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**International
Criminal
Court**

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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 redacted version

Decision on the "Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo"

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor

Counsel for the Defence
Emmanuel Altit
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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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States Representatives

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REGISTRY

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Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Silvia Fernández de Gurmendi, Single Judge for Pre-Trial Chamber I (“Chamber”) of the International Criminal Court (“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 renders the decision on the *“Requête de la Défense demandant la mise en liberté provisoire du Président Gbagbo”* (“Request for Interim Release”).

I. Procedural history

1. On 23 November 2011, the 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” (“Decision on the Article 58 Application”).³

2. On 5 December 2011, during the first appearance of Laurent Gbagbo before the Court, Pre-Trial Chamber III scheduled the commencement of the confirmation of charges hearing for 18 June 2012.⁴ On 12 June 2012, the Single Judge postponed the commencement of the hearing to 13 August 2012.⁵

3. On 1 May 2012, the Defence submitted its Request for Interim Release, requesting the Chamber to order: (i) the interim release of Mr Gbagbo on the territory of [REDACTED] (“[REDACTED]”); or in the alternative, (ii) the conditional release of Mr Gbagbo on the territory of [REDACTED]. The Defence further requests the Chamber to note that the health conditions of Mr Gbagbo do not enable him to effectively participate in his defence. The

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, p. 8.

⁵ Decision on the *“Requête de la Défense en report de l’audience de confirmation des charges prévue le 18 juin 2012”* (“Decision on the postponement”), ICC-02/11-01/11-152-Red, p. 12.

defence submits that Mr Gbagbo can only improve his psychological and physical conditions outside of prison in a familial environment.⁶ Among the documents annexed to the Request for Interim Release was a letter from [REDACTED] offering to host Mr Gbagbo on the territory of his State if he was temporarily released by the Court.⁷

4. On 8 May 2012, the Single Judge issued the “Decision requesting observations on the Defence Request for Interim release.”⁸

5. On 28 May 2012, the Registry filed the observations on the Request for Interim Release received from the Host State and [REDACTED],⁹ as well as the the “Registry’s report on the management of Mr. Laurent Gbagbo’s health conditions while in custody at the Court’s Detention Centre” *ex parte* available only to the Registry and Defence.¹⁰

6. On 4 June 2012, the Prosecutor submitted the “Prosecution’s response to Defence request for provisional release pursuant to Article 60(2)” (“Prosecutor’s Response”).¹¹

7. On 26 June 2012, the Single Judge, following a request to this effect by the Defence,¹² issued the “*Ordonnance aux fins de faire procéder à un examen médical*”,¹³ whereby the Single Judge *inter alia*, designated three experts to conduct a physical, psychological and psychiatric examination of Mr Gbagbo and ordered the medical experts to transmit a report, jointly if possible, on the

⁶ ICC-02/11-01/11-105-Conf-Red-Corr, p.39.

⁷ ICC-02/11-01/11-105-Conf-Anx9.

⁸ ICC-02/11-01/11-109-Conf.

⁹ ICC-02/11-01/11-130-Conf.

¹⁰ ICC-02/11-01/11-132-Conf-Exp.

¹¹ ICC-02/11-01/11-137-Conf.

¹² ICC-02/11-01/11-158-Conf-Exp.

¹³ *Ordonnance aux fins de faire procéder à un examen médical*, 26 June 2012, ICC-02/11-01/11-164-Conf.

ability of Mr Gbagbo to participate in the confirmation of the charges hearing, no later than 19 July 2012.

II. Submissions of the parties and participants

A. *The Defence*

8. The Defence submits that the conditions of article 58(1)(b) of the Rome Statute (“Statute”) are not met and further contends that interim release is warranted in order to enable the physical and psychological recovery of Mr Gbagbo, a condition to ensure his right to a fair trial.

9. In the alternative to its request for interim release, the Defence submits that conditional release should be granted as a State party to the Statute has offered to host Mr Gbagbo and to implement any necessary conditions restricting liberty that might be imposed by the Chamber pursuant to article 60(2) of the Statute and rule 119 of the Rules of Procedure and Evidence (“Rules”).¹⁴

10. With respect to the requirement of article 58(1)(b)(i) and in support of its argument that Mr Gbagbo will not abscond if granted interim release, the Defence contends that in the Prosecutor’s request for an arrest warrant against Mr Gbagbo, the Prosecutor relied solely on press articles in order to demonstrate the existence of a flight risk. Contesting the probative value of this type of information, the Defence further submits that the Prosecutor has not brought forward any further elements to corroborate his allegations.¹⁵ In particular, the Defence avers that the Prosecutor failed to sufficiently demonstrate that Mr Gbagbo has many supporters inside and outside of Côte

¹⁴ Request for Interim Release, paras 57-60, 67-71, 78-92.

¹⁵ Request for Interim Release, paras 44 and 45.

d'Ivoire and has failed to identify and link Mr Gbagbo to the individuals that have important financial means to which he can access.¹⁶

11. Further, the Defence contends that:

- (i) Mr Gbagbo has expressed in a letter dated 17 April 2012 his commitment to comply with any request from the Court;¹⁷
- (ii) Mr Gbagbo has demonstrated since his arrival in The Hague his cooperation with and respect to the Court;¹⁸
- (iii) Mr Gbagbo has stated at his first appearance before the Chamber that he will participate in the proceedings against him until their end, providing him with the occasion to give for the first time his version of the facts;¹⁹
- (iv) fleeing will be against Mr Gbagbo's principles and ideals and will unnecessarily expose his family, in particular his wife who is being currently detained by the Ivorian authorities, to risk;²⁰
- (v) the main reason of his Request for Interim Release is his physical and psychological recovery, which will enable him to be fit to take part in the proceedings;²¹ and
- (vi) Mr Gbagbo has no access to financial means as they have been frozen. Also, the bank accounts of the persons who supported him have been frozen and these persons are either detained or at large. Accordingly, he has no means to flee should he wish to do so.²²

12. The Defence finally states that [REDACTED] have committed themselves to ensuring that Mr Gbagbo will appear before the Court, notably

¹⁶ Request for Interim Release, para.47.

¹⁷ Request for Interim Release, para.50.

¹⁸ Request for Interim Release, para.51.

¹⁹ Request for Interim Release, para.51.

²⁰ Request for Interim Release, paras 52 and 55.

²¹ Request for Interim Release, para. 53.

²² Request for Interim Release, para. 54.

by prohibiting him to leave the country, obliging him to hand over his passport and providing a 24 hour police presence near his place of residence.²³

13. The Defence submits that Mr Gbagbo's commitment and [REDACTED]'s offer mitigate any risk of flight if Mr Gbagbo is released.²⁴

14. In relation to the requirement of article 58(1)(b(ii) of the Statute, the Defence submits that in his request for an arrest warrant against Mr Gbagbo, the Prosecutor relied solely on uncorroborated public sources to demonstrate the alleged capacity of Mr Gbagbo to interfere with the investigations as well as his alleged intention to harm potential witnesses.²⁵

15. The Defence further considers that it would be illogical to follow the Prosecutor's argument, according to which the risks follow from the disclosure of evidence. The Defence submits that such reasoning would amount to placing the suspect in a position to choose between his right for disclosure of the evidence and his right to request interim release.²⁶

16. The Defence adds that the Prosecutor bears the burden of demonstrating that the risk of witness interference emanates from Mr Gbagbo, not simply his entourage.²⁷

17. The Defence also contends that Mr Gbagbo will not and cannot endanger the investigations since: (i) he has committed not to do so should he be released; and (ii) he has no financial or material means at his disposal.²⁸ According to the Defence, Mr Gbagbo will equally not be in a position to interfere with the investigations in Côte d'Ivoire since he is not aware of its

²³ Request for Interim Release, paras 56-58.

²⁴ Request for Interim Release, para. 59.

²⁵ Request for Interim Release, paras 61-62.

²⁶ Request for Interim Release, para.63.

²⁷ Request for Interim Release, para.64.

²⁸ Request for Interim Release, para. 65.

scope, content, and the number of witnesses, their identities and the content of their statements.²⁹

18. The Defence finally underlines that the guarantees offered by [REDACTED], in particular the systems of monitoring his communications and correspondence as well as the prohibition of encounters with witnesses, reduce the risks of obstructing and endangering the investigations.³⁰

19. As concerns the grounds for detention set forth in article 58(1)(b)(iii) of the Statute, the Defence submits that they should be assessed in a particularly restricted manner so as not to infringe the principle of presumption of innocence.³¹

20. Again, the Defence submits that in his request for an arrest warrant against Mr Gbagbo, the Prosecutor relied solely on uncorroborated public sources to demonstrate that the arrest was necessary in order to prevent Mr Gbagbo from continuing the commission of the crimes.³²

21. The Defence reiterates that in light of the guarantees offered [REDACTED], Mr Gbagbo has very little room to manoeuvre. These authorities have offered to organise his stay on their territory in such a way to prevent Mr Gbagbo from playing any kind of role in relation to Côte d'Ivoire.³³

22. It adds that he will be geographically remote from Côte d'Ivoire and that the persons named by the Prosecutor in November 2011 are also limited in manoeuvre, since their assets have been frozen, they are subject to a travel

²⁹ Request for Interim Release, para. 66.

³⁰ Request for Interim Release, paras 67-72.

³¹ Request for Interim Release, para. 73.

³² Request for Interim Release, para. 73.

³³ Request for Interim Release, paras 78-79.

ban and they are closely monitored by the current government in Côte d'Ivoire.³⁴

23. The Defence further requests the Chamber to note that the health conditions of Mr Gbagbo do not enable him to effectively participate in his defence. The Defence submits that Mr Gbagbo can only improve his psychological and physical conditions outside of prison in a familial environment.³⁵

B. The Prosecutor

24. The Prosecutor requests the Chamber to reject the Request for Interim Release and order that Mr Gbagbo remains in detention. The Prosecutor adds that "[i]f the Chamber is inclined to grant GBAGBO provisional release to [REDACTED] (with or without conditions) it should first seek the views of the relevant authorities of Côte d'Ivoire pursuant to Rule 119(3) and return GBAGBO to Côte d'Ivoire to face proceedings before a national court, if the Ivorian authorities so request". Finally, in the event the Chamber determines that Mr Gbagbo can be released to [REDACTED], the Prosecutor submits that [REDACTED] should be invited "to appear and provide greater clarity on [REDACTED]'s position and ability to satisfy conditions".³⁶

25. In support of the position that the conditions of detention under article 58(1) of the Statute are met, the Prosecutor argues as a preliminary point that open source information can be relied upon when determining whether interim release is warranted. In the submission of the Prosecutor, "[t]he type of evidence relied upon, as well as the manner in which evidence is to be assessed, greatly depends on the use to which the evidence is put, the scope of the decision to be taken by the Chamber, and the relevant standard

³⁴ Request for Interim Release, paras 76-77.

³⁵ Request for Interim Release, p. 39.

³⁶ Prosecutor's Response, para. 79.

of proof". The Prosecutor invokes in this regard the jurisprudence of the Appeals Chamber, which has held that the question whether arrest appears necessary revolves around the possibility, not the inevitability, of a future occurrence.³⁷

26. In relation to the requirement under article 58(1)(b)(i) of the Statute, the Prosecutor submits that the gravity of the charges against Mr Gbagbo and the possible length of sentence if convicted provide strong incentive for him to flee if provisionally released. The Prosecutor also submits that Mr Gbagbo's detailed knowledge of the incriminating evidence and the proximity of the confirmation of charges hearing are factors that increase the flight risk.³⁸

27. In addition, the Prosecutor avers that Mr Gbagbo continues to maintain his claim to the Presidency of Côte d'Ivoire and that he will want to return to power when released. In this respect, the Prosecutor submits that in the jurisprudence of the Appeals Chamber, continuing political aspirations may be weighed in favour of the continued detention of the suspect.³⁹

28. According to the Prosecutor, Mr Gbagbo also has national and international contacts and ties which he can mobilise to abscond. In particular, the Prosecutor points to [REDACTED], and to the existence of a network of supporters, including his political party, who have the intention to liberate Mr Gbagbo.⁴⁰

29. The Prosecutor submits that Mr Gbagbo possesses the means and has access to financial resources that would enable him to abscond, in particular since not all of his and his supporters' assets have been frozen. Moreover, the

³⁷ Prosecutor's Response, para. 13.

³⁸ Prosecutor's Response, para. 16.

³⁹ Prosecutor's Response, para. 17.

⁴⁰ Prosecutor's Response, paras 18-19.

Prosecutor claims that Mr Gbagbo's relations in Côte d'Ivoire and abroad could provide him with the necessary means of absconding.⁴¹

30. As concerns article 58(1)(b)(ii) of the Statute, the Prosecutor states that Mr Gbagbo has the intent and means to interfere with witnesses, including detailed knowledge of the Prosecutor's investigation. Again, the Prosecutor alleges that there is an active and well-organized network of supporters of Mr Gbagbo, for which there is a possibility that it will be used to interfere with witnesses or otherwise obstruct the investigation or court proceedings in order to obtain the liberation of Mr Gbagbo.⁴²

31. The Prosecutor argues that a particular factor to be considered in this respect is Mr Gbagbo's knowledge of the Prosecutor's evidence against him, but submits that this is so in the particular circumstances of the case and that it is generally not true that the Defence's right to disclosure necessarily has the consequence that a suspect will remain in detention.⁴³

32. In relation to article 58(1)(b)(iii) of the Statute, the Prosecutor submits first that, given the low standard of proof, a finding to the effect that Mr Gbagbo may commit further crimes is not inconsistent with the presumption of innocence, as suggested by the Defence.⁴⁴

33. The Prosecutor avers that Mr Gbagbo has the capability and presumed intent to commit further crimes, [REDACTED].⁴⁵

34. Further, the Prosecutor submits that the guarantees put forward by [REDACTED] are insufficient to effectively mitigate the risks described in article 58(1)(b) of the Statute. Moreover, any additional conditions that could

⁴¹ Prosecutor's Response, paras 20-21.

⁴² Prosecutor's Response, paras 23-27.

⁴³ Prosecutor's Response, paras 28-29.

⁴⁴ Prosecutor's Response, para. 30.

⁴⁵ Prosecutor's Response, para. 31-32.

be imposed by the Chamber under Rule 119 of the Rules are insufficient in this case. The Prosecutor insists that the risks cannot be effectively managed unless Mr Gbagbo is kept in detention.⁴⁶

35. A particular submission of the Prosecutor in this context is that the mere ability of Mr Gbagbo to communicate with any member of his extensive network of supporters would be sufficient for him to be able to obstruct the investigation, or to commit further crimes. The Prosecutor alleges that such communication could not be effectively prevented if Mr Gbagbo were granted interim release. Also, the Prosecutor argues that a State can only be considered willing and able to implement the requisite conditions accompanying interim release on its territory when it provides the necessary means and covers all related costs.⁴⁷

36. The Prosecutor also submits that the state of health of Mr Gbagbo does not warrant interim release, as Rule 135 of the Rules, which deals with cases where the accused is unfit to stand trial, does not foresee interim release as a remedy. To the contrary, the Prosecutor submits that Regulation 103(5) of the Regulations of the Court makes it clear that when a detained person is found to be of ill health, he or she shall be treated under conditions of continuous detention, even if transferred to a hospital. In any event, the Prosecutor submits that the Defence allegations regarding Mr Gbagbo's health are unsupported and that the conclusions of the medical practitioners relied on by the Defence are unqualified. Finally, the Prosecutor states that even if the Defence's factual allegations were true, they do not support the conclusion that Mr Gbagbo is unfit to stand trial.⁴⁸

⁴⁶ Prosecutor's Response, para. 35.

⁴⁷ Prosecutor's Response, paras 42-48

⁴⁸ Prosecutor's Response, paras 53-69.

37. In the Response, the Prosecutor invokes as relevant the fact that Mr Gbagbo is at present subject to domestic judicial proceedings in Côte d'Ivoire, in the course of which he was detained prior to his transfer to the Court. The Prosecutor submits that "a determination by the Court that detention is not necessary for the confined purposes of its own proceedings cannot mean that such detention is automatically also deemed to be unnecessary for the purposes of separate and autonomous national proceedings conducted in relation to different crimes. [...] Côte d'Ivoire's interest thus gives it a right to be heard on this matter".⁴⁹

C. The Host State

38. On 11 May 2012, the Host State confirmed, upon request by the Single Judge, that pursuant to articles 44 and 47 of the Headquarters Agreement between the Court and the Host State, it would facilitate the transport or transfer of Mr Gbagbo into a State other than the Host State if his release was granted. [REDACTED].⁵⁰

D. The State to which release is sought

39. On 18 May 2012, [REDACTED] affirmed that [REDACTED] was willing and prepared to receive and host Mr Gbagbo if he was granted interim release. It further affirmed that it would provide the necessary guarantees to satisfy any conditions restricting liberty that may be imposed by the Court, including:

- (i) guarantees for securing Mr Gbagbo's appearance in Court, such as a prohibition to leave the country, handing over his passport, 24 hour surveillance at his place of residence and providing him with police escorts;

⁴⁹ Prosecutor's Response, paras 70-74.

⁵⁰ ICC-02/11-01/11-130-Conf-Anx2.

- (ii) guarantees to ensure that Mr Gbagbo will not interfere with the investigation, such as monitoring his communications and prohibiting encounters with witnesses; and
- (iii) a guarantee that Mr Gbagbo would not be involved in any illegal actions that might take place in Côte d'Ivoire, such as screening visitors.⁵¹

40. In a separate letter, [REDACTED].⁵²

III. The Applicable law

41. The Single Judge notes articles 58, 60 and 66 of the Statute, rules 118 and 119 of the Rules and regulations 20 and 51 of the Regulations of the Court.

42. At the outset, the Single Judge notes that article 60 of the Statute is a procedural safeguard against detention that does not comply with the Statute, in particular article 58(1) of the Statute, and internationally recognised human rights.⁵³ The Appeals Chamber has previously emphasised that this regime “must be considered in the context of the ‘detained person’s right to be presumed innocent’”.⁵⁴

43. 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

⁵¹ ICC-02/11-01/11-130-Conf-Anx4.

⁵² ICC-02/11-01/11-130-Conf-Anx5.

⁵³ Appeals Chamber, “Judgment of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release” 9 June 2008, ICC-01/04-01/07-572 (“*Ngudjolo Chui Appeals Judgment*”), para. 15 (“[T]he provisions of the Statute relevant to detention, like every other provision of it, must be interpreted and applied in accordance with internationally recognized human rights”).

⁵⁴ Appeals Chamber, Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled “Decision on the defence’s 28 December 2011 *Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo*”, 5 March 2012, ICC-01/05-01/08-2151-Red (“*Bemba Appeals Judgement (OA 10)*”), para.40.

satisfied, the Pre-Trial Chamber shall release the person, with or without, conditions.

44. 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.

45. The reasons for detention pursuant to article 58(1)(b)(i) to (iii) of the Statute are alternative.⁵⁵ Accordingly, if at least one of these three conditions is fulfilled, the person shall continue to be detained.

46. Furthermore, as already held by the Appeals Chamber,

[T]he decision on continued detention or release pursuant to article 60 (2) read with article 58 (1) of the Statute is not of a discretionary nature. Depending upon whether or not the conditions of article 58 (1) of the Statute continue to be met, the detained person *shall* be continued to be detained or *shall* be released".⁵⁶

47. In assessing whether the conditions under article 58(1) of the Statute continue to be met, the Chamber must address anew the issue of detention in light of the material placed before it and may sustain or modify its ruling if it

⁵⁵ Appeals Chamber, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Decision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'", 13 February 2007, ICC-01/04-01/06-824, ("*Lubanga Appeals Judgment*"), para. 139; Appeals Chamber, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", 2 December 2009, ICC-01/05-01/08-631-Red ("*Bemba Appeals Judgment (OA2)*"), para. 89.

⁵⁶ *Lubanga Appeals Judgment*, para. 134; *Bemba Appeals Judgment (OA2)*, para. 59.

is satisfied that changed circumstances so require.⁵⁷ As underlined by the Appeals Chamber, the notion 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.”⁵⁸

48. In relation to the apparent necessity of detention within the meaning of article 58(1)(b) of the Statute, the Appeals Chamber has held that “the question revolves around the possibility, not the inevitability, of a future occurrence”.⁵⁹ Specifically with respect to article 58(1)(b)(i) of the Statute, the Appeals Chamber has also held that “any determination by a Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction”.⁶⁰ The Appeals Chamber has further held that “the apparent necessity of continued detention in order to ensure the detainee’s appearance at trial does not necessarily have to be established on the basis of one factor taken in isolation. It may also be established on the basis of an analysis of all relevant factors taken together”.⁶¹

49. As to the imposition of conditions upon release, the Appeals Chamber held that:

If the [Chamber] is satisfied that the conditions set forth in article 58 (1) of the Statute are not met, it shall release the person, with or without conditions. If, [...] release would lead to any of the risks described in article 58 (1) (b) of the Statute, the Chamber may, pursuant to rule 119 of the Rules of Procedure and Evidence, examine appropriate conditions with a view to mitigating or negating the risk. As the list of conditions in rule 119 (1) of the Rules of Procedure and Evidence indicates, the Chamber may also, in appropriate circumstances, impose conditions that do not, *per se*, mitigate the risks

⁵⁷ *Ngudjolo Chui* Appeals Judgment, para. 12.

⁵⁸ *Bemba* Appeals Judgment (OA 2), para. 60

⁵⁹ *Ngudjolo Chui* Appeals Judgment, para. 21; Appeals Chamber, “Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for Interim release’”, 16 December 2008, ICC-01/05-01/08-323 (“*Bemba* Appeals Judgment (OA)”), para. 55.

⁶⁰ *Lubanga* Appeals Judgment, para. 137.

⁶¹ *Bemba* Appeals Judgment (OA), para. 55.

described in article 58 (1) (b) of the Statute. The result of this two-tiered examination is a single unseverable decision that grants conditional release on the basis of specific and enforceable conditions. Put differently, in such circumstances, release is only possible if specific conditions are imposed.⁶²

50. Furthermore, for conditional release to be granted, the identification of a State willing to accept the person concerned as well as enforce related conditions is necessary.⁶³

51. In this respect, the Appeals Chamber has further specified that:

[T]he Chamber has the discretion to consider whether the risk [...] can be mitigated by the imposition of conditions and to order conditional release. However, given that a person's personal liberty is at stake if a Chamber is considering conditional release and a State has indicated its general willingness and ability to accept a detained person and enforce conditions, the Chamber must seek observations from that State as to its ability to enforce specific conditions identified by the Chamber. Depending on the circumstances, the Chamber may have to seek further information from the State if it finds that the State's observations are insufficient to enable the Chamber to make an informed decision. That is not to say that the Chamber upon receiving observations from the State is obliged to grant conditional release. It only means that the Chamber must seek information that would enable it to make an informed decision on the matter.⁶⁴

52. According to the jurisprudence of the Appeals Chamber, the Chamber's obligation to specify conditions and, if necessary, seek additional information regarding conditions of release is triggered 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;

⁶² *Bemba Appeals Judgment (OA2)*, para. 105.

⁶³ *Bemba Appeals Judgment (OA2)*, para. 106.

⁶⁴ Appeals Chamber, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release", 19 August 2011, ICC-01/05-01/08-1626-Red ("*Bemba Appeals Judgment (OA7)*"), para. 55; See also Appeals Chamber, "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 judgement of 19 August 2011", 23 November 2011, ICC-01/05-01/08-1937-Red2 ("*Bemba Appeals Judgment (OA9)*"), para. 34.

and (c) the Chamber does not have sufficient information before it regarding the conditions of release to enable it to make an informed decision.⁶⁵

IV. The Single Judge's determination

A. Whether the requirements of article 58(1) of the Statute are met

53. In the following sections of the present decision, the Single Judge will address in turn the three requirements of article 58(1)(b) of the Statute, to which the arguments of the Defence relate. In relation to the requirement under article 58(1)(a) of the Statute, the Single Judge recalls the findings of the Decision on the Article 58 Application.

54. The Single Judge notes at the outset that the Defence opposes the reliance on newspaper articles or other public sources for the purpose of assessing the requirements. The Single Judge, however, considers that there does not exist in the applicable law any impediment to the use of such material, or any requirement that it be corroborated. Rather, the Single Judge must analyse all the material placed before it, in order to determine what weight must be given to it for the purpose of the determination as to whether continued detention "appears necessary".⁶⁶

(i) Whether the continued detention of Mr Gbagbo appears necessary to ensure his appearance before the Court

55. The Single Judge notes the submissions of the Defence that since his arrival in The Hague, Mr Gbagbo has demonstrated cooperation and respect for the Court, and in particular the personal undertaking provided to the Chamber by Mr Gbagbo, wherein he pledges that he will appear before the Chamber at any time the Chamber considers it necessary, and that he will

⁶⁵ *Bemba Appeals Judgment (OA9)*, para.35.

⁶⁶ See above para. 48.

provide to the Chamber all assurances necessary to this effect.⁶⁷ However, the Single Judge is of the view that the assurances of Mr Gbagbo are not *per se* sufficient to grant interim release,⁶⁸ and are outweighed by factors in favour of his continued detention.

56. Mr Gbagbo is charged with four counts of crimes against humanity under article 7 of the Statute, namely with murder, rape and other sexual violence, other inhumane acts and persecution.⁶⁹ The Single Judge considers that the gravity of the charges against Mr Gbagbo, and the lengthy prison sentence that may ensue in the event of conviction, constitute an incentive for him to abscond. This inference is in line with the position previously expressed by the Appeals Chamber, which has held that “the seriousness of the crimes allegedly committed is a relevant factor and may make a person more likely to abscond”.⁷⁰

57. Furthermore, the Single Judge notes that other Chambers of this Court have previously found that considerations relating to the suspect’s past and present political and professional position, international contacts and ties, financial situation and resources, and availability of the necessary network and financial resources are relevant factors to the determination of the existence of a risk of flight.⁷¹ In this regard, the Single Judge recalls that in the Decision on the Article 58 Application Pre-Trial Chamber III found that

⁶⁷ *Attestation du Président Gbagbo daté du 17 avril 2012*, ICC-02/11-01/11-105-Conf-Anx11.

⁶⁸ Pre-Trial Chamber III, “Decision on Application for Interim Release”, 16 December 2008, ICC-01/05-01/08-321, para. 37; Pre-Trial Chamber II, “Decision on Application for Interim Release”, 14 April 2009, ICC-01/05-01/08-403, para. 50. See also *Bemba Appeals Judgment (OA2)*, para. 75.

⁶⁹ ICC-02/11-01/11-124-Conf-Anx1.

⁷⁰ *Ngudjolo Chui Appeals Judgment*, para. 21; *Bemba Appeals Judgment (OA)*, para. 55; *Lubanga Appeals Judgment*, para. 136; *Bemba Appeals Judgment (OA)*, para. 55; *Bemba Appeals Judgment (OA2)*, paras 67 and 70 (“[T]he length of sentence that Mr Bemba is likely to serve if convicted on these charges is a further incentive for him to abscond”).

⁷¹ Pre-Trial Chamber III, “Decision on application for interim release”, 20 August 2008, ICC-01/05-01/08-80-Anx, paras 54-55; See also *Lubanga Appeals Judgment*, para. 137; *Bemba Appeals Judgment (OA2)*, para. 72; *Ngudjolo Chui Appeals Judgment*, para. 22

detention of Mr Gbagbo was necessary to ensure his appearance before the Court, *inter alia*, because he appeared to have the political motivations as well as the necessary political contacts and funds to abscond.⁷² The Single Judge considers that the conclusions reached by Pre-Trial Chamber III at the time of such decision continue to be valid to date.

58. In relation to the means at the disposal of Mr Gbagbo to abscond, the Defence submits that Mr Gbagbo has a limited scope for action.⁷³ However, this assertion by the Defence is compellingly contradicted by other available information.

59. Firstly, the Single Judge considers relevant the submission by the Prosecutor, supported by documentary evidence, that certain assets belonging to Mr Gbagbo or his wife may have not been frozen to date [REDACTED].⁷⁴

60. Secondly, and even more importantly, there appears to exist in Côte d'Ivoire a large and well-organised network of political supporters of Mr Gbagbo, as already found in the Decision on the Article 58 Application.⁷⁵ In addition, he has political contacts abroad.⁷⁶ There is no indication that the support network has ceased activity in the period since the Decision on the Article 58 Application; to the contrary, the Prosecutor provides new information on the members of the network,⁷⁷ its objective as being the

⁷² Decision on the Article 58 Application, paras 85-87.

⁷³ See above para. 11.

⁷⁴ [REDACTED].

⁷⁵ Decision on the Article 58 Application, para. 85; See also The Australian, "Pro-Gbagbo rally stirs Ivorian civil war risk", 28 March 2011, ICC-02/11-24-US-Exp-Anx6.74, p. 2; Ghana News Agency, "Former Ivorian Defence Minister calls for President Gbagbo's release", 11 October 2011, ICC-02/11-24-US-Exp-Anx6.95, p. 3; AfrikNews, "Alassane Ouattara: 'The priority is economic recovery'", 7 October 2011, ICC-02/11-24-US-Exp-Anx6.90, pp. 2-3.

⁷⁶ The Gambia Voice, "Gbagbo has friends in Africa", 7 April 2011, ICC-02/11-24-US-Exp-Anx6.85, p. 3-4; The New York Times, "A Strongman Found Support in Prominent U.S. Conservatives", 11 April 2011, ICC-02/11-24-US-Exp-Anx6.81, p. 2-3.

⁷⁷ Le Nouveau Réveil, "Après la chute de leur mentor, Laurent Gbagbo : Voici où se cachent les barons Lmp", 2 September 2011, ICC-02/11-01/11-137-Conf-Anx10, pp 2-3; Le Nouveau

“liberation” of Mr Gbagbo,⁷⁸ and its activities.⁷⁹ The capacity of the support network is also apparent, as alleged by the Prosecutor, from the fact that it was able to mobilise more than 140,000 telephone calls to the Court over a short time period in December 2011.⁸⁰

61. The Single Judge considers of particular relevance the press release issued on 25 February 2012 by the *Comité Central Ordinaire* of the *Front Populaire Ivoirien*, Mr Gbagbo’s political party, wherein it is stated that “the Central Committee notes the importance of the period from January to June 2012, during which the mobilisation and the vigilance should be reinforced in order to obtain the liberation of Laurent Gbagbo, the peaceful return of the exiles, the freedom of all prisoners and the restoration of democracy.”⁸¹

62. In the assessment of the Single Judge, there is a risk that Mr Gbagbo would use the means that his support network could provide in order to abscond in the event that he is granted interim release.

Réveil, “Lmp à Accra: Les barons fuient le Ghana pour le Togo et le Bénin” 14 September 2011, ICC-02/11-01/11-137-Conf-Anx11, p. 2.

⁷⁸ Le Patriote, “Libération de Laurent Gbagbo – L’hypocrisie du FPI”, 07 May 2012, ICC-02/11-01/11-137-Conf-Anx9, p. 2; Action Concrète Communication Côte d’Ivoire, ACC-Côte d’Ivoire’s Facebook page, 23 February 2012, ICC-02/11-01/11-137-Conf-Anx17, p. 2.

⁷⁹ Le Nouveau Réveil, “Lmp à Accra: Les barons fuient le Ghana pour le Togo et le Bénin” 14 September 2011, ICC-02/11-01/11-137-Conf-Anx11, p. 2; Comité des Patriotes Ivoiriens au Royaume-Uni, “ Important ! Déclaration du Comité des Patriotes Ivoiriens au Royaume-Uni relative au Transfèrement du Président Gbagbo à la Cour Pénale Internationale”, 6 December 2011, ICC-02/11-01/11-137-Conf-Anx15, p. 2; Jeunesse du PDCI-RDA, “Important !!! Déclaration de la Jeunesse du PDCI-RDA”, 6 December 2011, ICC-02/11-01/11-137-Conf-Anx16, pp 2-3; Excerpt from “La Défense du Président Gbagbo” website, 31 May 2012, ICC-02/11-01/11-137-Conf-Anx19, p. 2; “Gbagbo Victorieux” website, “Portrait du Président Gbagbo”, 31 May 2012, ICC-02/11-01/11-137-Conf-Anx20, pp. 2-3; Excerpt from “Côte d’Ivoire-La Vraie” website, 31 May 2012, ICC-02/11-01/11-137-Conf-Anx21, pp. 2-8; Excerpt from the “Afrique Emergente, le blog de Marc Micael” website, 31 May 2012, ICC-02/11-01/11-137-Conf-Anx22, p. 2-5; Excerpt from “Le Train de la Liberté” website, 31 May 2012, ICC-02/11-01/11-137-Conf-Anx23, p. 2.

⁸⁰ Prosecutor’s Response, para. 26; ICC Information Security, “Increased number of phone calls to the Court / Augmentation de nombre des appels téléphoniques”, 12 December 2011, ICC-02/11-01/11-137-Conf-Anx2, p. 2.

⁸¹ *Communiqué de Presse: Comité Central Ordinaire*, 27 February 2012, ICC-02/11-01/11-137-Conf-Anx14, p. 4.

63. On the basis of the above analysis, the Single Judge concludes that the continued detention appears necessary to ensure Mr Gbagbo's appearance before the Court.

(ii) Whether the continued detention of Mr Gbagbo appears necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings

64. In the Decision on the Article 58 Application, Pre-Trial Chamber III held that the arrest of Mr Gbagbo was necessary to ensure that he does not use his political or economic resources to obstruct or endanger the investigation.⁸²

65. The argument of the Defence in this regard is that Mr Gbagbo: (i) has personally undertaken not to obstruct the investigation; and (ii) has no material or financial means at his disposal.⁸³ However, as analysed above, there is information that Mr Gbagbo enjoys the support of an elaborate network of supporters,⁸⁴ and appears to have the motivation to obstruct the investigation of crimes he has allegedly committed.⁸⁵

66. The risk to the investigation and the court proceedings in the event of the interim release of Mr Gbagbo is amplified by his extensive knowledge of the sources of evidence against him. The Single Judge does not consider that this finding gives rise to a general principle that full disclosure of incriminating evidence by the Prosecutor will necessarily lead to continued detention of the suspect, as suggested by the Defence.⁸⁶ Knowledge of the details of incriminating evidence as such does not make detention necessary, but it constitutes, in the view of the Single Judge, a factual circumstance that

⁸² Decision on the Article 58 Application, para. 87.

⁸³ See above para. 17.

⁸⁴ See above paras 60-61.

⁸⁵ See above paras 56-57.

⁸⁶ See above para. 15.

must be taken into account when assessing the level of risk for the investigation and the court proceedings in the event of interim release of the suspect.

67. In light of the above, the Single Judge concludes that the continued detention of Mr Gbagbo appears necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings.

(iii) Whether the continued detention of Mr Gbagbo appears necessary to prevent him from continuing with the commission of the crimes with which he is charged, or related crimes within the jurisdiction of the Court and arising out of the same circumstances

68. The Single Judge notes that in the Decision on the Article 58 Application, Pre-Trial Chamber III found that the arrest of Mr Gbagbo was necessary to prevent the commission of further crimes.⁸⁷

69. The available material indicates that the activities of Mr Gbagbo's support network, in particular his political party, appear to be directed at the restoration of his power.⁸⁸ In particular, the Single Judge notes a [REDACTED] the goal of restoring Mr Gbagbo to power.⁸⁹ The Single Judge is of the view that Mr Gbagbo could indeed utilise the network of his supporters to commit crimes within the jurisdiction of the Court.

70. Therefore, the Single Judge is of the view that continued detention of Mr Gbagbo appears necessary to prevent him from continuing with the commission of crimes within the jurisdiction of the Court.

71. In conclusion, the Single Judge is satisfied, based on the above analysis, that all of the requirements for detention found in article 58(1)(b)(i) to (iii) are

⁸⁷ Decision on the Article 58 Application, para. 87.

⁸⁸ See above paras 60-61.

⁸⁹ [REDACTED].

met and that continued detention of Mr Gbagbo appears necessary. Interim release can therefore not be granted.

B. Whether conditional release may be considered

72. The Single Judge recalls that, in instances where she has found that the conditions for detention under article 58(1) are met, she maintains the discretion to consider whether the risks under paragraphs (i) to (iii) of article 58(1)(b) of the Statute can be mitigated by the imposition of conditions restricting liberty other than detention.⁹⁰

73. The Single Judge takes note of the information and assurances provided by [REDACTED] in relation to conditions it is prepared to enforce against Mr Gbagbo. The Single Judge further notes, as underlined by the Defence, that the [REDACTED] authorities also expressed their general willingness to impose other specific conditions pursuant to rule 119 of the Rules to be identified by the Chamber.⁹¹

74. The Single Judge is however of the view that, in light of the factual circumstances described above and which led to her conclusion that continued detention is warranted, there is no condition short of detention which would be sufficient to mitigate these risks. In particular, the Single Judge is attentive to the fact, also noted by the Prosecutor,⁹² that the mere possibility for Mr Gbagbo to communicate effectively with members of his network would enable him to abscond, interfere with the investigation or court proceedings, or commit crimes within the jurisdiction of the Court. The Single Judge is of the view that the existing risks can only effectively be managed in detention at the seat of the Court. Accordingly, the Defence request for conditional release shall be rejected.

⁹⁰ *Bemba Appeals Judgment (OA7)*, para. 55; *Bemba Appeals Judgment (OA9)*, para. 34

⁹¹ See above paras 39-40.

⁹² See above para. 35.

C. Whether interim or conditional release should be granted based on medical reasons

75. The Single Judge notes that the Statute, the Rules and the Regulations of the Court and the Regulations of the Registry provide for specific procedures when the health of a suspect is in question. Notably, they do not envisage interim or conditional release as a remedy in such situations.

76. Indeed, regulation 103(5) of the Regulations of the Court specifically refers to situations where a detained person may require medical treatment. Under this provision, even if the Defence submissions as to Mr Gbagbo's need for treatment were considered to be sufficiently supported, Mr Gbagbo "shall, as far as possible, be treated within the detention centre." Should hospitalization be necessary, Mr Gbagbo "shall be transferred to a hospital without delay" whilst the "Registrar shall ensure the continuous detention of the person both at the place of treatment and when in transit."

77. With respect to fitness to stand trial, the Single Judge recalls that this question is specifically regulated by rule 135 of the Rules which is also applicable to pre-trial proceedings.⁹³ Rule 135 of the Rules does not provide for interim or conditional release as a remedy for a person deemed unfit to stand trial. In fact, rule 135 of the Rules provides that where a Chamber is satisfied, upon a medical examination, that the person is unfit to stand trial, the legal remedy is the adjournment of the proceedings. If the person is deemed unfit to stand trial, the "case shall be reviewed every 120 days unless there are reasons to do otherwise."

78. The Single Judge recalls that the procedure under rule 135 of the Rules has been triggered by the Defence and that expert reports following the

⁹³ Decision on the postponement, para. 26.

physical, psychological and psychiatric examination of Mr Gbagbo are expected shortly.

79. In light of the foregoing, the Single Judge considers that interim or conditional release cannot be ordered on the basis of the alleged health conditions of Mr Gbagbo.

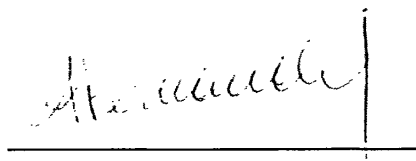
D. Review of the present decision

80. The Single Judge recalls that the present decision shall be subject to periodic review in accordance with article 60(3) of the Statute and rule 118(2) of the Rules.

FOR THESE REASONS, THE SINGLE JUDGE

REJECTS the Defence Request for Interim Release.

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



Judge Silvia Fernández de Gurmendi

Single Judge

Dated this 13 July 2012

At The Hague, The Netherlands