846-Anx, para. 15.
[35] ICC-02/11-01/15-734-Conf-Exp.
[36] ICC-02/11-01/15-793-Conf.
[37] ICC-02/11-01/11-278-Conf, para. 2.
[38] ICC-02/11-01/15-657-Conf-Exp-AnxII.
[39] ICC-02/11-01/15-846, para. 17.

> On the contrary, given the gravity of the crimes charged, any sentence may well imply that Mr Gbagbo will spend the rest of his life in prison. In the event of a conviction, he therefore has a clear incentive to abscond to avoid such a scenario.[40]

50. In Presiding Judge Tarfusser's view:

> No reasoning is provided in support of the decision to reverse, in one stroke of pen, the observation of human compassion underlying several legal provisions enacted at the national level whereby age is considered as a factor militating against, rather than in favour of, protracted detention. In the absence of detailed reasoning on this point, I will simply note that, to this day, Mr Gbagbo benefits, like all accused, of the presumption of innocence and that his advanced age should not be used as a factor to his detriment in the context of the assessment of his detention, even less so on the basis of the hypothetical scenario of a conviction.[41]

51. By holding Laurent Gbagbo's age against him and not even taking into consideration his [REDACTED] state of health, the majority is actually refusing to examine the individual person and the particular factual circumstances pertaining to him, instead hiding behind an abstract approach. It was for the Chamber to undertake a genuine assessment of the risks associated with the conditions of article 58(1), not on the basis of the picture that can be painted of him, [REDACTED]. As Presiding Judge Tarfusser opined:

> In my view, the age and health conditions of Laurent Gbagbo diminish *per se* his very ability to even consider a prospective of flight, thereby significantly weakening the risk that he might abscond from justice. As such, they would *per se* mandate considering the feasibility of an alternative to detention.[42]

52. The majority disregarded the use of criteria that can be objectively verified (age, state of health), thus refusing to look at the reality of the situation to assess the need for continued detention. In doing so, it erred in law, invalidating the impugned decision.

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[40] *Idem*.
[41] ICC-02/11-01/15-846-Anx, para. 14.
[42] *Ibid*., para. 15.

5. Fifth ground of appeal: The Chamber erred in law by basing the continued detention on the "extreme gravity of the charges" and the fact that the Accused "denies responsibility".[43]

53. In the impugned decision, the majority recognizes that it has "no specific evidence before it that Mr Gbagbo has any intention of absconding or obstructing the trial proceedings".[44] Logically, the majority therefore should not have relied in its reasoning on this lack of intention to abscond.

54. Nevertheless, the majority reverts to the issue of intent ascribed to Laurent Gbagbo, and states later that he has a "clear incentive to abscond". To reach this conclusion, the majority equates the Accused's claim of innocence with an intention to abscond. It also intimates that the "extreme gravity of the charges" could only impel an accused – any accused – in such a situation to abscond: "it must take into consideration the extreme gravity of the charges against him as well as the fact that he denies responsibility".[45] In doing so, the Chamber would have it, as will be shown below, that no one claiming to be innocent will ever be granted interim release.

55. Firstly, the majority does not explain what is meant by "extreme gravity". It is recalled that all the crimes that fall within the Court's jurisdiction are, by definition, "the most serious crimes".[46] If, by "extreme gravity", the Bench is referring to all crimes within the Court's jurisdiction, then no accused before the Court would ever be able to obtain interim release. Logically, this provision of the Statute should not be interpreted as prohibiting all requests for interim release and requiring continued pre-trial detention for all accused. In that case, why provide for the possibility for an

[43] ICC-02/11-01/15-846, para. 17.
[44] *Idem*.
[45] *Idem*.
[46] Article 1 of the Rome Statute.

accused to request interim release, if simply being prosecuted by the Court suffices to be kept in detention?[47]

56. If the Bench considered "extreme gravity" to be a degree of gravity that is higher than that which establishes the Court's material jurisdiction, it should have explained what was meant by "extreme gravity" and the criteria applied for changing the legal context from "gravity" to "extreme gravity". Indeed, any criteria used by a court as criteria warranting continued detention must, *a minima*, be defined so as to avoid arbitrary judicial application.

57. Secondly, the Bench seems to indicate that it would consider the request for interim release only if the Accused first admitted his guilt. In other words, any accused claiming to be innocent would be condemned to remain in prison (regardless of factual circumstances, age or state of health).

58. By deciding to continue the Accused's detention on the premise that he "denies responsibility", the Bench has committed a serious breach of the principle of the presumption of innocence and the rights of the Defence. An accused is presumed innocent and the burden of proof lies on the Prosecution to prove his or her guilt. Under these conditions, not pleading guilty cannot be held against a person. Furthermore, everyone has the right to defend him or herself in criminal proceedings and the exercise of this basic right may not serve to justify the violation of another basic right of that person: freedom. In addition, the majority's reasoning leads to a logical dead-end: a person must plead guilty to obtain interim release. Yet, one would think the opposite would be true: pleading guilty would impede release. Lastly, in reality, by ruling as it has, the majority seems to prejudge the "responsibility" of Laurent Gbagbo. Why else would the Bench decide to continue the detention of a man presumed innocent on the grounds that he "denies

[47] ICC-02/11-01/15-846-Anx, para. 12.

responsibility", unless it considered him to be responsible for something in connection with the charges?

59. As Presiding Judge Tarfusser expressed in his dissenting opinion:

> […] Mr Gbagbo benefits from the presumption of innocence as well as of the ensuing right to defend himself from the charges as basic human rights and I fail to see how the fact that "he denies responsibility", or his age, might be turned against him for the purposes of substantiating a risk of flight.[48]

5. Sixth ground of appeal: The majority refused to consider the possibility of conditional release.

60. In the impugned decision, the majority refused to consider the possibility of conditional release.[49]

61. The majority does not even take the trouble to consider the practical conditions that would make a release possible, declaring:

> Indeed, as the trial is ongoing at the moment, Mr Gbagbo is required to be in The Hague to attend the hearings. As far as the Chamber is aware, there is currently only one tentative proposal available for conditional release, but it is far from clear how this would work in practice. In particular, it is entirely unclear how Mr Gbagbo would still be able to attend his trial if released in another country. The Chamber notes, in this regard, that the Court does not have an obligation to make excessive expenditures in order to facilitate the conditional release of an accused. The Chamber is therefore of the view that there is currently no realistic proposal that would permit the conditional release of Mr Gbagbo. Accordingly, the Chamber shall not consider the issue any further at this stage.[50]

62. Firstly, the Chamber errs in law by averring that "the Court does not have an obligation to make excessive expenditures in order to facilitate the conditional release of an accused". In fact, such budgetary argument cannot be raised against the rights of Laurent Gbagbo, who, as he is presumed innocent, has the right to freedom.

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[48] *Ibid.*, para. 19.
[49] ICC-02/11-01/15-846, para. 22.
[50] *Idem*.

63. Even in the most extreme cases, release must be preferred over detention when it is possible to obtain safeguards that would minimize the risk of flight.

64. Accordingly, article 9(3) of the International Covenant on Civil and Political Rights provides that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement".

65. Article 5(3) of the European Convention on Human Rights and article 7(5) of the American Convention on Human Rights also provide that release may be conditioned by guarantees to appear for trial.

66. The European Court of Human Rights has also specified that

> when the only remaining reasons for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, [the accused's] release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance.[51]

67. As Presiding Judge Tarfusser declared in his dissenting opinion: "A Chamber cannot shy away from its duty to at least test, *motu proprio* if necessary, the existence of a solution and its feasibility before concluding that continued detention is the only option."[52]

68. [REDACTED].

69. Thirdly, it would be wrong to think the fact that "as the trial is ongoing at the moment, Mr Gbagbo is required to be in The Hague to attend the hearings"[53] would hinder a ruling to grant the Accused's interim release. Indeed, it should be recalled

[51] ECtHR, *Wemhoff v. Germany*, 27 June 1968, no. 2122/64, para. 15.
[52] ICC-02/11-01/15-846-Anx, para. 22.
[53] ICC-02/11-01/15-846, para. 22.

that the obligation under article 63(1) that the accused must be present at trial has consistently been interpreted, in particular by the Appeals Chamber in *Ruto* and *Kenyatta*, as not being an absolute obligation, but subject to the discretion of the Bench, depending on the circumstances of the case at hand.[54] The Chamber should have kept in mind that Laurent Gbagbo had agreed to sign a written waiver with respect to his presence at the hearings.[55] As Presiding Judge Tarfusser indicated in his dissenting opinion, "what matters, for the conduct of the trial, is that the accused be duly represented by counsel and has consented to waive his right to be present".[56]

70. Given that the Chamber's discretion in this matter is sufficiently broad to decide that the Accused's presence is not always required, the majority should have taken into account the objective factors (duration of detention, duration of the trial, age and state of health) to consider the possibility of interim release.

71. Lastly, even if the Chamber did not wish to concede Laurent Gbagbo's absence during the entire trial, it should have at least considered the possibility of interim release during non-sitting periods, which sometimes last several weeks, in particular during the summer and winter judicial recesses.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

Considering articles 58(1)(b), 60(3) and 82(1)(b) of the Statute and rule 119 of the Rules of Procedure and Evidence

- **Set aside** the impugned decision in its entirety.
- **Remand** the matter of interim release to the Trial Chamber, instructing it to:

[54] ICC-01/09-01/11-1066.
[55] ICC-02/11-01/15-734-Conf-Exp, para. 20.
[56] ICC-02/11-01/15-846-Anx, para. 23.

- **Determine** whether the conditions of article 58(1)(b) are met on the day of the request;
- **Consider** the possibility of granting interim release.

[signed]

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Emmanuel Altit
Lead Counsel for Laurent Gbagbo
Dated this 20 March 2017
At The Hague, Netherlands