

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/11
Date: 12 November 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Single Judge

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR V. LAURENT GBAGBO***

Public

**Decision on the review of Laurent Gbagbo's detention pursuant to article 60(3)
of the Rome Statute**

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

The Office of the Prosecutor
Fatou Bensouda

Counsel for the Defence
Emmanuel Altit
Agathe Bahi Baroan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Judge Silvia Fernández de Gurmendi, Single Judge for Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”), responsible for carrying out the functions of the Chamber in relation to the situation in the Republic of Côte d’Ivoire and the cases emanating therefrom,¹ hereby issues this decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute (the “Statute”).

I. Procedural history

1. On 23 November 2011, Pre-Trial Chamber III issued an arrest warrant for Laurent Gbagbo (“Mr Gbagbo”),² who was transferred to the Court on 30 November 2011. On 30 November 2011, Pre-Trial Chamber III issued the “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo”.³

2. On 5 December 2011, Mr Gbagbo first appeared before the Court.⁴

3. On 1 May 2012, the Defence submitted the “*Requête de la Défense demandant la mise en liberté provisoire du Président Gbagbo*”, wherein the Defence requested the Single Judge to order the interim release of Mr Gbagbo pursuant to article 60(2) of the Statute.⁵

4. On 26 June 2012, the Single Judge issued the “Order to conduct a medical examination”, whereby she appointed medical experts to conduct medical, psychological and psychiatric examinations of Mr Gbagbo, with a view to determining whether he is fit to take part in the proceedings against him.⁶

¹ ICC-02/11-01/11-61.

² ICC-02/11-01/11-1.

³ ICC-02/11-01/11-9-US-Exp. A public redacted version is available (ICC-02/11-01/11-9-Red).

⁴ ICC-02/11-01/11-T-1-ENG.

⁵ ICC-02/11-01/11-105-Conf-Red-Corr, p. 39.

⁶ ICC-02/11-01/11-164-Conf-tENG.

view to determining whether he is fit to take part in the proceedings against him.⁶

5. On 13 July 2012, the Single Judge issued the “Decision on the *‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’*” (the “Decision on Interim Release”), in which the request for interim release advanced by the Defence was rejected.⁷

6. On 19 July 2012, the Registry filed in the record of the case the medical reports of the three experts appointed by the Single Judge.⁸

7. On 23 July 2012, the Defence lodged an appeal against the Decision on Interim Release.⁹

8. On 24 and 25 September 2012, a hearing in relation to Mr Gbagbo’s fitness to take part in the proceedings was held in closed session before the Chamber, in the presence of Mr Gbagbo, his Defence, the Prosecutor, representatives of the Registry and the experts appointed by the Chamber.¹⁰

9. On 19 October 2012, the Single Judge issued the “Order scheduling a hearing pursuant to rule 118(3) of the Rules of Procedure and Evidence”,¹¹ in which she convened a hearing on 30 October 2012 to receive observations from the Prosecutor, the Office of Public Counsel for victims (“OPCV”) and the Defence on the issue of continued detention or release of Mr Gbagbo.

10. On 26 October 2012, the Appeals Chamber issued the “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial

⁶ ICC-02/11-01/11-164-Conf-tENG.

⁷ ICC-02/11-01/11-180-Red, p. 26.

⁸ ICC-02/11-01/11-190-Conf-Corr and annexes.

⁹ ICC-02/11-01/11-193-Conf OA.

¹⁰ ICC-02/11-01/11-T-6-CONF-ENG, ICC-02/11-01/11-T-7-CONF-ENG. See also “Order scheduling a hearing in relation to Mr Gbagbo’s fitness to take part in the proceedings against him”, ICC-02/11-01/11-241, and “Decision on issues related to the hearing on Mr Gbagbo’s fitness to take part in the proceedings against him”, ICC-02/11-01/11-249 and annex.

¹¹ ICC-02/11-01/11-270.

Chamber I of 13 July 2012 entitled “Decision on the ‘*Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*’” (“Gbagbo Appeals Judgment”), confirming the Decision on Interim Release and dismissing the appeal of the Defence.¹²

11. On 30 October 2012, the hearing on Mr Gbagbo’s detention took place.¹³

12. On 2 November 2012, the Chamber issued the “Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court”, finding that Mr Gbagbo is fit to take part in the proceedings before this Court.¹⁴

13. Also on 2 November 2012, the Single Judge issued the “Order to the Registry to provide two reports”.¹⁵

II. Submissions of the parties and participants

A. *The Prosecutor*

14. At the hearing held on 30 October 2012, the Prosecutor submitted that Mr Gbagbo must remain in detention, taking into consideration that the circumstances found by the Chamber in the Decision on Interim Release have not changed and, therefore, all three conditions justifying detention under article 58(1)(b) of the Statute are still met.¹⁶

15. With regard to the condition envisaged under article 58(1)(b)(i) of the Statute, namely to ensure Mr Gbagbo’s appearance at trial, the Prosecutor submitted that the nature of the charges against the suspect and the lengthy prison sentence that could be given in case of conviction are still the same

¹² 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 ‘the *Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*’”, 26 October 2012, ICC-02/11-01/11-278-Red OA.

¹³ ICC-02/11-01/11-T-9-ENG ET; ICC-02/11-01/11-T-10-CONF-EXP-ENG ET.

¹⁴ ICC-02/11-01/11-286-Conf. A public redacted version has been filed simultaneously.

¹⁵ ICC-02/11-01/11-287-Conf-Corr.

¹⁶ ICC-02/11-01/11-T-9-ENG ET, p. 4, lines 20-21; p. 6, line 19 to p. 11, line 11.

since the Decision on Interim Release.¹⁷ With regard to the political motivations and the necessary resources that could make Mr Gbagbo's flight possible, the Prosecutor submitted that there is no information since the Decision on Interim Release that Mr Gbagbo "has given up a desire to return to power".¹⁸ In addition, Mr Gbagbo allegedly continues to have "a network of supporters in Côte d'Ivoire and in other countries who are organized as the FPI looking for his liberation".¹⁹ In this respect, the Prosecutor underlined that in a document presented by the Defence at the hearing it is stated that the release of all political prisoners and the physical presence of Mr Gbagbo are deemed as non-negotiable conditions for the reconciliation process in Côte d'Ivoire.²⁰

16. Furthermore, the Prosecutor maintained that Mr Gbagbo still has "access to financial resources that can help him to abscond",²¹ and that this circumstance has not changed since the Decision on Interim Release. Recalling the *Gbagbo* Appeals Judgment, the Prosecutor averred that "it was not necessary to show that other assets were not frozen. It suffices that there be an inference of the existence of recently identified assets as assets that have not been referred to [...] [sic]".²² The Prosecutor submitted that the Group of Experts on Côte d'Ivoire set up by the United Nations Secretary General found in its report that a pro-Gbagbo organisation created in Belgium in May 2011 "has an objective to raise funds massively in Europe to the amount of [...] 50 [euros] per person in order to fund the fight against the current government".²³ The organisation allegedly intends to entrust financial operators of former president Gbagbo with responsibility for said

¹⁷ ICC-02/11-01/11-T-9-ENG ET, p. 7, lines 2-3.

¹⁸ ICC-02/11-01/11-T-9-ENG ET, p. 7, lines 5-7.

¹⁹ ICC-02/11-01/11-T-9-ENG ET, p. 7, lines 10-11.

²⁰ ICC-02/11-01/11-T-9-ENG ET, p. 7, lines 13-17.

²¹ ICC-02/11-01/11-T-9-ENG ET, p. 7, line 24.

²² ICC-02/11-01/11-T-9-ENG ET, p. 8, lines 2-6.

²³ ICC-02/11-01/11-T-9-ENG ET, p. 8, lines 8-14.

fundraising.²⁴ Lastly, the Prosecutor alleged that the same Group of Experts “is in possession of credible information and evidence about a bank account in France where funds are being collected in support of President Gbagbo”.²⁵

17. As for the condition under article 58(1)(b)(ii) of the Statute, namely to ensure that the suspect does not obstruct the investigation or the Court’s proceedings, the Prosecutor recalled the *Gbagbo* Appeals Judgment, according to which the intention to take flight and to obstruct the investigation and the proceedings have the same ultimate purpose, to prevent the trial from taking place, thus establishing a link between the two conditions envisaged by article 58(1)(b)(i) and (ii) of the Statute.²⁶ With regard to this second condition, the Prosecutor mentioned three arguments. First, the findings in the Decision on Interim release to the effect that Mr Gbagbo “seems to have a motivation or a reason to be an obstacle to investigations [...] appears to be true”.²⁷ Second, the Prosecutor submitted that Mr Gbagbo is fully versed with the Prosecution case against him, since all the evidence on which the Prosecutor intends to rely at the confirmation of charges hearing has been disclosed to him, including the names of the witnesses.²⁸ Third, the Prosecutor recalls the circumstance whereby Mr Gbagbo still disposes of “a network of contacts and access to economic networks and finances that he can use to obstruct investigations and proceedings”.²⁹ In the view of the Prosecutor, all these circumstances, which were found in the Decision on Interim Release, have not since changed.³⁰

18. Finally, with regard to the condition under article 58(1)(b)(iii) of the Statute, namely ensuring that the suspect does not further the commission of

²⁴ ICC-02/11-01/11-T-9-ENG ET, p. 8, lines 8-14.

²⁵ ICC-02/11-01/11-T-9-ENG ET, p. 8, lines 15-18.

²⁶ ICC-02/11-01/11-T-9-ENG ET, p. 9, lines 2-6.

²⁷ ICC-02/11-01/11-T-9-ENG ET, p. 9, lines 8-10.

²⁸ ICC-02/11-01/11-T-9-ENG ET, p. 9, lines 11-15.

²⁹ ICC-02/11-01/11-T-9-ENG ET, p. 9, lines 16-18.

³⁰ ICC-02/11-01/11-T-9-ENG ET, p. 9, lines 19-20.

crimes within the jurisdiction of the Court, the Prosecutor submitted that Mr Gbagbo “still has a network of supporters and financial resources, people with weapons and arms with an intent to commit violent acts in the Côte d’Ivoire with a view to bringing Laurent Gbagbo back to power”³¹ and that Mr Gbagbo “may use this network of supporters to commit further crimes that fall within the jurisdiction of the Court”.³² The Prosecutor referred to the abovementioned report prepared by the Group of Experts on Côte d’Ivoire, which stated: (i) senior personalities and members of the defence and security forces of the former regime of Mr Gbagbo have sought refuge in countries neighbouring Côte d’Ivoire and are suspected of organising and funding military groups in Côte d’Ivoire by recruiting mercenaries and purchasing weapons and materials; (ii) a meeting was held on 12 July 2012 among various groups of exiled persons who support Mr Gbagbo, with a view to establishing a common plan to take back power in Côte d’Ivoire; and (iii) out of 30 attacks that occurred in Côte d’Ivoire in 2012, 20 can be ascribed to pro-Gbagbo groups, some of which took place after 13 July 2012.³³

19. The Prosecutor contends that all the foregoing circumstances, which were established by the Single Judge in the Decision on Interim Release, have not changed to date, thus making the conditions for detention pursuant to article 58(1)(b) of the Statute still valid.³⁴

20. With regard to the possibility of granting conditional release to Mr Gbagbo pursuant to rule 119 of the Rules of Procedure and Evidence (the “Rules), the Prosecutor submitted that “there is no condition that can attenuate the risks arising under article 58(1)(b)(i) [which] can only be properly managed by keeping [...] [Mr] Gbagbo in detention here in The

³¹ ICC-02/11-01/11-T-9-ENG ET, p. 9, lines 24-25.

³² ICC-02/11-01/11-T-9-ENG ET, p. 10, lines 1-2.

³³ ICC-02/11-01/11-T-9-ENG ET, p. 10, lines 6-24.

³⁴ ICC-02/11-01/11-T-9-ENG ET, p. 9, lines 19-20 and p. 11, lines 10-11.

Hague [...]”.³⁵The Prosecutor averred that, if released, Mr Gbagbo’s physical and mental conditions do not prevent him from fleeing, from obstructing the investigation or the proceedings or from furthering the commission of crimes within the Court’s jurisdiction.³⁶

B. The OPCV

21. The OPCV submitted that the conditions that led to the detention of Mr Gbagbo have not changed.³⁷ The OPCV submitted that the seriousness of the charges brought against the suspect has been acknowledged in the jurisprudence of the Appeals Chamber as a factor justifying continued detention.³⁸ The OPCV further submitted, with regard to the financial resources at Mr Gbagbo’s disposal, that the Appeals Chamber has established that the existence of a network on which the suspect can draw upon is a relevant factor when determining whether detention is warranted under article 58(1)(b) of the Statute.³⁹ The OPCV recalled that the suspect’s knowledge of the incriminating and exculpatory evidence disclosed to him by the Prosecutor constitutes another relevant factor in the assessment of whether the condition under article 58(1)(b)(ii) of the Statute is fulfilled, as also held in the *Gbagbo* Appeals Judgment.⁴⁰

22. The OPCV concludes that Mr Gbagbo must remain in custody, as the conditions under article 58(1) of the Statute remain satisfied and no change has occurred since the previous ruling on the release or detention of the suspect.⁴¹

³⁵ ICC-02/11-01/11-T-9-ENG ET, p. 11, lines 14-17.

³⁶ ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 2, line 23 to p. 3, lines 2-4.

³⁷ ICC-02/11-01/11-T-9-ENG ET, p. 12, lines 19-22.

³⁸ ICC-02/11-01/11-T-9-ENG ET, p. 17, lines 8-13.

³⁹ ICC-02/11-01/11-T-9-ENG ET, p. 17, lines 20-24.

⁴⁰ ICC-02/11-01/11-T-9-ENG ET, p. 18, lines 1-6.

⁴¹ ICC-02/11-01/11-T-9-ENG ET, p. 18, lines 23-25.

C. *The Defence*

23. The Defence submitted that the circumstances have changed since the Decision on Interim Release and that, as a consequence, the conditions under article 58(1) of the Statute are no longer fulfilled. Thus, Mr Gbagbo should be granted interim release.⁴² In the alternative, the Defence contends that the conditional release of Mr Gbagbo pursuant to rule 119 of the Rules should be ordered.⁴³

24. First, the Defence submitted that Mr Gbagbo's reiterated commitment to appear before the Court and the absence of any intent of revenge, as also confirmed by the medical experts in their respective reports, constitutes a changed circumstance that would impact on the risk under article 58(1)(b)(i) of the Statute.⁴⁴

25. Second, the Defence identified a changed circumstance in the lack of financial resources of Mr Gbagbo, which would make it impossible for him to abscond.⁴⁵ In this respect, the Defence averred that the Chamber should not rely on the Prosecutor's allegations that there exist bank accounts linked to groups of supporters of Mr Gbagbo with the aim of collecting funds to support him.⁴⁶ Furthermore, the Defence contended that the Prosecutor has not proved that the network of Mr Gbagbo's supporters and their activities are linked to the suspect.⁴⁷ In addition, the Defence opined that the bank accounts statements on which the Prosecutor relied in the proceedings that

⁴² ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 14, lines 12-15.

⁴³ ICC-02/11-01/11-T-9-ENG ET, p. 28, line 8 to p. 29, line 3.

⁴⁴ ICC-02/11-01/11-T-9-ENG ET, p. 22, line 20 to p. 23, line 19; ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 8, line 19 to p. 9, line 14; p. 11, lines 12-23.

⁴⁵ ICC-02/11-01/11-T-9-ENG ET, p. 23, line 20 to p. 24, line 17.

⁴⁶ ICC-02/11-01/11-T-9-ENG ET, p. 23, line 20 to p. 24, line 17.

⁴⁷ ICC-02/11-01/11-T-9-ENG ET, p. 26, lines 18-19.

led to the Decision on Interim Release are from 2007 and it is likely that they are now frozen.⁴⁸

26. The third changed circumstance advanced by the Defence concerns the new information on the medical conditions of Mr Gbagbo, in particular the reports prepared by the three experts appointed by the Chamber.⁴⁹ In this respect, the Defence alleged that the pathologies from which Mr Gbagbo suffers according to the experts, in particular the Post Traumatic Stress Disorder (“PTSD”) and the hospitalisation syndrome, impact on his ability to flee, as he could not receive the necessary treatment in the event of a flight.⁵⁰ In support of its allegation that the information on the health of Mr Gbagbo constitutes changed circumstance, the Defence recalled that the Appeals Chamber has recently stated in the *Gbagbo* Appeals Judgment, that any decision by this Chamber on Mr Gbagbo’s release or detention based on medical reasons would have been premature on 13 July 2012, since the question of Mr Gbagbo’s fitness was still under consideration.⁵¹

27. Concerning the request for conditional release, the Defence averred that Mr Gbagbo’s health conditions, together with his reiterated commitment to appear before the Court and the guarantees offered by a State party to the Statute to host Mr Gbagbo, are sufficient grounds to grant conditional release pursuant to rule 119 of the Rules. The Defence opined that “the assessment of risks should be done applying less stringent criteria because of his state of health and because of the duration of his detention, which is 18 months, and because of the demonstration of his good faith”.⁵²

⁴⁸ ICC-02/11-01/11-T-9-ENG ET, p. 23, line 20 to p. 24, line 3.

⁴⁹ ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 7, line 20 to p. 10, line 20.

⁵⁰ ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 9, lines 15-22.

⁵¹ ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 10, lines 18-20.

⁵² ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 14, lines 2-5.

III. The applicable law

28. The Single Judge notes articles 58(1), 60(2) and (3) of the Statute and rules 118 and 119 of the Rules.

29. Article 58(1) of the Statute provides:

At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
- (b) The arrest of the person appears necessary:
 - (i) To ensure the person's appearance at trial;
 - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
 - (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

30. Article 60(2) of the Statute provides as follows:

A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without, conditions.

31. Article 60(3) of the Statute, in conjunction with rule 118(2) of the Rules, mandates the Chamber to review its ruling on the release or detention of the person at least every 120 days. According to article 60(3) of the Statute "upon such review, [the Chamber] [...] may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require".

32. The Appeals Chamber has stated, in relation to a periodic review of a ruling on detention under article 60(3) of the Statute:

The Chamber must revert to the ruling on detention to determine whether there has been a change in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58(1) of the Statute. For this reason, the Chamber should not restrict itself to only considering the arguments raised by the detained person.

The Chamber must weigh the Prosecutor's submissions against the submissions, if any, of the detained person. The Chamber must also consider any other information which has a bearing on the subject. Finally, in its decision on review, the Chamber must clearly set out reasons for its findings.⁵³

33. The Appeals Chamber has clarified that the notion of "changed circumstances" within the meaning of article 60(3) of the Statute entails "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."⁵⁴ The Appeals Chamber has further held:

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. If, however, the Pre-Trial or Trial Chamber finds that there are no changed circumstances, that Chamber is not required to further review the ruling on release or detention.⁵⁵

34. Lastly, the Chamber recalls that the Appeals Chamber has recently stated in the *Gbagbo Appeals Judgment* that "the scope of the review carried out in reaching a decision under article 60 (3) is potentially much more limited than that to be carried out in reaching a decision under article 60 (2) of the Statute".⁵⁶ In the *Bemba Appeals Judgment* (OA 4), the Appeals Chamber specified that "[t]he Chamber does not have to enter findings on the circumstances already decided upon in the ruling on detention" and does not have to "entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions".⁵⁷

35. A review of a previous ruling on detention may result in the person's continued detention, release, or release with conditions. In this regard, the Appeals Chamber has stated:

[T]he examination of conditions of release is discretionary and that conditional release is possible in two situations: (1) where a Chamber, although satisfied that the conditions under article 58 (1) (b) are not met, nevertheless considers it

⁵³ *Bemba Appeals Judgment* (OA 4), para. 52.

⁵⁴ *Bemba Appeals Judgment* (OA 2), para. 60.

⁵⁵ *Bemba Appeals Judgment* (OA 10), para. 1.

⁵⁶ *Gbagbo Appeals Judgment*, para. 24.

⁵⁷ *Bemba Appeals Judgment* (OA 4), para. 53.

appropriate to release the person subject to conditions; and (2) where risks enumerated in article 58 (1) (b) exist, but the Chamber considers that these can be mitigated by the imposition of certain conditions of release.⁵⁸

36. Finally, the Single Judge notes that in its recent Judgment in the present case, the Appeals Chamber stated that “the medical condition of the detained person may be a reason for a Pre-Trial Chamber to grant interim release with conditions”, in the sense that “the ill health of a detained person may be a factor in the exercise of its discretion”.⁵⁹

IV. Analysis and conclusions of the Single Judge

A. Whether there are changed circumstances that would require a modification of the previous ruling on detention

37. In accordance with the above, the Single Judge will assess whether there has been any change in the circumstances underpinning the Decision on Interim Release, which require a modification of that decision.

(i) Mr Gbagbo’s commitment to appear before the Court and the absence of any intent to seek revenge

38. In the Decision on Interim Release, the Single Judge noted the personal undertaking provided to the Chamber by Mr Gbagbo, wherein he pledged that he would appear before the Chamber at any time that the Chamber considered it necessary and that he would provide the Chamber all assurances necessary to this effect, but found that “the assurances of Mr Gbagbo are not *per se* sufficient to grant interim release, and are outweighed by factors in favour of his continued detention”.⁶⁰

39. At the hearing, the Defence submitted a letter in which Mr Gbagbo reiterated his commitment to appear before the Court when required and to

⁵⁸ *Bemba Appeals Judgment (OA 7)*, para. 55.

⁵⁹ *Gbagbo Appeals Judgment*, para. 87.

⁶⁰ Decision on Interim Release, para. 55.

provide all assurances to this effect.⁶¹ In addition, the Defence submitted that Mr Gbagbo's desire to appear before the Chamber and the absence of any intent to seek revenge have been confirmed by the medical experts in their reports.⁶² The foregoing facts, in the view of the Defence, would amount to a changed circumstance within the meaning of article 60(3) of the Statute, which would impact on the risk of flight under article 58(1)(b)(i) of the Statute.

40. The Prosecutor contended that little weight should be given to Mr Gbagbo's written commitment.⁶³ Moreover, the Prosecutor submitted that "[n]either the desire to abscond, nor to interfere, were issues that were raised with the experts and therefore they were not in a position to answer those questions"⁶⁴ and that "the same remarks [...] stand in respect of the issue of vengeance".⁶⁵

41. The Single Judge notes that the written undertaking submitted by the Defence at the hearing is exactly the same document presented during the previous proceedings on interim release, the only difference being that on 29 October 2012, Mr Gbagbo added a handwritten note at the bottom of said document, reiterating his commitment. Mr Gbagbo's stated commitment to appear before the Court when required and to provide all assurances to this effect were circumstances already before the Single Judge for purposes of the Decision on Interim Release. The simple renewal of the written commitment previously submitted by Mr Gbagbo does not constitute a changed circumstance capable of having a bearing on any of the conditions under article 58(1)(b) of the Statute.⁶⁶

⁶¹ ICC-02/11-01/11-285-Conf-Anx9, p. 2.

⁶² ICC-02/11-01/11-T-9-ENG ET, p. 22, line 20 to p. 23, line 19; ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 8, line 19 to p. 9, line 14; p. 11, lines 12-23.

⁶³ ICC-02/11-01/11-T-9-ENG ET, p. 8, lines 19-24.

⁶⁴ ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 14, line 25 to p. 15, line 1.

⁶⁵ ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 15, line 5.

⁶⁶ *Bemba Appeals Judgment* (OA 10), para. 17.

42. That said, the change of circumstance invoked by the Defence is mainly predicated on the basis that the experts allegedly agree that Mr Gbagbo has expressed his intention to take part in the confirmation of charges hearing and to have his voice heard, thus integrating Mr Gbagbo's written commitment with new information which was not available on 13 July 2012.⁶⁷

43. Nevertheless, the Single Judge is of the view that this information does not render Mr Gbagbo's renewed commitment a changed circumstance within the meaning of article 60(3) of the Statute. In fact, as submitted by the Prosecutor, the experts have been appointed pursuant to rule 135 of the Rules in order to provide the Chamber with answers to specific questions related to Mr Gbagbo's fitness to take part in the proceedings against him.⁶⁸ They have not been called to assess Mr Gbagbo's flight risk or whether he harbors any intent to seek revenge for purposes of justifying his continued detention under article 58(1) of the Statute.

44. Furthermore, the experts, in particular Dr Lamothe, concluded that the suspect is determined to appear before the Chamber and to have his voice heard within the context of Mr Gbagbo being in detention. These opinions, in the view of the Single Judge, cannot be invoked to support a prognosis predicated upon different circumstances, namely, when he is not in detention. Therefore, the Single Judge is not persuaded that, in light of the findings of the experts, Mr Gbagbo's commitment is a changed circumstance.

(ii) Mr Gbagbo's lack of financial resources

45. In the Decision on Interim Release, the Single Judge found that "certain assets belonging to Mr Gbagbo or his wife may have not been frozen to date by Ivorian authorities".⁶⁹ This constituted one of the circumstances relied

⁶⁷ ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 9, lines 2-6.

⁶⁸ ICC-02/11-01/11-164-Conf, paras 39-41 and p. 13.

⁶⁹ Decision on Interim Release, para. 59.

upon by the Single Judge in finding that the condition under article 58(1)(b)(i) of the Statute was fulfilled.

46. At the hearing, the Defence submitted that circumstances in this respect have changed.⁷⁰ The Defence underlined that the bank accounts referred to by the Prosecutor during the previous proceedings on interim release “maybe [...] are already frozen today”, considering that the Prosecutor herself had requested so.⁷¹ At another point in the hearing, the Defence stated that “[t]he two accounts we talked about in July have been frozen”.⁷² In addition, the Defence contended that the Single Judge should disregard the allegations made by the Prosecutor as to the existence of bank accounts in Europe that are linked to groups and organisations with the aim of raising funds in support of Mr Gbagbo, since these allegations are unsupported by evidence.⁷³ Furthermore, the Defence alleged that Mr Gbagbo cannot be held responsible for activities carried out by his supporters abroad.⁷⁴

47. The Single Judge recalls the jurisprudence of the Appeals Chamber, according to which the question of whether arrest appears necessary “revolves around the possibility, not the inevitability, of a future occurrence”.⁷⁵ With regard to the suspect’s access to resources, the Appeals Chamber has held that “it was sufficient for the [...] Chamber to establish that there was a risk [...] on the basis of concrete evidence, that Mr Gbagbo has the financial means to abscond”.⁷⁶

⁷⁰ ICC-02/11-01/11-T-9-ENG ET, p. 23, line 20 to p. 24, line 3; ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 14, lines 8-9.

⁷¹ ICC-02/11-01/11-T-9-ENG ET, p. 23, line 20 to p. 24, line 3; ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 17, line 23.

⁷² ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 17, line 23.

⁷³ ICC-02/11-01/11-T-9-ENG ET, p. 24, lines 4-17.

⁷⁴ ICC-02/11-01/11-T-9-ENG ET, p. 22, lines 6-9.

⁷⁵ *Katanga Appeals Judgment* (OA 4), para. 21.

⁷⁶ *Gbagbo Appeals Judgment*, para. 56.

48. The Single Judge disagrees with the Defence submission that, given the current circumstances, Mr Gbagbo no longer has access to financial resources. In relation to bank accounts which may have not been frozen, despite the Prosecutor's request to freeze the bank accounts belonging to Mr Gbagbo and his wife, there is no information that these accounts have effectively been frozen and the Defence submissions in this respect are speculative. Moreover, the Single Judge considers relevant the new information provided by the Prosecutor, which goes to establish the existence and activities of a network of Mr Gbagbo's supporters who appear to be raising funds in Europe in his support.⁷⁷ The relevant issue to be considered is not whether there are financial resources which belong to the suspect or to his close family circle, but whether he could have access to such resources, regardless of their ownership. Similarly, contrary to the argument of the Defence, what is at stake is not Mr Gbagbo's accountability for activities carried out by his supporters but the availability of assistance that supporters could provide for the purpose of Mr. Gbagbo's flight. In light of the foregoing considerations, the Single Judge considers that circumstances existing today do not change but, on the contrary, confirm the conclusion in the Decision on Interim Release that "there is a risk that Mr. Gbagbo would use the means that his support network could provide in order to abscond in the event he is granted interim release".⁷⁸

(iii) Mr Gbagbo's health condition

49. The Defence identified a third alleged changed circumstance in the information on the medical conditions of Mr Gbagbo, in particular the reports prepared by the medical experts, which were not available at the time of the Decision on Interim release.⁷⁹ In particular, the Defence alleged that PTSD and

⁷⁷ ICC-02/11-01/11-285-Anx, I paras 132-133.

⁷⁸ Decision on Interim release, para. 62.

⁷⁹ ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 7, line 20 to p. 10, line 20.

hospitalisation syndrome impact Mr Gbagbo's ability to flee, as he could not receive the necessary treatment in the event of flight.⁸⁰

50. The Prosecutor argued that the health conditions of Mr Gbagbo are "far from the mark where that state of health could impact upon [sic] the criteria under [article] 58(1)(b)".⁸¹ In particular, the Prosecutor contended that neither his physical health nor his mental state constitutes a material obstacle to a flight or would prevent him from hindering the investigation or the proceedings or from further committing crimes within the Court's jurisdiction.⁸²

51. The Single Judge is of the view that the information available in the record of the case concerning the health condition of Mr Gbagbo, in particular the experts' reports, constitutes a new circumstance that was not known at the time of the Decision on Interim Release. However, the Single Judge considers that this new circumstance has no impact on the necessity of Mr Gbagbo's continued detention.

52. First, the Single Judge recalls that in the "Decision on Mr Gbagbo's fitness", the Chamber found that Mr Gbagbo is "fit to take part in proceedings before the Court",⁸³ despite the existence of somatic issues, PTSD and hospitalisation syndrome.⁸⁴ The Single Judge is of the view that the physical and mental conditions of Mr Gbagbo, even though diminished to a certain extent, still allow him to take steps towards fleeing from the Court's jurisdiction, disrupting the investigation and the Court's proceedings and furthering the commission of crimes within the jurisdiction of the Court. Indeed, nothing in the medical reports presented to the Chamber suggests

⁸⁰ ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 9, lines 15-22.

⁸¹ ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 2, lines 10-11.

⁸² ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 2, line 23 to p. 3, line 4.

⁸³ ICC-02/11-01/11-286-Conf, p. 36.

⁸⁴ ICC-02/11-01/11-286-Conf, paras 67, 69.

that the medical or mental conditions of Mr Gbagbo are such that he could not take such steps. Furthermore, he could avail himself of the assistance of an extensive network of political contacts and supporters both in Côte d'Ivoire and abroad as discussed elsewhere in this Decision.⁸⁵

53. In light of these considerations, the Single Judge concludes that the medical condition of Mr Gbagbo does not have a bearing on the risks under article 58(1)(b) of the Statute.

(iv) Other relevant circumstances

54. The Single Judge notes that, with regard to the existence of a network of supporters, which has been found in the Decision on Interim Release to be a relevant factor in the determination of all relevant risks under article 58(1)(b)(i), (ii) and (iii) of the Statute,⁸⁶ the Prosecutor has submitted new information relevant to the determination of the necessity of Mr Gbagbo's continued detention.⁸⁷

55. In particular, the Prosecutor has presented the "*Rapport de mi-mandat du Groupe d'expert sur la Côte d'Ivoire en application du paragraphe 16 de la résolution 2045 (2012) du Conseil de sécurité, 15 octobre 2012*",⁸⁸ which indicates that high-ranking representatives of Mr Gbagbo's former regime, members of militias such as the *Jeunes Patriotes* and officials of the armed and security forces, took refuge in neighbouring countries like Benin, Ghana, Liberia and Togo after the post-electoral violence in Côte d'Ivoire.⁸⁹ According to the same document, these groups of exiled representatives of the former Ivorian regime are suspected of organising and financing military operations in Côte d'Ivoire,

⁸⁵ See above para. 48 and below para. 55.

⁸⁶ Decision on Interim Release, paras 60-62, 65, 69.

⁸⁷ ICC-02/11-01/11-T-9-ENG ET, p. 9, line 21 to p. 11, line 4.

⁸⁸ ICC-02/11-01/11-285-Anx1.

⁸⁹ ICC-02/11-01/11-285-Anx1, para. 28.

recruiting mercenaries and purchasing weapons.⁹⁰ The available material alleges specifically that a meeting took place in Takoradi, Ghana, on 12 July 2012, in which supporters of Mr Gbagbo's former regime discussed the establishment of a joint action plan to regain power in Côte d'Ivoire.⁹¹ The material available further suggests that the network of Mr Gbagbo's supporters is well organized and capable of conducting military operations.⁹² The report also lists operations recently launched on Ivorian territory which could be attributable to the pro-Gbagbo network referred to above.⁹³

56. The Single Judge notes that the Defence has sought to undermine the probative value of this report. It has presented a document stating that one of the alleged members of the network of Mr Gbagbo's supporters has been released from custody by a Ghanaian court "because the Ghanaian government did not have any evidence to point to any crime in those circumstances".⁹⁴ However, the press article presented by the Defence does not support this argument, as it clearly states that the person was released on bail for lack of Ghanaian jurisdiction, while proceedings remain pending in relation to an extradition request by Côte d'Ivoire.⁹⁵ In addition, the Single Judge notes that this alleged member of the network is believed to be one of the financiers of the organization and that no personal and direct involvement in meeting and activities is alleged in the material before the Single Judge.⁹⁶ Thus, no conclusions can be drawn from the document presented by the Defence.

57. In addition, the Defence has presented material indicating that the clashes in the east of Côte d'Ivoire are related to the struggle between various

⁹⁰ ICC-02/11-01/11-285-Anx1, para. 28.

⁹¹ ICC-02/11-01/11-285-Anx1, para. 29.

⁹² ICC-02/11-01/11-285-Anx1, para. 31, pp. 108-109.

⁹³ ICC-02/11-01/11-285-Anx1, p. 107.

⁹⁴ ICC-02/11-01/11-T-9-ENG, p. 21, lines 7-9.

⁹⁵ ICC-02/11-01/11-285-Anx3.

⁹⁶ ICC-02/11-01/11-285-Anx1, para. 30, p. 108.

groups for control over the land,⁹⁷ and cannot be attributed to the activities of Mr Gbagbo's alleged support network.⁹⁸ However, the Single Judge does not consider this information to be mutually exclusive with the report presented by the Prosecutor. No conclusions can therefore be drawn from them for the present purposes.

58. The Single Judge considers that the newly available information presented by the Prosecutor does not show that Mr Gbagbo is in contact or otherwise exercises direct control over the activities of his support network. Nevertheless, as stated above, the issue is not whether Mr Gbagbo can be held accountable for the activities of the support network but whether there exists a risk that the latter could provide Mr Gbagbo, in the event of release, with assistance in absconding, interfering with the investigation of Court's proceedings, or in the commission of further crimes, within the meaning of article 58(1)(b) of the Statute.⁹⁹ In this respect, the Single Judge observes that among the alleged members of the network, there are family members of Mr Gbagbo as well as several close political associates.¹⁰⁰

59. On the basis of the above discussion, it appears that the network of Mr Gbagbo's supporters, based in countries neighbouring Côte d'Ivoire, in particular in Ghana, has strengthened its level of military and political organization in the last months. Accordingly, the Single Judge considers that the development of such network has increased the risks under article 58(1)(b) of the Statute.

⁹⁷ ICC-02/11-01/11-285-Anx2 and ICC-02/11-01/11-285-Anx6.

⁹⁸ ICC-02/11-01/11-T-9, p. 20, line 22 to p. 21, line 3.

⁹⁹ See above para. 48.

¹⁰⁰ ICC-02/11-01/11-285-Anx1, pp. 108-109.

60. With regard to the remaining circumstances underlying the Decision on Interim Release,¹⁰¹ the Single Judge considers that there is no information indicating any change in those circumstances.

(v) Conclusion

61. In conclusion, the Single Judge is satisfied, on the basis of the above analysis, that there are no changed circumstances since the Decision on Interim Release that affect Mr Gbagbo's detention. The grounds justifying detention pursuant to article 58(1)(b)(i) to (iii) of the Statute still exist and the continued detention of Mr Gbagbo appears necessary. Interim release cannot be granted.

B. *Conditional release on medical grounds*

62. At the hearing, the Defence submitted that, as an alternative to interim release, conditional release should be ordered pursuant to rule 119 of the Rules, in light of Mr Gbagbo's state of health.¹⁰² Moreover, the Defence submitted a letter, in which a State reconfirmed its willingness to provide the necessary conditions restricting liberty that might be imposed by the [...] Court [...] by virtue of rule 119 of the Rules [...].¹⁰³ The Defence argued that the conditions offered by that State, "seem to be reasonable and valid, in general terms".¹⁰⁴

63. The Prosecutor contended that conditional release should not be granted because "there is no condition that can attenuate the risks arising under Article 58(1)(b)(i)"¹⁰⁵ and that this risk can only be properly managed if Mr Gbagbo is held in detention in The Hague.¹⁰⁶ Moreover, the Prosecutor

¹⁰¹ Decision on Interim Release, paras 56, 66.

¹⁰² ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 12, line 10 to p. 14, line 5.

¹⁰³ ICC-02/11-01/11-285-Conf-Anx10, p. 2.

¹⁰⁴ ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 12, line 14.

¹⁰⁵ ICC-02/11-01/11-T-9-ENG ET, p. 11, lines 14-15.

¹⁰⁶ ICC-02/11-01/11-T-9-ENG ET, p. 11, lines 16-17 ; ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 16, lines 3-5.

opined that some of the conditions proposed and assurances given by the State are unrealistic and impractical.¹⁰⁷

64. The Single Judge emphasises that, in line with the jurisprudence of the Appeals Chamber, “the medical condition of the detained person may be a reason for a Pre-Trial Chamber to grant interim release with conditions”, in the sense that “the ill health of a detained person may be a factor in the exercise of its discretion”.¹⁰⁸

65. In this respect, the Single Judge recalls that, in the Decision on Mr Gbagbo’s fitness, the Chamber, while finding Mr Gbagbo fit to take part in the proceedings against him, also stated that his health requires heightened attention, as all three experts concluded at the hearing on 24 and 25 September 2012 that Mr Gbagbo needed appropriate treatment.¹⁰⁹ Accordingly, the Single Judge requested the Registry to provide a report “about the available avenues to provide adequate treatment to improve Mr Gbagbo’s physical and psychological health”.¹¹⁰ In addition, in light of the offer made by a State to host Mr Gbagbo should he be granted conditional release, and to enforce conditions as may be deemed necessary by the Court, the Single Judge considered it appropriate to request the Registry to seek further information from that State with regard to its offer.¹¹¹ Indeed, as stated by the Appeals Chamber, a decision on conditional release must be “a single unseverable decision that grants conditional release on the basis of specific and enforceable conditions”.¹¹²

¹⁰⁷ ICC-02/11-01/11-T-10-CONF-EXP-ENG ET, p. 16, lines 6-14.

¹⁰⁸ *Gbagbo Appeals Judgment*, para. 87.

¹⁰⁹ See e.g. ICC-02/11-01/11-T-6-CONF-ENG, p. 9, lines 10-24; p. 22, lines 17-21; p. 38, line 22 to p. 39, line 3; p. 39, lines 14-15; p. 65, lines 5-18; ICC-02/11-01/11-T-7-CONF-ENG, p. 23, line 22 to p. 25, line 9.

¹¹⁰ ICC-02/11-01/11-287-Conf-Corr, para. 10.

¹¹¹ ICC-02/11-01/11-287-Conf-Corr, para. 13.

¹¹² *Bemba Appeals Judgment (OA 2)*, para. 105.

66. The Single Judge is of the view that, in order to exercise the discretion to consider conditional release “judiciously and with full cognizance of the fact that a person’s personal liberty is at stake”,¹¹³ it is necessary to first obtain the abovementioned information from the Registry. Thereafter, the Single Judge will determine whether conditional release should be considered, under which conditions and where they could be enforced.

FOR THESE REASONS, THE SINGLE JUDGE

DECIDES that Mr Gbagbo shall remain in detention.

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



Judge Silvia Fernández de Gurmendi

Single Judge

Dated this 12 November 2012

At The Hague, The Netherlands

¹¹³ Gbagbo Appeals Judgment, para. 79.