

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **10 March 2017**

TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ***

Public

Decision on Mr Gbagbo's Detention

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Eric MacDonald

Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

Legal Representatives of Victims

Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber I (“Chamber”) of the International Criminal Court, in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to Articles 60, 61(11) and 64(6)(a) of the Rome Statute (“Statute”), and Rules 118 and 119 of the Rules of Procedure and Evidence (“Rules”), issues, by majority, Judge Tarfusser dissenting, this Decision on Mr Gbagbo’s Detention.

I. Procedural Background

1. On 2 November 2015, the Trial Chamber reviewed Mr Gbagbo’s detention and decided that he shall continue to be detained (“Tenth Decision”).¹
2. On 27 November 2015, the Trial Chamber determined that Mr Gbagbo was fit to stand trial and to attend trial proceedings.²
3. On 28 January 2016, the trial against Mr Gbagbo and Mr Blé Goudé commenced.³
4. On 19 October 2016, the Defence of Mr Gbagbo filed a request seeking a Registry report.⁴
5. On 6 December 2016, the Chamber rejected the aforesaid request of the Defence of Mr Gbagbo (“6 December 2016 Decision”). However, it invited the parties to file submissions for the purpose of Article 60(3) of the Statute, as concerns any new developments since the Tenth Decision.⁵

¹ Tenth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute, ICC-02/11-01/15-328.

² Decision on the fitness of Laurent Gbagbo to stand trial, ICC-02/11-01/15-349.

³ ICC-02/11-01/15-T-9-ENG ET.

⁴ Requête de la Défense à la suite de la transmission par le Greffe d’un rapport médical concernant Laurent Gbagbo, ICC-02/11-01/15-734-Conf. The Chamber notes that all relevant filings are confidential. However, the Chamber has drafted the decision in a manner that does not compromise any confidential information.

⁵ Decision on the “Requête de la Défense à la suite de la transmission par le Greffe d’un rapport médical concernant Laurent Gbagbo”, ICC-02/11-01/15-770-Conf.

6. On 3 February 2017, the Legal Representative for Victims,⁶ the Defence of Mr Gbagbo⁷ and the Office of the Prosecutor⁸ filed their respective submissions.

II. Submissions

7. The Prosecutor submits there has been no change of circumstances since the Tenth Decision.⁹ To the contrary, she submits that developments in the last year confirm the existence of a pro-Gbagbo network advocating and working for the release of Mr Gbagbo by any means, including the obstruction of the trial.¹⁰ In this regard, the Prosecutor refers to the said network's activities to circumvent orders by disclosing the identity of protected witnesses, which lead to unprecedented measures such as deferring the retransmission of court hearings and the exclusion of an individual from the public gallery.¹¹ The Prosecutor also refers to specific individuals that allegedly form part of this pro-Gbagbo network, and who have financially and logistically supported demonstrations and gatherings in support of Mr Gbagbo and cyber-activities related to the trial.¹² Furthermore, as regards any health issues, the Prosecutor indicates that Mr Gbagbo is being treated at the ICC Detention Centre.¹³ In conclusion, she submits that if released, Mr Gbagbo could abscond to a territory out of the reach of the Court or could otherwise obstruct Court proceedings.¹⁴
8. The Legal Representative for Victims equally submits there have been no changed circumstances since the Tenth Decision and all conclusions of the Chamber in that

⁶ Submissions for the purpose of article 60(3) of the Statute pursuant to Decision ICC-02/11-01/15-770-Conf, ICC-02/11-01/15-792-Conf.

⁷ Soumissions de la défense portant sur les condition d'application des articles 60(3) et 58(1)(b), présentées à la suite de l'ordonnance rendue par la Chambre le 6 décembre 2016, ICC-02/11-01/15-793-Conf.

⁸ Prosecution's 11th submission for the purpose of article 60(3), ICC-02/11-01/15-794-Conf.

⁹ ICC-02/11-01/15-794-Conf, paras 1 and 11.

¹⁰ ICC-02/11-01/15-794-Conf, para.

¹¹ ICC-02/11-01/15-794-Conf, paras 12-14.

¹² ICC-02/11-01/15-794-Conf, paras 15-20.

¹³ ICC-02/11-01/15-794-Conf, paras 1 and 10.

¹⁴ ICC-02/11-01/15-794-Conf, para. 21.

decision are still valid today.¹⁵ In her view, detention of Mr Gbagbo needs to be maintained in order to ensure his appearance at trial and that he does not obstruct or endanger the proceedings.¹⁶ Furthermore, she submits that the ongoing trial is a factor in favour for maintaining detention, just as the confirmation of charges is a “changed circumstance” that increases the likelihood that an accused might abscond.¹⁷ The Legal Representative for Victims also contends that the start of the trial further galvanised the pro-Gbagbo activists and reinforced their determination to obtain Mr Gbagbo’s release (she refers to petition to release Mr Gbagbo as well as activities in social media).¹⁸ As regards his health conditions, the Legal Representative for Victims states that there are no changed circumstances that would have an impact on the regime of detention.¹⁹

9. The Defence of Mr Gbagbo submits that liberty is the general rule and detention the exemption, pursuant not only to the Statute, but also to internationally recognised human rights.²⁰ Referring to national legislation and international human rights treaties and case law, the Defence states that the risk of absconding justice should be objective and taking into consideration the particular circumstances of the case.²¹ Moreover, the Defence contends that the burden of proof in the context of the review of detention lies on the Prosecutor, which has to provide the elements justifying continued detention.²² The Defence submits that Mr Gbagbo has already been detained for almost six years and has pathologies that affect his physical and psychological well-being.²³ Moreover, given his age, detention has negative effects on his health.²⁴ The Defence argues that the network of Mr Gbagbo’s supporters does

¹⁵ ICC-02/11-01/15-792-Conf, paras 6-7.

¹⁶ ICC-02/11-01/15-792-Conf, para. 9.

¹⁷ ICC-02/11-01/15-792-Conf, para. 10.

¹⁸ ICC-02/11-01/15-792-Conf, paras 11-12.

¹⁹ ICC-02/11-01/15-792-Conf, para. 13.

²⁰ ICC-02/11-01/15-793-Conf, paras 2-9, 22-23, 25-26.

²¹ ICC-02/11-01/15-793-Conf, paras 10-14.

²² ICC-02/11-01/15-793-Conf, paras 15-21, 24, 28-33.

²³ ICC-02/11-01/15-793-Conf, para. 34.

²⁴ ICC-02/11-01/15-793-Conf, paras 35-36.

not have as an objective absconding trial.²⁵ In fact, the Defence argues that the petitions for Mr Gbagbo's liberation emanate from respectable personalities in accordance with human rights and reconciliation efforts and that these have never had criminal intentions of obstructing justice.²⁶ Additionally, the Defence submits that other criminal proceedings, including the trial against Simone Gbagbo, are taking place in Cote d'Ivoire without any incidents, despite these being public and including some of the same witnesses testifying in this case.²⁷ Moreover, the Defence states that the security situation in Cote d'Ivoire is more stable, with many exiled persons back in the country. It submits that any current instability is the sole result of former rebels' activities.²⁸ The Defence also submits that to date no funds belonging to Mr Gbagbo have been identified, which would allow him to abscond justice.²⁹ Accordingly, the Defence concludes that there is no concrete element allowing establishing that Mr Gbagbo could abscond justice if released.³⁰ It requests the Chamber to release Mr Gbagbo, with certain conditions. The Defence suggests some countries in which this release could be foreseeable.³¹

III. Analysis and Conclusions

10. The Chamber notes that once the trial hearing commences (*i.e.* after the opening statements), a Trial Chamber is not obliged to conduct any further automatic reviews on detention pursuant to Article 60(3) of the Statute. Notwithstanding, the accused person may apply for interim release at any time pending trial as provided for in Article 60(2) of the Statute. Accordingly, in light of the 6 December 2016 Decision and the Defence of Mr Gbagbo's request for interim release, the Chamber will analyse

²⁵ ICC-02/11-01/15-793-Conf, paras 37-38.

²⁶ ICC-02/11-01/15-793-Conf, paras 39-48.

²⁷ ICC-02/11-01/15-793-Conf, para. 49.

²⁸ ICC-02/11-01/15-793-Conf, paras 50-56.

²⁹ ICC-02/11-01/15-793-Conf, paras 57-59.

³⁰ ICC-02/11-01/15-793-Conf, paras 60-62.

³¹ ICC-02/11-01/15-793-Conf, paras 63-72.

whether: (a) there have been changed circumstances that would warrant a modification of its previous rulings on detention; and (b) whether interim release, as requested by the Defence of Mr Gbagbo, with or without conditions, is appropriate.

(a) Changed Circumstances

11. The Chamber notes that pursuant to Article 60(3) of the Statute, the Chamber must determine if there are changed circumstances vis-à-vis the last decision taken under Article 60(3), and if so, how they impact on the previous ruling under review (the Tenth Decision). The requirement of changed circumstances “imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary”.³² Change in circumstances must be demonstrated on a concrete basis,³³ considering all available information, not only the arguments of the detained person.³⁴
12. The Chamber also recalls its previous decisions in which it has established that it is not required to “entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions”.³⁵ The Chamber will thus not entertain arguments that have been raised previously,

³² *Prosecutor v. Bemba*, ICC-01/05-01/08-1019 OA4, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled “Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence”, 19 November 2010, paras 51-52 quoting *Prosecutor v. Bemba*, ICC-01/05-01/08-631 OA2, 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, para. 60.

³³ *Prosecutor v. Bemba*, Trial Chamber III, ICC-01/05-01/08-1565-Conf, Decision on Applications for Provisional Release, 27 June 2011, para. 58 citing *Prosecutor v. Bemba*, ICC-01/05-01/08-323 PT OA, 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, para. 55; see also *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA 7, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, 13 February 2007, para. 138.

³⁴ *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, ICC-01/04-01/10-428, Review of Detention and Decision on the ‘Third Defence request for interim release’, 16 September 2011, para. 36 citing *Prosecutor v. Bemba*, ICC-01/05-01/08-1019 (OA 4), Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled ‘Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence’, 19 November 2010, para. 52.

³⁵ Tenth Decision, ICC-02/11-01/15-328, para. 6.

including before the Appeals Chamber, and that have been dismissed by judges as irrelevant to the assessment of Mr Gbagbo's detention under Article 60(3) of the Statute. Accordingly, the Chamber shall not adjudicate the arguments as to the exceptional nature of detention or the general submissions arguing that the Prosecutor has failed to establish the ongoing existence of a pro-Gbagbo network.³⁶

13. The Chamber will now turn to review whether there have been changed circumstances that would warrant a modification of its previous rulings on detention, namely vis-à-vis "Mr Gbagbo's network of supporters" and the "need for Mr Gbagbo to be detained to ensure his appearance at trial and to ensure that he does not obstruct or endanger the proceedings".³⁷ Given the updated information provided by the parties in their submissions, as well as the information on the case record, the Chamber will determine whether the network is still operational and whether it could have the wherewithal to help Mr Gbagbo abscond or to obstruct the trial proceedings.³⁸

14. The Chamber recalls that the Appeals Chamber has found that while the existence of a political party that supports the detained person is a factor that is relevant to the determination of whether the continued detention appears necessary under Article 58(1)(b) of the Statute, there is no need for the Prosecutor to establish the criminality of Mr Gbagbo's network of supporters, but merely its ongoing existence, on the basis, *inter alia*, that such support could indeed facilitate absconding.³⁹

³⁶ Tenth Decision, ICC-02/11-01/15-328, para. 7.

³⁷ Tenth Decision, ICC-02/11-01/15-328, para. 15.

³⁸ Evidence that a person would actually utilize these means to abscond is not required. Rather, there must be concrete evidence establishing the possibility that a person has the means to abscond. *See, Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red OA, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 26 October 2012, para. 56; *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-283 OA, Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the 'Defence Request for Interim Release'", 14 July 2011, paras 25-26; *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 (OA 7), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté [sic] provisoire de Thomas Lubanga Dyilo", 13 February 2007, paras 136-137.

³⁹ Appeals Chamber Judgement on Article 60(2) Decision, ICC-02/11-01/11-278-Red, para. 59.

15. In the course of the trial proceedings, it has become apparent that Mr Gbagbo still enjoys the support of a large group of persons. On various occasions, court orders aimed at protecting witnesses at risk have been circumvented.⁴⁰ This ultimately led the Chamber to delay the transmission of hearings in response to what it determined was “the action of certain few individuals who surely do not represent the people of Côte d’Ivoire, but who have created a serious risk to the integrity of these proceedings and to the safety of the witnesses who come to testify before the Court simply performing their duty to tell us what they know”.⁴¹ In fact, the Chamber ultimately excluded one of these individuals (a purported member of this pro-Gbagbo network) from attending court hearings.⁴² Moreover, in its submissions, the Prosecutor has provided additional information which also provides more up-to-date information of the network’s activities in social media and other actions related to the trial of Mr Gbagbo.

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

⁴⁰ ICC-02/11-01/15-T-36-CONF-ENG ET, page 11, line 24 et seq. On that occasion the Chamber stated as follows: “[...] I want to address the public here in the courtroom, in the public gallery and all those who follow this proceedings or anyhow are interested in these proceedings outside the courtroom. The Chamber has been informed this morning about speculations in the social media as regard the identity of witnesses in this case whose identity is protected by order of the Chamber. This is of utmost concern to the Chamber and it is about these speculations and the connected security issues we have been discussing this morning. The Chamber strongly reminds the public, and when I refer to “the public”, I refer to those in the public gallery, I refer to those covering the trial in the media and I refer to those following the trial on the media, that disclosing identifying information of protected witnesses is forbidden. Witnesses, and I mean all witnesses, are here only to help the Chamber in its endeavour to find the truth and, therefore, they must be in a position to do so. [...] It must be clear to everyone that continuing speculations about the identity of protected witnesses does not only have no benefit but, even worse, it will compel the Chamber to order that large parts or even the entirety of the testimonies be conducted in private or closed session and, as such, withheld from the public. The Chamber cannot imagine that this scenario, which will become real if these speculations continue, is in the interest of justice and of the Ivorian people. And therefore it expects - not it wishes, it expects - that such speculations will immediately cease for now and the future and that, therefore, a resulting restrictive approach by the Chamber will not have to be the course taken.

⁴¹ ICC-02/11-01/15-T-52-CONF-ENG ET, page 91, line 22 et seq.

⁴² ICC-02/11-01/15-T-83-CONF-ENG ET, page 1, line 16 et seq.

detention may be warranted even without a high probability that the accused would actually abscond or obstruct the proceedings. The mere possibility that he or she might do so suffices.

17. An important element in this decision is the Chamber's evaluation of how likely it is that the accused would attempt to abscond or obstruct the proceedings. The Chamber has no specific evidence before it that Mr Gbagbo has any intention of absconding or obstructing the trial proceedings. However, it must take into consideration the extreme gravity of the charges against him as well as the fact that he denies any responsibility. Mr Gbagbo's age is also not decisive, in this regard. On the contrary, given the gravity of the crimes charged, any sentence may well imply that Mr Gbagbo will spend the rest of his life in prison. In the event of a conviction, he therefore has a clear incentive to abscond to avoid such a scenario.
18. Likewise, the Chamber has considered the submissions of the Defence of Mr Gbagbo, stating that circumstances have changed insofar as: (a) the pro-Gbagbo network includes respectable personalities; (b) criminal proceedings related to Simone Gbagbo have taken place publicly without any incidents; (c) the security situation in Cote d'Ivoire has improved; (d) exiled persons have returned to Cote d'Ivoire; and (e) the current instability is the result of activities of former pro-Ouattara rebels.
19. Apart from the first point, the Chamber considers that all these elements, while perhaps true, are not determinative to the current decision, as several scenarios can be envisaged in which Mr Gbagbo might attempt to abscond or obstruct the proceedings where these factors would not be relevant. In relation to the point about the respectability of some of Mr Gbagbo's supporters, this observation is not persuasive as the Defence is not claiming that all Mr Gbagbo's supporters fall into this category.

20. Having reviewed the submissions and all material before it, the Chamber is satisfied that the circumstances have not changed to such an extent as to warrant Mr Gbagbo's release.

(b) Request for Interim Release

21. Notwithstanding the above, the Chamber notes that Rule 119 of the Rules provides that a Chamber may still grant conditional release, even if the Article 58(1) conditions are satisfied, on the basis of specific and enforceable conditions, provided these are available and negate or sufficiently mitigate any risks identified.⁴³

22. Although the Chamber is not, in principle, opposed to conditionally releasing Mr Gbagbo, it cannot but conclude that the circumstances are not conducive to it. Indeed, as the trial is ongoing at the moment, Mr Gbagbo is required to be in The Hague to attend the hearings.⁴⁴ As far as the Chamber is aware, there is currently only one tentative proposal available for conditional release, but it is far from clear how this would work in practice. In particular, it is entirely unclear how Mr Gbagbo would still be able to attend his trial if released in another country. The Chamber notes, in this regard, that the Court does not have an obligation to make excessive expenditures in order to facilitate the conditional release of an accused. The Chamber is therefore of the view that there is currently no realistic proposal that

⁴³ *Prosecutor v. Bemba*, ICC-01/05-01/08-1626-Conf OA 7, 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, paras 47, 55, 82; *Prosecutor v. Bemba*, ICC-01/05-01/08-631 (OA 2), 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, para. 105. Despite prior statements of the Appeals Chamber to the contrary, Trial Chamber III has interpreted the Appeals Chamber's most recent finding on this matter to mean that it has discretion to consider conditional release, even when a state is willing and able to enforce conditions upon release. *Prosecutor v. Bemba*, Trial Chamber III, ICC-01/05-01/08-2022-Conf, Decision on the «Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo», 19 December 2011, paras 17-19, 22-23 referring to *Prosecutor v. Bemba*, ICC-01/05-01/08-1937-Conf OA 9, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled "Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011", 23 November 2011, para. 35.

⁴⁴ Article 63(1) of the Statute.

would permit the conditional release of Mr Gbagbo. Accordingly, the Chamber shall not consider the issue any further at this stage.

FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, JUDGE TARFUSSER DISSENTING, HEREBY

DECIDES that Mr Gbagbo shall remain in detention.

Judge Tarfusser appends a dissenting opinion.

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



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuccion



Judge Geoffrey Henderson

Dated 10 March 2017

At The Hague, The Netherlands