

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 22 May 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 THE REPUBLIC OF CÔTE D'IVOIRE

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

Public Document

Redacted version of the “Response to Mr Gbagbo’s document in support of the appeal against the “Decision on Mr Gbagbo’s Detention” (ICC-02/11-01/15-864-Conf)”

Source: Office of Public Counsel for Victims

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

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I. Introduction

1. The Common Legal Representative of the victims admitted to participate in the proceedings (the “Legal Representative”)¹ submits that Mr Gbagbo’s appeal against the “Decision on Mr Gbagbo’s Detention” (the “Impugned Decision”)² must be dismissed.

2. The appeal does not show that Trial Chamber I (the “Chamber”) committed any error when issuing the Impugned Decision.

3. The Legal Representative contends that the Chamber (i) analysed the Defence’s submissions concerning the pro-Gbagbo network and rightly refused to consider arguments previously presented to and dismissed by both the Chamber and the Appeals Chamber in this regard; (ii) rightly considered that the mere lapse of time is not a “*changed circumstance*” in the sense of article 60(3) of the Rome Statute (the “Statute”); (iii) carefully analysed all relevant information and reached the reasonable conclusion that the possibility continues to exist that the network of pro-Gbagbo supporters may break the law to help Mr Gbagbo; (iv) did not fail to address the possibility to grant Mr Gbagbo conditional release in light of his age and medical condition, but reasonably disagreed with the Defence’s unsupported and partial consideration of these factors; (v) rightly considered the gravity of the charges against Mr Gbagbo as a factor militating against granting him *interim* release; and (vi) correctly considered all relevant factors to deny Mr Gbagbo conditional release at present, without discarding the possibility to decide otherwise in the future, should a State suggest a certain, feasible and implementable proposal in this regard.

¹ See the “Directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015, p. 24.

² See the “Decision on Mr Gbagbo’s Detention” (Trial Chamber I), No. ICC-02/11-01/15-846, 10 March 2017 (the “Impugned Decision”); and the “Dissenting opinion of Judge Cuno Tarfusser” (Trial Chamber I), No. ICC-02/11-01/15-846-Anx, 10 March 2017 (the “Dissenting Opinion”).

II. Background

4. On 26 October 2012, the Appeals Chamber, by majority, confirmed a decision dismissing a request by the Defence of Mr Gbagbo for *interim* release (the “*Interim Release Appeal Judgment*”).³

5. On 12 November 2012, the then Single Judge of Pre-Trial Chamber I issued the first decision reviewing Mr Gbagbo’s detention under article 60(3) of the Statute, ruling that the Accused should remain in detention.⁴

6. On 12 March 2013, 12 July 2013 (the “Third Decision”), 11 November 2013, 12 March 2014, 11 July 2014, 11 November 2014 (the “Seventh Decision”), 11 March 2015, 8 July 2015 (the “Ninth Decision”), and 2 November 2015 (the “Tenth Decision”), Pre-Trial Chamber I and Trial Chamber I rendered decisions pursuant to article 60(3) of the Statute, all confirming that Mr Gbagbo shall remain in detention.⁵

³ See the “Public redacted version - 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’” (Appeals Chamber), No. ICC-02/11-01/11-278-Red, 26 October 2012 (the “*Interim Release Appeal Judgment*”).

⁴ See the “Decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-291, 12 November 2012.

⁵ See the “Public redacted version of the Second decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-417-Red, 12 March 2013; the “Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (Pre-Trial Chamber I), No. ICC-02/11-01/11-454, 12 July 2013 (the “Third Decision”); the “Fourth decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (Trial Chamber I), No. ICC-02/11-01/11-558, 11 November 2013; the “Fifth decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (Trial Chamber I), No. ICC-02/11-01/11-633, 12 March 2014; the “Sixth decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-668, 11 July 2014; the “Seventh decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (Trial Chamber I), No. ICC-02/11-01/11-718-Red, 11 November 2014 (the “Seventh Decision”); the “Eighth decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (Trial Chamber I), No. ICC-02/11-01/11-808, 11 March 2015; the “Public redacted version of Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute” (Trial Chamber I), No. ICC-02/11-01/15-127-Red, 8 July 2015 (the “Ninth Decision”); and the “Tenth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute” (Trial Chamber I), No. ICC-02/11-01/15-328, 2 November 2015 (the “Tenth Decision”).

7. In October 2013 and September 2015, the Appeals Chamber dismissed the appeals filed by the Defence of Mr Gbagbo against the Third Decision and the Ninth Decision (the “Ninth Decision Appeal Judgment”).⁶

8. On 6 December 2016, the Chamber rejected a request of the Defence of Mr Gbagbo seeking a medical report from the Registry, but invited the parties and participants to file submissions for the purpose of article 60(3) of the Statute, as concerned any new developments since the Tenth Decision.⁷

9. On 3 February 2017, the Defence filed its submissions, requesting Mr Gbagbo’s conditional release (the “Request for Conditional Release”).⁸

10. On 10 March 2017, the Chamber, by majority, issued the Impugned Decision,⁹ deciding that Mr Gbagbo shall remain in detention.

11. On 20 March 2017, Mr Gbagbo filed the notice of appeal against the Impugned Decision (the “Notice of Appeal”).¹⁰ On the same date, Mr Gbagbo filed the

⁶ See the “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled ‘Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute’” (Appeals Chamber), No. ICC-02/11-01/11-548-Conf OA4, 29 October 2013; and the “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled ‘Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute’” (Appeals Chamber), No. ICC-02/11-01/15-208 OA6, 8 September 2015 (the “Ninth Decision Appeal Judgment”).

⁷ See the “Decision on the ‘Requête de la Défense à la suite de la transmission par le Greffe d’un rapport médical concernant Laurent Gbagbo’” (Trial Chamber I), No. ICC-02/11-01/15-770-Conf, On 6 December 2016.

⁸ See the “Soumissions de la défense portant sur les condition d’application des articles 60(3) et 58(1)(b), présentées à la suite de l’ordonnance rendue par la Chambre le 6 décembre 2016”, No. ICC-02/11-01/15-793-Conf, 3 February 2017 (the “Request for Conditional Release”).

⁹ See the Impugned Decision, *supra* note 2.

¹⁰ See the “Acte d’appel de la Défense relatif à la «Decision on Mr Gbagbo’s Detention» (ICC-02/11-01/15-846) de la Chambre de première instance I décidant du maintien en détention de Laurent Gbagbo”, No. ICC-02/11-01/15-858-Conf, 20 March 2017 (the “Notice of Appeal”).

document in support of the appeal against the Impugned Decision (the “Document in Support of the Appeal”).¹¹

12. Pursuant to regulation 64(5) of the Regulations of the Court,¹² the Legal Representative files her response to the Document in Support of the Appeal.

III. Confidentiality

13. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidentially because it makes reference to submissions filed under the same classification. A public redacted version will be filed in due course.

IV. Submissions

14. As a preliminary remark, the Legal Representative notes that the Defence misuses regulation 64(1) of the Regulations of the Court in the Notice of Appeal. Indeed, as clearly indicated in said provision, and recalled by the Defence, a notice of appeal shall be limited to state “(a) the name and number of the case or situation; (b) the title and date of the decision being appealed; (c) the specific provision of the Statute pursuant to which the appeal is filed; and (d) the relief sought”.¹³

15. The Defence – by disguising substantive arguments under a procedural background heading – devotes more than 20 pages of the Notice of Appeal to put forward relevant submissions in support of the appeal,¹⁴ and to recall *verbatim* and at

¹¹ See the “Document à l’appui de l’appel de la «Decision on Mr Gbagbo’s Detention» (ICC-02/11-01/15-846) du 10 mars 2017”, No. ICC-02/11-01/15-857-Conf, 20 March 2017 (the “Document in Support of the Appeal”).

¹² See the “Reasons for the “Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention (ICC-02/11-01/15-134-Red3)’” (Appeals Chamber), No. ICC-02/11-01/15-172 OA6, 31 July 2015, paras. 16 and 19.

¹³ See the Notice of Appeal, *supra* note 10, para. 83.

¹⁴ See the Notice of Appeal, *supra* note 10, in particular paras. 30 and 37-41.

length arguments previously advanced in written and oral submissions.¹⁵ Following this approach, the Defence requests in the Document in Support of the Appeal the inclusion of the procedural history developed in the Notice of Appeal.¹⁶

16. In this regard, the Legal Representative submits that a notice of appeal pursuant to regulation 64(1) of the Regulations of the Court cannot contain substantive arguments supporting the appeal itself because said document is merely meant to indicate a participant's intent to challenge the decision at hand.

17. Moreover, a notice of appeal cannot be used as a means to circumvent the page limit for the document in support of the appeal foreseen in regulation 37(1) – and thereby “*to add or alter the substance of the submissions made in a document*”¹⁷ – or to circumvent the procedure to request an extension of the page limit pursuant to regulation 37(2) of the Regulations of the Court.¹⁸

18. Accordingly, the Legal Representative submits that the substantive arguments raised and developed in the Notice of Appeal must be disregarded for the purpose of adjudicating this appeal.

1. On the first ground of appeal: the Chamber correctly disregarded the repetitive Defence's arguments already addressed in previous decisions

19. In the first ground of appeal,¹⁹ the Defence argues, without referring to its previous submissions, that the Chamber erred in law by refusing to examine its

¹⁵ *Idem*, in particular paras. 44, 62, 72 and 76.

¹⁶ See the Document in Support of the Appeal, *supra* note 11, para. 2.

¹⁷ See, *mutatis mutandis*, the “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’” (Appeals Chamber), No. ICC-01/05-01/08-631-Red OA2, 2 December 2009, para. 38. See also ICTY, *Prosecutor v. Šainović et al.*, “Decision on Nebojša Pavković's second motion to amend his notice of appeal” (Appeals Chamber), 22 September 2009, para. 18, available at <www.icty.org/x/cases/milutinovic/acdec/en/090922.pdf> (last accessed on 27 March 2017).

¹⁸ *Idem*.

¹⁹ See the Document in Support of the Appeal, *supra* note 11, paras. 15-19.

arguments on the non-existence of the pro-Gbagbo network “*uniquement parce qu’il s’agissait de la question du réseau*”.²⁰

20. These arguments clearly misconstrue the Impugned Decision and should be dismissed. A proper reading of the Impugned Decision shows that the Chamber analysed the Defence’s contentions concerning the pro-Gbagbo network. Indeed, in the paragraphs immediately following the dismissal of the arguments adjudicated in prior decisions, the Chamber analysed, *inter alia*, whether the network is still operational and the additional material provided by the Prosecution showing up-to-date information of the network’s activities.²¹

21. Furthermore, the Chamber acted reasonably in refusing to consider the “*general submissions arguing that the Prosecutor has failed to establish the ongoing existence of a pro-Gbagbo network*” on the basis that they were repetitive and had already been dismissed.²² In fact, it is noteworthy that in the Request for Conditional Release the Defence re-stated, by copying and pasting for the most part,²³ the same arguments that the Chamber had previously dismissed,²⁴ even “*with concern*”, in the Tenth Decision.²⁵ By simply copying and pasting the same arguments, the Defence could have only expected that they would be rejected again, especially as this approach by the Chamber was specifically endorsed by the Appeals Chamber.²⁶

²⁰ *Idem*, para. 16.

²¹ *Ibid.*, paras. 14-16.

²² *Ibid.*, para. 12.

²³ Compare *e.g.* the arguments in the Request for Conditional Release, *supra* note 8, paras. 44-48, with the arguments in the “Version publique expurgée des « Soumissions de la Défense portant sur les conditions d’application des dispositions de l’article 58(1)(b), faites à l’invitation de la Chambre, dans le cadre du dixième réexamen de la détention »”, No. ICC-02/11-01/15-283-Red, 9 October 2015, paras. 28-32.

²⁴ See the Tenth Decision, *supra* note 5, para. 7, referred to in the Impugned Decision, *supra* note 2, para. 12, footnote 36.

²⁵ See the Tenth Decision, *supra* note 5, para. 7.

²⁶ See the Ninth Decision Appeal Judgment, *supra* note 6, paras. 51-53.

22. The Legal Representative also notes that some of the contentions dismissed as repetitive and irrelevant by the Chamber in its prior rulings were copied and pasted again in the Document in Support of the Appeal.²⁷

2. On the second ground of appeal: the Chamber rightly considered the duration of Mr Gbagbo's detention

23. Contrary to the Defence's arguments in the second ground of appeal,²⁸ the majority of the Chamber did not commit an error by not taking into account the duration of Mr Gbagbo's detention *as such*.

24. The Defence argues, relying on the Dissenting Opinion, that "*le temps écoulé entre deux décisions de maintien en détention d'une personne est par définition un « changement de circonstances »*".²⁹ The Legal Representative submits that this interpretation of article 60(3) of the Statute is not consistent with its wording, context and purpose.

25. As the Appeals Chamber has clarified, the requirement of "changed circumstances" "*imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary*".³⁰ The mere lapse of time does not satisfy either of these requirements. Moreover, this interpretation cannot be accepted as it would imply

²⁷ See e.g. the arguments concerning the non-existence of the network in the Document in Support of the Appeal, *supra* note 11, paras. 27-29 and 33, which are mostly identical to those in the "Soumissions de la défense portant sur les conditions d'application des dispositions de l'article 58(1)(b), faites à l'invitation de la Chambre, dans le cadre du neuvième réexamen de la détention", No. ICC-02/11-01/15-83, 28 May 2015, paras. 33-37, and which were dismissed as repetitive and not relevant in the Ninth Decision Decision, *supra* note 5, paras. 5-6 (footnote 18).

²⁸ See the Document in Support of the Appeal, *supra* note 11, paras. 20-23.

²⁹ *Idem*, para. 20. See also *ibid.*, para. 22.

³⁰ See the "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'", *supra* note 17, para. 60; and the Ninth Decision Appeal Judgment, *supra* note 6, para. 45.

that there would always be “*changed circumstances*” within the meaning of article 60(3) of the Statute after some time has elapsed since the detention of a person.

26. The purpose and context of article 60(3) confirm this conclusion. The Appeals Chamber has ruled that “*if there are changed circumstances, the Pre-Trial or Trial Chamber will need to consider their impact on the factors that formed the basis for the decision to keep the person in detention*”.³¹ Accordingly, related provisions, such as rule 118(2) of the Rules of Procedure and Evidence (the “Rules”), require a periodic examination of the person’s detention in order to determine whether the circumstances justifying it have changed over time.

27. Therefore, as already found by the Chamber, the very passage of time spent on detention may not be considered as a “*changed circumstance*” when deciding on a request for *interim* release under article 60(3),³² but may be taken into account if it has an impact on other factors related to a person’s detention, such as his or her age or medical condition. The Legal Representative submits *infra* that the Chamber made no error in its consideration of either of said factors.³³

3. On the third ground of appeal: the Chamber did not err in relation to its analysis of the pro-Gbagbo network

a) On the structure and the means of the network and the identity of its members (grounds 3.1 and 3.2)

28. This part of the third ground of appeal³⁴ should be summarily dismissed because the Defence simply re-states arguments already dismissed by the Chamber

³¹ See the *Interim Release Appeal Judgment*, *supra* note 3, para. 23, referring to the “Public redacted version - 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’” (Appeals Chamber), No. ICC-01/05-01/08-2151-Red OA10, 5 March 2012, paras. 1 and 31.

³² See the Seventh Decision, *supra* note 5, para. 50.

³³ See *infra* paras. 37-40.

³⁴ See the Document in Support of the Appeal, *supra* note 11, paras. 24-35.

and the Appeals Chamber³⁵ in previous decisions. Indeed, the Defence simply copied and pasted, with minor changes, its submissions contained in a previous document in support of an appeal filed on 23 July 2015.³⁶

29. It is noteworthy that these arguments were also presented before the Chamber,³⁷ and dismissed in the Ninth Decision as repetitive and irrelevant.³⁸ They were again presented on 9 October 2015,³⁹ and again summarily dismissed in the Tenth Decision.⁴⁰ The Legal Representative contends that the Appeals Chamber should expressly disapprove the Defence's repeated practice of simply re-stating already adjudicated arguments.

*b) On the willingness of the members of the network to assist Mr Gbagbo
(ground 3.3)*

30. In this part of the third ground of appeal, the Defence alleges that the Chamber was unreasonable in requiring impossible evidence and in maintaining the Accused in detention on speculative assertions.⁴¹

31. Firstly, and as the Defence re-asserts the same contentions as to the structure of the network,⁴² these arguments should be summarily dismissed for the reasons indicated *supra* in section 3.a).

³⁵ See the Ninth Decision Appeal Judgment, *supra* note 6, paras. 66-68 and 71-79.

³⁶ Compare the arguments presented in the Document in Support of the Appeal, *supra* note 11, paras. 26-33, with the arguments presented in "Document à l'appui de l'appel de la «Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute » (ICC-02/11-01/15-127-Conf) du 8 juillet 2015", ICC-02/11-01/15-147-Red2, 23 July 2015, paras. 37-44.

³⁷ See the "Soumissions de la défense portant sur les conditions d'application des dispositions de l'article 58(1)(b), faites à l'invitation de la Chambre, dans le cadre du neuvième réexamen de la détention", *supra* note 27, paras. 33-37.

³⁸ See the Ninth Decision, *supra* note 5, paras. 5-6, footnote 18.

³⁹ See the "Version publique expurgée des « Soumissions de la Défense portant sur les conditions d'application des dispositions de l'article 58(1)(b), faites à l'invitation de la Chambre, dans le cadre du dixième réexamen de la détention »", *supra* note 23, paras. 26-34.

⁴⁰ See the Tenth Decision, *supra* note 5, paras. 5-7.

⁴¹ See the Document in Support of the Appeal, *supra* note 11, para. 36-41.

⁴² *Idem*, para. 38.

32. Secondly, the whole reasoning is based on the Defence's wrong assertion that the Chamber's conclusion on the possibility that Mr Gbagbo's supporters might be willing to break the law for his sake is solely grounded on observers having speculated on the witnesses' identities.⁴³ Instead, the Chamber carefully analysed all the relevant information, including the additional information provided by the Prosecution,⁴⁴ and concluded that it was not possible to exclude that the supporters of the Accused might break the law for his sake.⁴⁵ This was a reasonable approach and the Defence does not show any error that invalidates the Impugned Decision.

33. As to the Defence's argument that the Chamber erred by relying on speculations,⁴⁶ it suffices to refer to the previous determination of the Appeals Chamber, according to which *"the question revolves around the possibility, not the inevitability, of a future occurrence"*,⁴⁷ and that *"it was not unreasonable for the Trial Chamber to find that a risk continued to exist that the network of pro-Gbagbo supporters may help Mr Gbagbo to abscond and/or obstruct or endanger the proceedings"*.⁴⁸

4. On the fourth ground of appeal: the Chamber rightly considered Mr Gbagbo's age and health condition

34. Contrary to the Defence's contention in the fourth ground of appeal,⁴⁹ the Legal Representative submits that the majority of the Chamber did not commit an error by refusing to consider Mr Gbagbo's age and health condition.

35. In fact, the Impugned Decision agrees with the Defence that both factors are inextricably linked to the possibility to conditionally release the Accused. However, contrary to the Defence's contentions, the Impugned Decision does not consider that

⁴³ *Ibid.*, para. 36.

⁴⁴ See the Impugned Decision, *supra* note 2, para. 15.

⁴⁵ *Idem*, para. 16.

⁴⁶ See the Document in Support of the Appeal, *supra* note 11, para. 39.

⁴⁷ See the Ninth Decision Appeal Judgment, *supra* note 6, para. 77 (emphasis added).

⁴⁸ *Idem*.

⁴⁹ See the Document in Support of the Appeal, *supra* note 11, paras. 42-52.

Mr Gbagbo's age or his health condition is a sufficient ground to grant him *interim* release.

36. The Legal Representative argues that the Defence's submissions in this regard disclose again the existence of a "mere disagreement" with the Chamber, rather than an error in evaluating "*changed circumstances*" in the context of article 60(3) of the Statute.⁵⁰ This is evidenced by the fact that the Document in Support of the Appeal simply contains submissions considered in the past regarding [REDACTED].⁵¹ In addition, the Defence provides again a partial reading of the most recent medical report,⁵² [REDACTED].⁵³

37. Moreover, contrary to the Defence's contention,⁵⁴ the Impugned Decision cannot be read as a statement by the majority of the Chamber contrary to the Appeals Chamber's ruling that "*medical reasons can play a role in decisions on interim release*".⁵⁵ The Impugned Decision acknowledges the Defence's arguments in this regard and does not refuse to take them into consideration.⁵⁶

38. In fact, the majority of the Chamber impliedly addresses Mr Gbagbo's medical situation where it discusses the possibility to grant him conditional release. The reference in the Impugned Decision to the existence of "*only one tentative proposal*" for this purpose⁵⁷ impliedly refers [REDACTED].⁵⁸ This reading is confirmed by the

⁵⁰ See the *Interim Release Appeal Judgment*, *supra* note 3, para. 52; the *Ninth Decision Appeal Judgment*, *supra* note 6, para. 53; and the *Tenth Decision*, *supra* note 5, para. 8.

⁵¹ Compare the Document in Support of the Appeal, *supra* note 11, paras. 42 and 45, with the "Decision on the fitness of Laurent Gbagbo to stand trial" (Trial Chamber I), No. ICC-02/11-01/15-349, 27 November 2015, paras. 28-31; and the Request for Conditional Release, *supra* note 8, paras. 35-36.

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ See the Document in Support of the Appeal, *supra* note 11, para. 46.

⁵⁵ See the *Interim Release Appeal Judgment*, *supra* note 3, paras. 2 and 87.

⁵⁶ See the Impugned Decision, *supra* note 2, para. 9.

⁵⁷ *Idem*, para. 22.

⁵⁸ See the Request for Conditional Release, *supra* note 8, paras. 66-72.

reference in the Impugned Decision to the “*expenditures*” that would be required to grant Mr Gbagbo *interim* release.⁵⁹

39. The Legal Representative acknowledges that the Impugned Decision could have been clearer had it been more explicit, but submits that the implied consideration of Mr Gbagbo’s medical condition by the majority of the Chamber suffices to comply with the relevant Appeals Chamber jurisprudence on the reasoning required for decisions on detention.⁶⁰

40. The Defence’s submissions on the alleged lack of consideration of Mr Gbagbo’s age in the Impugned Decision merit a similar response. The majority of the Chamber did consider this factor,⁶¹ and the Defence merely disagrees with the consideration thereof as “*not decisive*”.⁶² The Defence again misrepresents the conclusions of the [REDACTED].⁶³

41. Moreover, the Defence argues that the majority of the Chamber disregards “*la pratique internationale et domestique qui exige que l’âge [...] soit un facteur à prendre en considération dans toute décision de remise en liberté*”,⁶⁴ but does not provide a single example supporting this contention. In this regard, the Defence also relies on the reference in the Dissenting Opinion to the “*observation of human compassion underlying several legal provisions enacted at the national level*”.⁶⁵ However, the mere reliance on the Dissenting Opinion cannot suffice to elucidate the existence of an alleged general principal of law derived from international and domestic practice.⁶⁶

⁵⁹ See the Impugned Decision, *supra* note 2, para. 22.

⁶⁰ See the *Interim* Release Appeal Judgment, *supra* note 3, paras. 48-49; and the Ninth Decision Appeal Judgment, *supra* note 6, para. 61.

⁶¹ See the Impugned Decision, *supra* note 2, para. 17.

⁶² See the Document in Support of the Appeal, *supra* note 11, para. 48.

⁶³ [REDACTED].

⁶⁴ See the Document in Support of the Appeal, *supra* note 11, para. 48.

⁶⁵ *Idem*, para. 50.

⁶⁶ See *e.g.* the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, paras. 23-32.

42. In this regard, the Legal Representative notes that the consideration of humanitarian factors is not envisaged as such in the Statute or in the Rules in order to decide on requests for *interim* release, by contrast with the legal instruments of other international criminal tribunals.⁶⁷

43. Lastly, the Defence once again misreads the Impugned Decision when it claims that the majority of the Chamber considered Mr Gbagbo's age as a sort of "*facteur aggravant*", using it only against him.⁶⁸ Actually, the Impugned Decision merely considers Mr Gbagbo's age as "*not decisive*" to grant him *interim* release,⁶⁹ contrary to the Defence's submissions.⁷⁰ The additional argument provided in the Impugned Decision that Mr Gbagbo may well spend the rest of his life in prison merely reflects the Appeals Chamber's finding that the length of the sentence that an accused is likely to serve if convicted may be considered by the Chamber as an important incentive for him or her to abscond.⁷¹

5. On the fifth ground of appeal: the Chamber did not commit an error in relying on the gravity of the charges and Mr Gbagbo's denial of responsibility

44. In its fifth ground of appeal, the Defence argues that the Chamber erred in law when evaluating the likelihood that the Accused would attempt to abscond or

⁶⁷ See e.g. rule 65(B) of the ICTY Rules of Procedure and Evidence, U.N. Doc IT/32/Rev.46, amended on 20 October 2011 in order to include the possibility to consider "*the existence of sufficiently compelling humanitarian grounds*", available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/it032rev46e.pdf (last accessed on 27 March 2017).

⁶⁸ See the Document in Support of the Appeal, *supra* note 11, paras. 49 and 51.

⁶⁹ See the Impugned Decision, *supra* note 2, para. 17.

⁷⁰ See the Request for Conditional Release, *supra* note 8, para. 71.

⁷¹ See the *Interim* Release Appeal Judgment, *supra* note 3, para. 54; and the "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'", *supra* note 17, para. 70.

obstruct the proceedings by relying on the extreme gravity of the charges and the fact that Mr Gbagbo denies responsibility.⁷²

45. Regarding the reliance on the extreme gravity of the charges, the Legal Representative submits that this argument was already dismissed by the Appeals Chamber, as far as in 2012, when it ruled that “*the gravity of the charges and the resulting expectation of a lengthy prison sentence are relevant factors for decisions on interim release*”.⁷³

46. Moreover, the Defence’s assertion that an Accused before this Court could never benefit from *interim* release as all the crimes over which the Court has jurisdiction are the most serious⁷⁴ should be dismissed. Indeed, the Appeals Chamber already ruled that “*whether charges may be similarly serious in respect of some or all other suspects who are brought before the Court is irrelevant because even if this were the case, this does not detract from the fact that the charges against Mr Gbagbo are serious*”, and that this was a factor that could be taken into account.⁷⁵

47. Lastly, the Legal Representative contends that the Defence misreads the Impugned Decision when it argues that the Chamber erred in law by relying on the fact that Mr Gbagbo denies responsibility.⁷⁶ Notably, it is totally misplaced to state that the Chamber “[semble] condamner tout Accusé clamant son innocence à rester en prison (quelles que soient les circonstances de fait, son âge ou son état de santé)”.⁷⁷ Rather, the Chamber carefully analysed the relevant factors in order to conclude that Mr Gbagbo has a clear incentive to abscond to avoid spending the rest of his life in prison in the event of a conviction, given his age, the gravity of the charges, and the

⁷² See the Document in Support of the Appeal, *supra* note 11, paras. 53-59.

⁷³ See the *Interim* Release Appeal Judgment, *supra* note 3, para. 54 and references contained therein.

⁷⁴ See the Document in Support of the Appeal, *supra* note 11, para. 55.

⁷⁵ See the *Interim* Release Appeal Judgment, *supra* note 3, para. 54.

⁷⁶ See the Document in Support of the Appeal, *supra* note 11, paras. 57-59.

⁷⁷ *Idem*, para. 57.

related fact that he denies responsibility.⁷⁸ The Defence does not show an error that invalidates the Impugned Decision and this ground of appeal should therefore be dismissed.

6. On the sixth ground of appeal: the Chamber did not commit an error in refusing to explore the possibility to implement Mr Gbagbo's *interim* release

48. Contrary to the Defence's contention in the sixth ground of appeal,⁷⁹ the Legal Representative submits that the majority of the Chamber did not make any error by refusing to consider any further Mr Gbagbo's *interim* release at the current stage.

49. Firstly, the Defence presents nothing else than a skeletal argument to sustain that the finding that "*the Court does not have an obligation to make excessive expenditures in order to facilitate the conditional release of an accused*"⁸⁰ is erroneous. The Defence merely refers to international legal instruments and to the Dissenting Opinion, without further elaboration.⁸¹

50. In this regard, the Legal Representative submits that the Appeals Chamber must not entertain these arguments because they have not been sufficiently elaborated in the Document in Support of the Appeal.⁸² In the alternative, international human rights jurisprudence does not rule out budgetary constraints as a valid ground not to grant *interim* release; it only requires that the assessment of whether the detention remains reasonable be made on the facts of each case and according to its specific features.⁸³

⁷⁸ See the Impugned Decision, *supra* note 2, para. 17.

⁷⁹ See the Document in Support of the Appeal, *supra* note 11, paras. 60-71.

⁸⁰ See the Impugned Decision, *supra* note 2, para. 22.

⁸¹ See the Document in Support of the Appeal, *supra* note 11, paras. 62-67.

⁸² See e.g. ICTY, *Prosecutor v. Mladić*, "Decision on Defence interlocutory appeal against the Trial Chamber's decision on EDS disclosure methods" (Appeals Chamber), 28 November 2013, para. 29, available at <<http://www.icty.org/x/cases/mladic/acdec/en/131128.pdf>> (last accessed on 27 March 2017).

⁸³ See e.g. ECHR, *McKay v. the United Kingdom* [GC], Judgment, 3 October 2006, paras. 41-45; *Bykov v. Russia* [GC], Judgment, 10 March 2009, paras. 61-64; and *Idalov v. Russia* [GC], Judgment, 22 May 2012,

51. Moreover, the part of the Dissenting Opinion quoted by the Defence does refer to the need to “*test, motu proprio if necessary, the existence of a solution and its feasibility*”.⁸⁴ The Legal Representative submits that the feasibility of a solution involves, *inter alia*, whether said solution is affordable to the authority which should implement it.

52. Secondly, the Legal Representative notes that the Chamber reached its conclusion that “*there is currently no realistic proposal that would permit the conditional release of Mr Gbagbo*” after considering all relevant “*circumstances*”,⁸⁵ *inter alia* that the proposal known to the Chamber is “*tentative*” and it is “*entirely unclear how Mr Gbagbo would still be able to attend his trial if released*”.⁸⁶ [REDACTE].⁸⁷ [REDACTED].⁸⁸

53. In this regard, the Appeals Chamber has repeatedly clarified that when any of the risks listed in article 58(1) of the Statute is present, as in the case at hand,⁸⁹ Chambers enjoy discretion to consider conditional release, and they have an obligation “*to specify possible conditions of release and, if necessary, to seek further information [from a State] [...] when (a) the Chamber is considering conditional release; (b) a State has indicated its general willingness and ability to accept a detained person into its territory; and (c) the Chamber does not have sufficient information before it to make an informed decision*”.⁹⁰

paras. 139-141. See also ECHR, *Labita v. Italy* [GC], Judgment, 6 April 2000, paras. 152-153; and *Kudła v. Poland* [GC], Judgment, 26 October 2000, paras. 110-111.

⁸⁴ See the Dissenting Opinion, *supra* note 2, para. 22.

⁸⁵ See the Impugned Decision, *supra* note 2, para. 22.

⁸⁶ *Idem*.

⁸⁷ See the Document in Support of the Appeal, *supra* note 11, para. 68.

⁸⁸ See the “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’”, *supra* note 17, paras. 106-109.

⁸⁹ See the Impugned Decision, *supra* note 2, para. 20.

⁹⁰ See the “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled ‘Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011’” (Appeals Chamber), No. ICC-

54. In the Impugned Decision, the Chamber did not discard the possibility to grant conditional release,⁹¹ and, consistently with past rulings of the Appeals Chamber,⁹² it analysed the known proposal and found that it would not consider the conditions any further, after concluding that the “*circumstances are not conducive to [conditional release]*”.⁹³ The Legal Representative sees no error in the Chamber’s approach.⁹⁴

55. Lastly, the Legal Representative submits that the Defence’s arguments that article 63(1) of the Statute does not impose an “*obligation absolue*” for Mr Gbagbo to attend his trial and that it grants the Chamber a “*suffisamment large*” discretion to decide on Mr Gbagbo’s presence during the trial⁹⁵ are inaccurate and, more importantly, unsuitable to the review of his detention under article 60(3) of the Statute.

56. The Defence’s arguments in this regard are unsuitable because the Appeals Chamber’s interpretation of article 63(1) of the Statute relied upon by the Defence was made regarding accused persons summoned to appear before the Court, not regarding those for whom a warrant of arrest has been issued.⁹⁶

01/05-01/08-1937-Red2 OA9, para. 35, as quoted in the Interim Release Appeal Judgment, *supra* note 3, para. 78.

⁹¹ See the Impugned Decision, *supra* note 2, para. 22.

⁹² See *supra* note 90.

⁹³ See the Impugned Decision, *supra* note 2, para. 22.

⁹⁴ See, *mutatis mutandis*, the “Public redacted version - 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’”, *supra* note 90, para. 80.

⁹⁵ See the Document in Support of the Appeal, *supra* note 11, paras. 69-70.

⁹⁶ See the “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’” (Appeals Chamber), No. ICC-01/09-01/11-1066 OA5, 25 October 2013, paras. 57 and 61 (“*The Appeals Chamber will next address the question as to whether the Trial Chamber properly exercised its discretion in the circumstances of the present case [...] the Appeals Chamber considers that the Trial Chamber did not properly exercise its discretion in the instant case. The discretion that the Trial Chamber enjoys under article 63 (1) of the Statute is limited and must be exercised with caution*”) (emphasis added).

57. Indeed, the limited scope of application of the Appeals Chamber judgment referred to by the Defence was transposed literally to the current text of rules 134^{ter} and 134^{quater}, which are applicable only to “*an accused subject to a summons to appear*”. By contrast, Mr Gbagbo is currently in detention pursuant to the warrant of arrest issued against him in 2011,⁹⁷ and which was effective when the Impugned Decision was adopted.

58. Moreover, the Defence’s argument that the Chamber enjoys a broad discretion to decide on Mr Gbagbo’s presence during the trial is inaccurate. The judgment of the Appeals Chamber relied upon by the Defence expressly found that “*the discretion that the Trial Chamber enjoys under article 63 (1) of the Statute is limited and must be exercised with caution*”,⁹⁸ and indicated, as a limitation to the exercise thereof, *inter alia*, that “*the absence of the accused can only take place in exceptional circumstances and must not become the rule; [...] [and] any absence must be limited to that which is strictly necessary*”.⁹⁹

59. The Legal Representative submits that the fact that Mr Gbagbo has renounced in writing to attend his trial, that he may be duly represented by counsel during his absence, and that it might have been possible for the Chamber to explore the possibility of granting him *interim* release during the judicial recess¹⁰⁰ are not sufficient elements to conclude that the Chamber made an error, in light of the standards set by the Appeals Chamber.¹⁰¹

60. In fact, the Legal Representative contends that the Appeals Chamber must dismiss *in limine* these three arguments because they were not presented by the

⁹⁷ See the “Warrant Of Arrest For Laurent Koudou Gbagbo” (Pre-Trial Chamber III), No. ICC-02/11-01/11-1, 25 November 2011 (dated 23 November 2011).

⁹⁸ See the “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’” *supra* note 96, paras. 2 and 61.

⁹⁹ *Idem*, paras. 2 and 62.

¹⁰⁰ See the Document in Support of the Appeal, *supra* note 11, paras. 69 and 71.

¹⁰¹ See *Interim Release Appeal Judgment*, *supra* note 3, para. 51.

Defence to the Chamber before the Impugned Decision was issued. Otherwise, the appeal process would grant the Defence an opportunity to remedy its previous failings.¹⁰²

61. Alternatively, the Legal Representative argues that the Chamber neither misappreciated facts nor disregarded relevant facts, but reached a conclusion consistent with the Appeals Chamber's finding that the presence of the accused during the trial is important for the accused himself, for the victims and witnesses, and for the very administration of justice.¹⁰³

V. Conclusion

62. For the foregoing reasons, the Legal Representative respectfully requests the Appeals Chamber to disregard any argument raised and developed in the Notice of Appeal and to dismiss the appeal.



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Principal Counsel

Dated this 22nd day of May 2017¹⁰⁴

At The Hague, The Netherlands

¹⁰² See e.g. ICTY, *Prosecutor v. Tolimir et al.*, "Decision on interlocutory appeal against Trial Chamber's decisions granting provisional release" (Appeals Chamber), 19 October 2005, para. 32, available at <<http://www.icty.org/x/cases/tolimir/acdec/en/051019.htm>> (last accessed on 27 March 2017).

¹⁰³ See the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'", *supra* note 96, para. 49.

¹⁰⁴ This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6, para. 32.