

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/11-01/15
Date: 25 September 2017

TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccia
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 redacted version of the
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
Gbagbo 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 58(1)(b), 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 Gbagbo Defence of Mr Gbagbo (“Gbagbo Defence”) filed a request seeking a Registry report.⁴
5. On 6 December 2016, the Chamber rejected the aforesaid request of the Gbagbo Defence and 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
6. On 10 March 2017, after having received observations from the Legal Representative for Victims (“LRV”),⁶ the Gbagbo Defence⁷ and the Office of the Prosecutor

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.

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 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.

(“Prosecution”),⁸ the Chamber, by majority, decided that Mr Gbagbo shall remain in detention (“Decision of 10 March 2017”).⁹

7. On 19 July 2017, the Appeals Chamber reversed the Decision of 10 March 2017 and directed the Trial Chamber to carry out a new review as to whether Mr Gbagbo should continue to be detained or should be released, with or without conditions (“Appeals Chamber Judgment”).¹⁰
8. On 20 July 2017, the Trial Chamber requested new submissions on the matter.¹¹
9. On 23 August 2017, the Gbagbo Defence,¹² the LRV¹³ and the Prosecution¹⁴ filed their observations.
10. On 4 September 2017, as instructed by the Chamber, the Registrar filed the “Transmission of the Medical Officer’s Report on the state of Mr Gbagbo’s health pursuant to Trial Chamber I’s order of 25 August 2017” (“Medical Report”).¹⁵
11. On 14 September 2017, the Prosecution submitted supplementary information which in its view is relevant for the present review.¹⁶

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

⁹ Decision on Mr Gbagbo’s Detention, ICC-02/11-01/15-846.

¹⁰ Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled “Decision on Mr Gbagbo’s Detention, ICC-02/11-01/15-992-Conf.

¹¹ Decision requesting new submissions for purposes of Article 60(3) of the Statute, ICC-02/11-01/15-993.

¹² Soumissions de la défense présentées à la suite de la «Decision requesting new submissions for purposes of Article 60(3) of the Statute» (ICC-02/11-01/15-993) du 20 juillet 2017, ICC-02/11-01/15-1008-Conf.

¹³ New Submissions for the purpose of article 60(3) of the Statute pursuant to Decision ICC-02/11-01/15-993, ICC-02/11-01/15-1011-Conf.

¹⁴ New submissions for the 11th review of the detention of Mr Gbagbo pursuant to article 60(3) of the Statute (notified on 24 August 2017), ICC-02/11-01/15-1012-Conf+Conf-Anxs.

¹⁵ ICC-02/11-01/15-1018-Conf-Exp + Conf-Exp-Anxs. Although the Medical Report was filed as confidential *ex parte*, the Chamber sees no reason to maintain this level of confidentiality. Accordingly, the Medical Report should be reclassified as confidential.

¹⁶ Prosecution’s Supplementary Information to its New Submissions on the 11th review of detention, 23 August 2017, ICC-02/11-01/15-1012-Conf, ICC-02/11-01/15-1024-Conf+Anxs.

II. Appeals Chamber Judgment

12. The Chamber will recapitulate on the conclusions of the Appeals Chamber Judgement, particularly to determine which of its findings contained in the Decision of 10 March 2017 require revision after the appellate review.
13. The Chamber notes that its findings as regards the ongoing existence of the risk factor pursuant to Article 58(1)(b) of the Statute, particularly the continuing existence of a pro-Gbagbo network, were confirmed by the Appeals Chamber.¹⁷ However, the Chamber observes that the Appeals Chamber indicated, for the purpose of future decisions, that the Chamber should be “more explicit in its reference to the material which it considered underpinned its decision”.¹⁸
14. Moreover, it is important to note that the Appeals Chamber established that the enquiry as to whether the conditions under Article 58(1) of the Statute are met “is not dependent only upon the new information provided by the parties, but is a review of the current circumstances as a whole which underpin detention”. The Appeals Chamber also stated that it is “the Trial Chamber’s obligation to look at those circumstances and be satisfied that continued detention is necessary”.¹⁹ It went further, indicating that “a Chamber cannot simply refer to findings in prior decisions without being satisfied that the evidence of information underpinning those decisions still supports the findings made at the time of the review”.²⁰
15. The Appeals Chamber equally confirmed the Trial Chamber’s finding that the gravity of the charges is an appropriate factor to consider in deciding whether or not the risks under Article 58(1)(b) of the Statute are established.²¹ The Appeals Chamber found no error in the the Trial Chamber’s reliance on the possible length of sentence

¹⁷ ICC-02/11-01/15-846, paras 12-20; ICC-02/11-01/15-992-Conf, paras 22-28 and 35-36.

¹⁸ ICC-02/11-01/15-992-Conf, paras 41 and 81.

¹⁹ ICC-02/11-01/15-992-Conf, para. 38.

²⁰ ICC-02/11-01/15-992-Conf, para. 39.

²¹ ICC-02/11-01/15-992-Conf, paras 66-67. *See also*, ICC-02/11-01/11-278-Conf, para. 54.

in case of conviction as a factor that may increase Mr Gbagbo's incentive to abscond.²²

16. The Chamber will now turn to those findings that were reversed by the Appeals Chamber and must be decided anew, namely: (a) age and (b) health of Mr Gbagbo, (c) duration of his detention and (d) acceptance of responsibility for the alleged crimes.
17. The Appeals Chamber provided the following guidelines: (a) age on its own is not *per se* a decisive factor,²³ (b) age shall be analysed along with other factors (*i.e.* ill-health condition);²⁴ (c) ill-health may be a factor to consider when making the risk assessment pursuant to article 58(1)(b) of the Statute (*i.e.* ability to abscond or obstruct court proceedings);²⁵ (d) the duration of the detention is a factor to consider (not *per se*, but its reasonableness when balanced with other factors);²⁶ and the accused's non-acceptance of his responsibility is not a applicable factor.²⁷

III. Review of Mr Gbagbo's Detention

1. Need for continued detention pursuant to Article 58(1)(b) of the Statute

18. In accordance with Article 58(1)(b) (i) and (ii) of the Statute, the Chamber shall analyse whether detention continues to be necessary to ensure Mr Gbagbo's appearance at trial or to ensure he does not obstruct or endanger the proceedings.
19. The Chamber recalls that its findings as regards the existence of a network of supporters of Mr Gbagbo in its Decision of 10 March 2017 remain applicable for the purpose of the present decision. The Chamber recalls in particular the following

²² ICC-02/11-01/15-992-Conf, para. 54.

²³ ICC-02/11-01/15-992-Conf, para. 53.

²⁴ ICC-02/11-01/15-992-Conf, para. 54.

²⁵ ICC-02/11-01/15-992-Conf, para. 55.

²⁶ ICC-02/11-01/15-992-Conf, paras 75-79.

²⁷ ICC-02/11-01/15-992-Conf, para. 2.

conclusions of its Decision of 10 March 2017, which apply *mutatis mutandis* to the present review:

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. 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”. In fact, the Chamber ultimately excluded one of these individuals (a purported member of this pro-Gbagbo network) from attending court hearings. 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, 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 [footnotes omitted].²⁸

20. Moreover, the Chamber’s previous findings as regards the gravity of the crimes and eventual sentence also remain applicable for the purpose of the instant review. In this regard, the Chamber reiterates that given the gravity of the charges against him and eventual sentence if convicted, Mr Gbagbo has a clear incentive to abscond to avoid such a scenario.²⁹

²⁸ ICC-02/11-01/15-846.

²⁹ ICC-02/11-01/15-846, para. 17.

21. For the purpose of the present decision and pursuant to the Appeals Chamber's Judgment, the Chamber hereby provides more explicit reference to the material which it considered in its Decision of 10 March 2017, as well as any new information received thereafter in submissions for the purpose of detention, but also throughout the proceedings in general.
22. Firstly, as noted by the Prosecution, the network of supporters of Mr Gbagbo has in multiple occasions undertaken actions that have impacted the proceedings and testimony of witnesses during trial. Although it is not necessary to establish the criminality of the network, there is sufficient information to show not only the network's existence, but also the possibility that members of the network of supporters of Mr Gbagbo could break the law for him.³⁰
23. The Chamber notes that several witnesses enjoying court protective measures were subject to interference, [REDACTED],³¹ the Chamber was informed that an alleged Gbagbo supporter [REDACTED].³² As a result, the Chamber addressed the public (in the courtroom and in general). The Chamber stated in that occasion:
- "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. I hope that this was clear enough and I hope we can really continue as publicly as possible these proceedings".³³
24. [REDACTED],³⁴ [REDACTED]. As a result, the Chamber ordered [REDACTED]. The Chamber also repeated that if such interference with the case continued, it would be

³⁰ ICC-02/11-01/15-992-Conf, para. 43.

³¹ [REDACTED]

³² [REDACTED]

³³ [REDACTED]

³⁴ [REDACTED]

forced to take more robust measures to protect the safety and well-being of witnesses. [REDACTED].³⁵ [REDACTED].³⁶ [REDACTED].³⁷

25. As noted by the Prosecution, neither Mr Gbagbo nor his counsel denounced the aforesaid incidents. Although such action is not required for the purposes of the present review, the fact that the Gbagbo Defence has defended these actions in court and disregarded the Chamber's rulings on protective measures, may suggest that Mr Gbagbo, if released, could disrespect such future court orders. [REDACTED]:³⁸

[REDACTED]

26. [REDACTED].³⁹ [REDACTED].⁴⁰

27. In other information transmitted by the Prosecution, [REDACTED],⁴¹ [REDACTED].⁴² [REDACTED].⁴³ Such allegations strongly suggest the existence of a network that could assist Mr Gbagbo in interfering with these proceedings and absconding justice.⁴⁴

28. The Chamber notes that [REDACTED], and also the information provided by the Prosecution,⁴⁵ Mr Gbagbo is still a respected and well-connected leader, [REDACTED] including Ivorian politicians and leaders. In fact, as noted above, Mr Gbagbo, either personally or through his counsel, had the possibility to discourage those that attempted to [REDACTED]. However, as stated above, he chose not to and in fact his counsel defended their actions.

³⁵ [REDACTED]

³⁶ [REDACTED]

³⁷ [REDACTED]

³⁸ [REDACTED]

³⁹ ICC-02/11-01/15-1012-Conf, AnxB, pages 4 and 6.

⁴⁰ ICC-02/11-01/15-1012-Conf, AnxB, page 5.

⁴¹ ICC-02/11-01/15-1012-Conf, AnxD, page 6.

⁴² ICC-02/11-01/15-794-Conf, AnxA, page 3.[REDACTED]; See also, ICC-02/11-01/15-1024-Conf-Anx A and B.

⁴³ ICC-02/11-01/15-794-Conf, AnxA, page 2.

⁴⁴ *The Prosecutor v. Walter Osapiri Barasa*, "[Warrant of arrest for Walter Osapiri Barasa](#)", 27 September 2013, ICC-01/09-01/13-1-Red2; *The Prosecutor v. William Samoei Ruto and Joshua arap Sang*, "[Decision on Defence Applications for Judgments of Acquittal](#)", 5 April 2016, ICC-01/09-01/11-2027-Red.

⁴⁵ ICC-02/11-01/15-1012-Conf, Anx-A.

29. As noted by the Prosecution, within the context of the review of detention, and precisely after the Decision of 10 March 2017 and subsequently after the Appeals Chamber Judgment, Mr Gbagbo [REDACTED].⁴⁶ [REDACTED].⁴⁷
30. It is important to note that following the Appeals Chamber Judgment, several assurances have been made on behalf of those supporting Mr Gbagbo stating that he will soon return to Cote d'Ivoire to actively participate in political life and potentially assume political power again. [REDACTED].⁴⁸ [REDACTED].⁴⁹ [REDACTED].⁵⁰
31. Mr Gbagbo has allegedly stated to his supporters that he is a hostage at the Court [REDACTED].⁵¹ [REDACTED].⁵² [REDACTED].
32. Accordingly, there is persuasive information to suggest that if released, Mr Gbagbo and his network of supporters could possibly make all efforts to bring him back to Cote d'Ivoire and thereafter avoid justice. For all the reasons above and detailed information provided to the Chamber and appearing in the record of this case, the detention of Mr Gbagbo continues to be necessary to ensure his continuous appearance at trial and to ensure that Mr Gbagbo or those acting in his support, do not obstruct or endanger the present trial proceedings.

2. Age and Health

33. As regards age and health, the Appeals Chamber provided the following guidelines: (a) age on its own is not *per se* a decisive factor,⁵³ (b) age shall be analysed along with other factors (*i.e.* ill-health condition);⁵⁴ and (c) ill-health may be a factor to consider when making the risk assessment pursuant to Article 58(1)(b) of the Statute (*i.e.*

⁴⁶ ICC-02/11-01/15-1012-Conf, Anx-A, pages 6-7.

⁴⁷ ICC-02/11-01/15-1012-Conf, Anx-A, page 5.

⁴⁸ ICC-02/11-01/15-1012-Conf, AnxC, page 3.

⁴⁹ ICC-02/11-01/15-1012-Conf, AnxD, pages 3 and 4.

⁵⁰ ICC-02/11-01/15-1012-Conf, AnxD, page 7.

⁵¹ ICC-02/11-01/15-1012-Conf, AnxD, page 4.

⁵² ICC-02/11-01/15-1012-Conf, AnxD, page 8.

⁵³ ICC-02/11-01/15-992-Conf, para. 53.

⁵⁴ ICC-02/11-01/15-992-Conf, para. 54.

ability to abscond)⁵⁵ and as regards the duration of the detention (its reasonableness).⁵⁶

34. Accordingly, as noted by the LRV, although age is a factor that may potentially mitigate any possibility to abscond, said factor cannot overcome all other relevant factors. Age cannot be taken on its own.⁵⁷

35. The Chamber recalls that on 27 November 2015 it issued the “Decision on the fitness of Laurent Gbagbo to stand trial” and determined that Mr Gbagbo was fit to stand trial and to attend trial proceedings.⁵⁸ In light of this decision the Chamber found that the accused was physically and mentally able to attend and follow the trial proceedings. The experts appointed by the Chamber concluded that Mr Gbagbo's state of health had significantly improved at the time.⁵⁹ Two of these appointed experts reported that the ongoing medical care provided to Mr Gbagbo was “perfectly adapted to his condition”, “satisfactory”, and, subject to proper monitoring, “appropriate”.⁶⁰ The Chamber decided, in light of the recommendations of the appointed experts, to adopt certain measures to accommodate Mr Gbagbo's needs during the court sessions.⁶¹

36. The Chamber notes that in its submission, the Gbagbo Defence portrays [REDACTED].⁶²

37. However, according to the Medical Report, [REDACTED].⁶³ [REDACTED]⁶⁴ [REDACTED].⁶⁵ Importantly, the Medical Report confirms the health of Mr Gbagbo has not really changed and has indeed improved.⁶⁶

⁵⁵ ICC-02/11-01/15-992-Conf, para. 55.

⁵⁶ ICC-02/11-01/15-992-Conf, paras 78-79.

⁵⁷ See also, *Gulyayeva v. Russia*, “[Judgment](#)”, 1 April 2010, application no. 67413/01, paras. 165, 190. In the context of early release: *Papon v. France (No. 1)*, “[Decision](#)”, 7 June 2001, application no. 64666/01.

⁵⁸ ICC-02/11-01/15-349.

⁵⁹ ICC-02/11-01/15-349, para.38.

⁶⁰ ICC-02/11-01/15-349, para.46.

⁶¹ ICC-02/11-01/15-349, paras 45 and 46.

⁶² ICC-02/11-01/15-1008-Conf, para. 52.

38. Hence, the Chamber is assured that the Detention Centre provides adequate medical treatment and all requirements compatible with human dignity.
39. As regards age, the Chamber recalls that age by itself is not incompatible with the pre-trial detention. The Rome Statute does not address the issue of chronological age of a detained person nor does it refer to age for the purposes of sentencing. Moreover, the Chamber notes that there is no universal standard of what is considered “old” or the factors that need to be evaluated to consider a person (in this case a detainee) as an “elderly person”.⁶⁷ The Chamber understands that the health and age of Mr Gbagbo are reasonable concerns of the Gbagbo Defence. The Chamber also observes that for the purpose of the ICC, the Medical Report [REDACTED]. However, far from placing him in a situation in which detention is not possible or appropriate,⁶⁸ the Detention Centre has catered many services individually and specifically for Mr Gbagbo, [REDACTED].⁶⁹

⁶³ If the requisite medical assistance is provided to the accused, he is detained under conditions compatible with human dignity, and the manner and method of execution of the measure do not subject him to “distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention”, detention would not be incompatible with the ECHR. *See, Kudla v. Poland*, “[Judgment](#)”, 26 October 2000, application no 30210/96, para. 94; *Güveç v. Turkey*, “[Judgment](#)”, 20 January 2009, application no. 70337/01, para 96; *Mouisel v. France*, “[Judgment](#)”, 14 November 2002, application no. 67263/01, paras. 39-40; *Papon v. France (No. 1)*, “[Decision](#)”, 7 June 2001, application no. 64666/01; Manfred Nowak and Anne Charbord, ‘Art 4 – Prohibition of Torture’ in Steve Peers et al. (eds), *The EU Charter of Fundamental Rights* (Hart Publishing: Oxford and Portland, Oregon, 2014), 85.

⁶⁴ ICC-02/11-01/15-1018-Conf-Exp-AnxI, page 2.

⁶⁵ ICC-02/11-01/15-1018-Conf-Exp-AnxI, pages 2-3.

⁶⁶ ICC-02/11-01/15-1018-Conf-Exp-AnxI, page 2. The Chamber notes that the Medical Report thus rebuts the following submission of the Gbagbo Defence : “*Aujourd’hui, Laurent Gbagbo est âgé de 72 ans, ce qui en fait une personne fragile soumise à des risques élevés dans le milieu carcéral. Les effets de la prison sont en effet démultipliés chez une personne âgée.*” ICC-02/11-01/15-1008-Conf, para. 23.

⁶⁷ For example, in the United States of America, “elderly inmates” are defined by Florida Statute 944.02 as “prisoners age 50 or older in a state correctional institution or facility operated by the Department of Corrections”. In general the American Federal Bureau of Prisons (BOP) accepts a 50-year- old as an elderly inmate. *See, The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*. Office of the Inspector General, U.S. Department of Justice, Revised February 2016, page 1. Available at: <https://oig.justice.gov/reports/2015/e1505.pdf>.

⁶⁸ A Human Rights Watch Report indicates the following: “Life in prison can challenge anyone, but it can be particularly hard for people whose bodies and minds are being whittled away by age. Prisons in the United States contain an ever growing number of aging men and women who cannot readily climb stairs, haul themselves to the top bunk, or walk long distances to meals or the pill line; whose old bones suffer from thin mattresses and winter’s cold; who need wheelchairs, walkers, canes, portable oxygen, and hearing aids; who cannot get dressed, go to the bathroom, or bathe without help; and who are incontinent, forgetful, suffering chronic illnesses, extremely ill, and dying.” *See, Human Rights Watch*. 2012, Old behind bars, The Aging Prison Population in the

40. In relation to the compatibility of old age and imprisonment, the European Court of Human Rights has decided as follows:

In the instant case the applicant relies essentially on his extreme old age, combined with his state of health. The Court notes that advanced age is not a bar to pre-trial detention or a prison sentence in any of the Council of Europe's member States. However, age in conjunction with other factors, such as state of health, may be taken into account either when sentence is passed or while the sentence is being served (for instance when a sentence is suspended or imprisonment is replaced by house arrest). While none of the provisions of the Convention expressly prohibits imprisonment beyond a certain age, the Court has already had occasion to note that, under certain circumstances, the detention of an elderly person over a lengthy period might raise an issue under Article 3. Nonetheless, regard is to be had to the particular circumstances of each specific case (see *Priebke v. Italy* (dec.), no. 48799/99, 5 April 2001, unreported, *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, 29 May 2001, unreported, and also, *mutatis mutandis*, *V. v. the United Kingdom* [GC], no. 24888/94, §§ 97-101, ECHR 1999-IX). The Court has examined all the documentary evidence submitted by the parties. From these it emerges that, although the applicant is over 90 and has health problems which restrict his freedom of movement (in particular, heart problems as he has had a triple heart bypass operation and has had a pacemaker fitted), Dr Sicard describes his overall condition as "good" and finds that "he is perfectly aware and lucid" and shows no signs of dependence. Although the applicant objects to certain aspects of the medical treatment he is undergoing, the Court notes that he is under regular medical supervision and receives treatment both from the medical and paramedical staff in the prison and through hospital consultations and periods spent in hospital. The Court has also examined the conditions in which the applicant is being held. While it is certain that he is not enjoying the same quality of life as he would if he were still at liberty, the Court notes that the national authorities have made as much allowance as possible for his state of health and his age.⁷⁰

41. [REDACTED].⁷¹ [REDACTED].⁷² This is not only the expert opinion contained in the Medical Report, but also of Mr Gbagbo, who as noted above, has allegedly informed his supporters in Cote d'Ivoire that he is fit to run for presidential elections in 2020.

United States, page 4. Available at: <https://www.hrw.org/report/2012/01/27/old-behind-bars/aging-prison-population-united-states>.

⁶⁹ ICC-02/11-01/15-1018-Conf-Exp-AnxI, pages 3-4.

⁷⁰ ECtHR, *Papon v. France (No. 1)*, "Decision", 7 June 2001, application no. 64666/01.

⁷¹ ICC-02/11-01/15-1018-Conf-Exp-AnxI, page 4. The Medical Report notes that although he has been offered a walking device he has refused it and his bone scan (DEXA=Dual Energy X-ray Absorptiometry), performed in June 2017, shows a normal to above average bone density and hence no extra risk of fracture.

⁷² ICC-02/11-01/15-1018-Conf-Exp-AnxI, page 2.

42. In light of the above, there is no evidence that the conditions of the detention of Mr Gbagbo are incompatible with his age and health [REDACTED].
43. Bearing in mind Mr Gbagbo's current health condition and the quality of the medical care available at the Detention Centre⁷³ the Chamber considers that the detention of Mr Gbagbo is reasonable and appropriate.
44. However, as noted by the Appeals Chamber, the Trial Chamber must now analyse whether the age and medical condition of Mr Gbagbo is such that it would prevent Mr Gbagbo from absconding or obstructing court proceedings such that those risks were no longer present.⁷⁴
45. As noted above, nothing before this Chamber, including the Medical Report, allows the Chamber to conclude that given his present state of health, Mr Gbagbo would be unable to abscond or obstruct court proceedings. [REDACTED].⁷⁵ [REDACTED],⁷⁶ [REDACTED].
46. Accordingly, in the case at hand, and given the up-to-date health condition of Mr Gbagbo, his age and current health are not decisive factors that in any way decrease the risks pursuant to Article 58(1)(b) of the Statute.
47. Up until now, and because he is in detention, the Chamber has been able to confirm Mr Gbagbo's state of health based on the objective and impartial medical expertise of the Medical Officer of the Detention Centre. If released, however, the Chamber could be impaired from ascertaining Mr Gbagbo's state of health. The Chamber can thus not discard that Mr Gbagbo's health could be used in the future as a means to avoid his due attendance to trial.

⁷³ ECtHR, *Affaire Sakkopoulos c. Grèce*, "[Arrêt](#)", 15 janvier 2004, requête n. 61828/00, para. 39; *Affaire Farbtuhs c. Lettonie*, "[Arrêt](#)", 2 décembre 2004, requête n. 4672/02, para. 53.

⁷⁴ ICC-02/11-01/15-992-Conf, paras. 54-55.

⁷⁵ [REDACTED] ICC-02/11-01/15-1008-Conf, para. 56.

⁷⁶ ICC-02/11-01/15-1012-Conf, AnxD, page 6.

3. Length of Detention

48. Pursuant to the Appeals Chamber Judgment, the Chamber will now analyse the length of detention together with other factors, in order to determine whether it continues to be reasonable, particularly vis-à-vis: (i) the aforesaid determinations on risk factors pursuant to Article 58(1)(b) of the Statute; (ii) factors that may have delayed proceedings; and (iii) the circumstances of the case as a whole (factual and case specific).⁷⁷

49. At the outset, it is important to point out that the Appeals Chamber determined that the lapse of time on its own cannot be considered as a changed circumstance under Article 60(3) of the Statute.⁷⁸ Although Mr Gbagbo, as any accused person has the right to trial within a reasonable time, this right needs to be assessed on a case by case basis.⁷⁹

50. In relation to the duration of detention and the nature of the deprivation of liberty, the jurisprudence of the Inter-American Court of Human Rights can be of guidance, as it has established as follows:

In brief, it is not sufficient that every reason for deprivation or restriction of the right to liberty is established by law; this law and its application must respect the requirements listed below, to ensure that this measure is not arbitrary: (i) that the purpose of the measures that deprive or restrict liberty is compatible with the Convention. It is worth indicating that the Court has recognized that ensuring that the accused does not prevent the proceedings from being conducted or evade the judicial system is a legitimate purpose; (ii) that the measures adopted are appropriate to achieve the purpose sought; (iii) that they are necessary, in the sense that they are absolutely essential to achieve the purpose sought and that, among all possible measures, there is no less burdensome one in relation to the right involved, that would be as suitable to achieve the proposed objective. Hence, the Court has indicated that the right to personal liberty supposes that any limitation of this right must be exceptional, and (iv) that the measures are strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from this

⁷⁷ ICC-02/11-01/15-992-Conf, paras 75-76

⁷⁸ ICC-02/11-01/15-992-Conf, para. 75.

⁷⁹ ECtHR, *Gábor Nagy v. Hungary*, “[Judgment](#)”, 11 February 2014, application no. 33529/11, para. 21; *Rudnickenko v. Ukraine*, “[Judgment](#)”, 11 July 2013, application no. 2775/07, para. 78.

restriction and the achievement of the purpose sought. Any restriction of liberty that is not based on a justification that will allow an assessment of whether it is adapted to the conditions set out above will be arbitrary and will thus violate Article 7(3) of the [American] Convention.⁸⁰

51. Regarding the length of detention, the European Court has indicated:

[...] the persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty. Where such grounds are “relevant” and “sufficient”, the Court must also ascertain whether the competent national authorities displayed “special diligence” in the conduct of the proceedings.”⁸¹

52. In the case at hand, and contrary to the submissions of the Gbagbo Defence, the duration of the judicial proceedings cannot be attributed solely to the Prosecution or to lack of diligence of the judicial authorities. Throughout this case there have been many factors that have affected the expeditiousness of proceedings, which the Chamber deems necessary to recapitulate upon for the purpose of the present review.

53. As noted above, Mr Laurent Gbagbo was transferred to the Court on 30 November 2011 and made his first appearance before the Pre-Trial Chamber I on 5 December 2011.⁸² The following procedural events in the pre-trial phase had an effect on the length of the proceedings, namely:

- a. Although the confirmation of charges hearing was originally scheduled for 18 June 2012,⁸³ on 5 June 2012 the Gbagbo Defence requested a postponement of the confirmation of charges hearing arguing that Mr

⁸⁰ IACtHR, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, “[Judgment](#)”, 21 November 2007, Series C, no. 170, para. 93.

⁸¹ ECtHR, *Letellier v. France*, “[Judgment](#)”, 26 June 1991, application no. 12369/86, para. 35. See also *Muller v. France*, “[Judgment](#)”, 17 March 1997, application no. 21802/93, para. 35; *Kuc v. Slovakia*, “[Judgment](#)”, 25 July 2017, application no. 37498/14, para. 45; *Labita v. Italy*, “[Judgment](#)”, 6 April 2000, application no. 26772/95, para. 153.

⁸² ICC-02/11-01/11-T-1-ENG.

⁸³ ICC-02/11-01/11-T-1-ENG, pages 3-8.

Gbagbo was unfit to stand trial.⁸⁴ Accordingly, on 26 June 2012, the Single Judge appointed three experts to conduct an examination of Mr Gbagbo.⁸⁵ Upon receipt of the expert reports, on 2 November 2012, the Chamber determined that Mr Gbagbo was fit to stand trial.⁸⁶

- b. On 3 June 2013, the Chamber issued, by majority, the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”.⁸⁷ On 31 July 2013, the majority of the Chamber granted the Gbagbo Defence and the Prosecution’s requests for leave to appeal the aforesaid decision.⁸⁸ The Appeals Chamber dismissed the appeal on 16 December 2013.⁸⁹
- c. On 12 June 2014, Pre-Trial Chamber I, by majority, issued the “Decision on the confirmation of charges against Laurent Gbagbo.” On 29 July 2014, the Gbagbo Defence filed a request for leave to appeal the decision confirming the charges,⁹⁰ which the Pre-Trial Chamber rejected on 11 September 2014.⁹¹

54. On 17 September 2014, the Presidency referred the case file to this Trial Chamber.⁹²

Also in this phase of the proceedings several procedural events have had an effect on the length of the proceedings:

⁸⁴ ICC-02/11-01/11-140-Conf, paras 38-60. Public redacted version at ICC-02/11-01/11-140-Red2.

⁸⁵ ICC-02-11/01-11-164-Conf (translated to ICC-02/11-01/11-164-Conf-tEng).

⁸⁶ Decision on the fitness of Laurent Gbagbo to take part in the proceedings before the Court”, 2 November 2012, ICC-02/11-01/11-286-Conf, para. 101, p. 36. Public redacted version at ICC-02/1101/11-286-Red.

⁸⁷ ICC-02/11-01/11-432.

⁸⁸ “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges”, 31 July 2013, ICC-02/11-01/11-464.

⁸⁹ Appeals Chamber, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of pursuant to article 61(7)(c)(i) of the Rome Statute’”, 16 December 2013, ICC-02/11-01/11-572.

⁹⁰ ICC-02/11-01/11-676-Conf. Public redacted version at ICC-02/11-01/11-676-Red.

⁹¹ “Decision on the Defence request for leave to appeal the ‘Decision on the Confirmation of Charges against Laurent Gbagbo’”, 11 September 2014, ICC-02/11-01/11-680.

⁹² Presidency, Decision re-constituting Trial Chamber I and referring to it the case of The Prosecutor v. Laurent Gbagbo, 17 September 2014, ICC-01/11-01/11-682.

- a. Having considered the submissions of the parties, on 17 November 2014 the Chamber set the date for the commencement of the trial for 7 July 2015.⁹³
- b. On 20 December 2014, the Presidency referred the case of Mr Blé Goudé to the Chamber.⁹⁴
- c. On 11 March 2015, the Chamber issued the "Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters."⁹⁵ Upon the request of the parties, including the Gbagbo Defence,⁹⁶ the Chamber decided to vacate the commencement date of trial and called for status conference to decide, among other issues, the new trial date.⁹⁷
- d. On 7 May 2015, and considering the parties submissions, the Chamber set the commencement date for trial, ordering that opening statements start on 10 November 2015.⁹⁸
- e. On 19 June 2015, the Prosecution filed a motion requesting that the Chamber order a medical and psychiatric examination of Mr Gbagbo, pursuant to Rule 135 of the Rules, "to confirm that [he] is fit to attend the trial proceedings".⁹⁹ Consequently, on 30 September 2015, the

⁹³ Order setting the commencement date for the trial and the time limit for disclosure, 17 November 2014, ICC-02/11-01/11-723

⁹⁴ Corrigendum to the "Decision referring the case of *The Prosecutor v. Charles Blé Goudé* to Trial Chamber I", ICC-02/11-02/11-193, 20 December 2014 (registered on 22 December 2014), 20 December 2014, ICC-02/1102/11-193-Corr.

⁹⁵ ICC-02/11-01/11-810

⁹⁶ ICC-02/11-01/11-810, para. 22.

⁹⁷ ICC-02/11-01/11-810, para. 74.

⁹⁸ ICC-02/11-01/15-58

⁹⁹ Prosecution's request for the medical examination of Laurent Gbagbo, 19 June 2015, ICC-02/11-01/15-94-Conf-Exp. A confidential redacted version was filed on 29 October 2015, (ICC-02/11-01/15-94-Conf-Red).

Chamber issued an 'Order to conduct an examination of Mr Gbagbo under Rule 135 of the Rules'.¹⁰⁰

- f. On 28 October 2015, upon a request of the Gbagbo Defence, the Chamber rescheduled the opening statements to 28 January 2016.¹⁰¹
- g. On 27 November 2015, the Chamber issued the "Decision on the fitness of Laurent Gbagbo to stand trial". It determined that Mr Gbagbo was fit to stand trial and to attend trial proceedings.¹⁰² Despite the medical experts considering that the standard sitting schedule was adequate for Mr Gbagbo, as requested by the Gbagbo Defence, the Chamber authorised certain changes to the standard trial schedule to accommodate Mr Gbagbo.
- h. The trial commenced on 28 January 2016.
- i. The Prosecution is expected to conclude with the presentation of evidence on 8 December 2017.¹⁰³

55. As noted above, the trial commenced on 28 January 2016. Since then, the Chamber has exercised particular diligence so that Mr Gbagbo and Mr Blé Goudé are tried in an expeditious manner, exercising judicial control of the proceedings, avoiding unnecessary delays in trial, whilst guaranteeing the rights of the accused.¹⁰⁴

56. The reasonableness of the detention period has to be determined on a case by case basis, taking into consideration, *inter alia*, the level of complexity of the case, the

¹⁰⁰ Order to conduct an examination of Mr Gbagbo under Rule 135 of the Rules ('Order appointing three experts'), 30 September 2015, ICC-02/11-01/15-253-Conf.

¹⁰¹ ICC-02/11-01/15-322.

¹⁰² ICC-02/11-01/15-349

¹⁰³ Decision on further amended schedule of hearings and order of appearance of witnesses, ICC-02/11-01/15-1013-Conf-Anx.

¹⁰⁴ Decision on the schedule of hearings after the summer recess, the order and manner of appearance of all witnesses, 7 June 2017, ICC-02/11-01/15-952; Decision on further amended schedule of hearings and order of appearance of witnesses, 29 August 2017, ICC-02/11-01/15-1013+Conf-Anx.

gravity and the nature of the crimes charged, the number of accused, and the volume of the evidence.¹⁰⁵

57. This is a case against two accused persons for four counts of crimes against humanity. The Prosecution's presentation of evidence consists of 84 witnesses testifying *viva voce* or pursuant to Rule 68(3) of the Rules, 15 witnesses whose statements were submitted pursuant to Rule 68(2)(b) of the Rules, and 9 witnesses whose documents have been submitted pursuant to paragraph 43 of the Directives on the Conduct of Proceedings.¹⁰⁶ The Prosecution has submitted thus far 5704 items of evidence (including documentary and audio-visual material). Moreover, 727 victims admitted to participate in the trial proceedings.¹⁰⁷ The Prosecution commenced its presentation of evidence on 3 February 2016, and as noted above, it intends to conclude with the presentation of its case by the end of this year.

58. Accordingly, the length of the detention cannot be considered as arbitrary or unreasonable due to the particular circumstances of the case. Contrary to what the Gbagbo Defence suggests, Mr Gbagbo's continued detention does not undermine the principle of presumption of innocence. To the contrary, as noted by the Gbagbo Defence in other instances,¹⁰⁸ the right of the defence to have adequate time to

¹⁰⁵ Triffterer and Ambos, *The Rome Statute of the International Criminal Court, A Commentary (Third Edition)*, 2016, *Article 60*, page 1482 and footnotes 55-56. See also *Suárez-Rosero v. Ecuador*, "[Judgment](#)", 12 November 1997, Series C 35, paras. 70, 72-74; *Bayarri v. Argentina*, "[Judgment](#)", 30 October 2008, Series C 187, para. 107; ¹⁰⁵ ICTR, Trial Chamber II, *Prosecutor v. Bizimungu*, "[Decision on Bizimungu's Motion for Provisional release pursuant to rule 65 of the Rules](#)", 4 November 2002, ICTR-99-50-T, paras. 30-32; ICTR, Trial Chamber II, *Prosecutor v. Kanyabashi*, "[Decision on the Defence Motion for the Provisional release of the Accused](#)", 21 February 2001, ICTR-96-15-T, paras. 8,9, 12; ICTR, Trial Chamber III, *Prosecutor v. Ndirumpatse et al.*, "[Decision on the motion by Ndirumpatse's Defence to find the accused's detention unlawful or, in the alternative, to order his provisional release](#)", 18 August 2003, ICTR-98-44-I, para. 25; ICTR, Trial Chamber II, *Prosecutor v. Bicamumpaka*, "[Decision on the Defence's Motion for provisional release pursuant to Rule 65 of the Rules](#)", 25 July 2001, ICTR-99-50-T, paras. 15-19; ICTY, Trial Chamber II, *Prosecutor v. Darko Mr a.*, "[Decision on Darko Mr a's request for provisional release](#)", 15 April 2002, IT-02-59-PT, para. 42.

¹⁰⁶ Decision adopting amended and supplemented directions on the conduct of the proceedings, 4 May 2016, ICC-02/11-01/15-498 + Anx.

¹⁰⁷ Decision on victim participation, 6 March 2015, ICC-02/11-01/11-800; Decision on victims' participation status, 7 January 2016, ICC-02/11-01/15-379.

¹⁰⁸ Observations de la Défense sur la « Defence Request for an extension of time for its response to the "Prosecution's application for the introduction of video evidence under paragraphs 43-44 of the directions on the conduct of the proceedings and notice that it will not call Witness P-0541 to testify"» (ICC-02/1101/15-1000), 7 August 2017, ICC-02/11-01/15-1001-Conf. In its submission, the Gbagbo Defence submits that it would require

prepare its defence is paramount given the complexity of the charges and the unprecedented volume of evidence submitted in this case.

59. The Gbagbo Defence argument that the prolonged detention of Mr Gbagbo is contrary to the principle of presumption of innocence is thus unwarranted.¹⁰⁹ Although the Chamber concurs with the Gbagbo Defence that the general principle is that the pre-trial detention should be the exception and not the rule, this is not an absolute principle that would render any pre-trial detention contrary to internationally recognised human rights. The right to the presumption of innocence cannot be in itself determinative in assessing whether provisional release should be granted. As noted above, pre-trial detention does not *per se* breach internationally recognised human rights or criminal law principles insofar it is justified on any of the grounds of Articles 58(1) and 60(2) of the Statute.¹¹⁰ As noted above, Mr Gbagbo's detention has been subject to careful judicial review throughout the pre-trial and trial proceedings and on every occasion his detention continued to be justified. The

at least 300 hours viewing and analysing the video evidence that the Prosecution seeks to submit in the record of this case. The Gbagbo Defence states that this cannot be done in the upcoming months and thus requests an extension of time limit until February 2018 to submit observations.

¹⁰⁹ ICC-02/11-01/15-1008-Conf, para. 10.

¹¹⁰ *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, "[Judgment on the appeal of Mr Aime Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled 'Decision on the Demande de mise en liberte proviso ire de Maitre Aime Kilolo Musamba'](#)", 11 July 2014, No. ICC-01/05-01/13-558, , paras. 67-68. See also, *Prosecutor v. Milutinovic et al.*, Decision on Joint Defence Motion for Provisional Release during Winter Recess, Case No. IT-05-87-T, ICTY Trial Chamber III, 5 December 2006, paras. 8 and 13. As regards the presumption of innocence, the Chamber refers as guidance to the following precedent from the International Criminal Tribunal for the Former Yugoslavia: [...] 8. Although indispensable to the conduct of trial and rendering of judgment, the presumption of innocence does not play a determinative role in deciding motions for provisional release. If it did, then no accused would ever be detained, as all are presumed innocent. As Rule 64 provides, however, "[u]pon being transferred to the seat of the Tribunal, [an] accused shall be detained." This is done not because the accused is presumed guilty of the crimes with which he or she is charged, but because the Tribunal, in order to conduct fair trials in the service of its mandate, must ensure that an accused will be present for trial and not seek to obstruct the proceedings by intimidating victims, witnesses, or others. Given that accused are not detained because they are presumed guilty, the presumption of innocence does not alone justify provisional release where the concerns underlying detention have not been dispelled. [...] 13. The Chamber interprets the Halilovic Trial Chamber's concerns to be that the provisional release of an accused was not appropriate where (1) there had been a significant quantum of evidence adduced and (2) there was still more evidence to be adduced that could be hindered by the accused's provisional release. This Chamber shares those concerns. In this trial, as previously stated, 85 witnesses have given evidence thus far, and dozens more are scheduled to give evidence in the future, 19 of whom have been granted protective measures by the Chamber because they are fearful for their or their families' security and sensitive to pressure or intimidation. Moreover, the Chamber currently is weighing additional requests for protective measures, and this further heightens the concerns of the Chamber. The Chamber is therefore not convinced, upon a balance of the probabilities, that the Accused, if provisionally released, will not pose a danger to any victim, witness, or other person.

duration of detention in itself is not a determinative factor. Although it is an aspect to consider, it must be balanced with other factors, including the aforesaid risks pursuant to Article 58(1)(b) of the Statute, as well as the accused's personal circumstances (*i.e.* age and health) and the particularities of the criminal case.

60. In light of the above, the Chamber considers that detention continues to be reasonable when all the aforesaid factors are considered.

4. Overall Assessment

61. Detention during trial proceedings is a precautionary measure which needs to meet the necessary requirements to restrict the right to personal liberty: if there are sufficient indicia to reasonably believe that the accused person is guilty and that such detention is strictly necessary to ensure that the accused will not impede the effective development of the investigations or evade justice.¹¹¹

62. The following finding of the Appeals Chamber has served as guidance for the present determination of the Chamber:

The duration of time in detention pending trial is factor that needs to be considered along with the risks that are being reviewed, in order to determine whether, all factors being considered, the continued detention 'stops being reasonable' and the individual accordingly needs to be released. Such determination requires balancing the Article 58(1) risks that were found to still exist against the duration of detention, taking into account relevant factors that may have delayed the proceedings and the circumstances of the case as a whole. The potential penalty for the offence charged may be a factor to take into account in assessing whether the time in detention is reasonable. It cannot be factor assessed in isolation, but would need to be assessed in light of all of the circumstances of the case. [Footnotes omitted]¹¹²

¹¹¹, IACtHR *Case of Palamara Iribarne v. Chile*, "[Judgment](#)", 22 November 2005, Series C, no. 135, para. 198.

¹¹² *Prosecutor v Jean-Pierre Bemba Gombo et al*, Decision Regarding Interim Release, 29 May 2015, ICC-01/05-01/13-969, para. 45

63. Detention is not maintained, as suggested by the Gbagbo Defence, simply because a hypothetical risk exists.¹¹³ In the case at hand, Mr Gbagbo's continued detention is necessary on the basis of demonstrable and clear risks. The Chamber is convinced in light of all the information received, and the record of this case that if Mr Gbagbo is released, with or without conditions, in the Netherlands or in any other State, there is a positive risk of flight and interference with the case.¹¹⁴
64. The fact that the accused knows the identity of witnesses and victims is a genuine risk, particularly since as noted above [REDACTED]. There is a real risk that if Mr Gbagbo is released his supporters may use all the resources to discontinue the proceedings, in exerting pressure or coercive actions on witnesses.
65. As noted by the Appeals Chamber, the gravity of the crime, the possible lengthy prison sentence, and the international contacts of the detained person may be used in assessing the risk of absconding.¹¹⁵ In this particular case, Mr Gbagbo as former President of Cote d'Ivoire, as someone who still has influence and authority within his political party, and in fact is considered by his supporters as a genuine candidate for the presidential elections of 2020, is most likely to have sufficient means and supporters to help him abscond justice, not only by physically hiding from justice, but also by taking political and legal actions in other jurisdictions that could impede the continuation of this trial.¹¹⁶
66. At this advanced stage of the trial proceedings the Chamber is under the obligation to ensure Mr Gbagbo's appearance in trial, and the proper administration of justice.

¹¹³ ICC-02/11-01/15-1008-Conf, para. 15.

¹¹⁴ See *Prosecutor v. Thomas Lubanga Dyilo, 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, No. ICC-01/04-01/06-824, para. 136.

¹¹⁵ ICC-02/11-01/15-992-Conf, paras. 41, 42, 43, 54, 66, and 67.

¹¹⁶ See paragraphs 26-32 above.

The Chamber notes for example, that [REDACTED] evidence could be highly influenced if Mr Gbagbo was to be released.¹¹⁷

67. The reasons that originated the warrant of arrest and detention of Mr Gbagbo have not disappeared: the material circumstances have not reduced the risks under Article 58(1)(b) of the Statute, and neither the length of the detention, the age, or the health, on their own or analysed together, are decisive factors to release the accused at this stage of the proceedings.

68. The continued detention of Mr Gbagbo is necessary and not unreasonable in light of the circumstances of the case and proportional in relation to the aim achieved.¹¹⁸

5. Conditional Release

69. The Gbagbo Defence submits that conditional release could be granted, [REDACTED]. The Gbagbo Defence also suggests that if conditional release is granted, Mr Gbagbo is willing to waive his right to attend trial, and refers to Rule 134 of the Rules. [REDACTED].

70. As noted above, Mr Gbagbo and his network of supporters contest the sheer nature and legality of the criminal proceedings against him and the Court's authority to bring charges against Mr Gbagbo, arrest him and maintain his detention. Accordingly, the Chamber considers it has no guarantees that Mr Gbagbo would be respectful to eventual court orders setting conditions on his release.

71. However, even if conditional release would be appropriate, the Gbagbo Defence has failed to provide the Chamber with concrete and solid conditions that would guarantee Mr Gbagbo's presence in trial if released.

¹¹⁷ [REDACTED].

¹¹⁸ ICTY, Trial Chamber II, *Prosecutor v. Darko Mr a*, "[Decision on Darko Mr a's request for provisional release](#)", 15 April 2002, IT-02-59-PT, para. 43. See also, IACtHR, *Barreto Leiva v. Venezuela*, "[Judgment](#)", 17 November 2009, Series C 206, para. 122; *Suárez-Rosero v. Ecuador*, "[Judgment](#)", 12 November 1997, Series C 35, para. 74 (the Court considered the period of detention unreasonable as it was not proportional to the potential sentence to be imposed upon the accused).

72. As noted above, although the Gbagbo Defence requests conditional release, it has not given any concrete and adequate proposal to the Chamber. While the Gbagbo Defence states that Mr Gbagbo would waive his right to attend trial, the Chamber recalls that his attendance is not only his right, but also his duty. Moreover, Rules 134*bis* and 134*ter* of the Rules allow the exceptional absence of the accused person, but in no way establish a rule. In fact, pursuant to Rule 134*ter* of the Rules, the accused's waiver of his right to attend trial is only one of the five cumulative requirements to apply this provision.

73. The Gbagbo Defence does not specify any of the following factors, without which the Chamber could not make a ruling on conditional release that would guarantee the expeditious and fair conduct of proceedings of this trial:

- a. Conditions that would guarantee Mr Gbagbo's regular presence in trial in a manner that would not affect the fairness and expeditious conduct of proceedings (including bearing of costs and logistics of such conditions);
- b. Bearing of costs and logistics to set out conditions that would guarantee that Mr Gbagbo does not interfere with the on-going proceedings (*i.e.* control of communications and filtering of visits suggested by the Gbagbo Defence);
- c. [REDACTED], housing, nutrition and care, transportation, security and safety of Mr Gbagbo at the location of eventual conditional release [REDACTED], including bearing of costs and logistics;
- d. Concrete application of Rule 134*bis*, particularly (i) logistics and bearing of costs of video-link connection between the location of conditional release [REDACTED] and The Hague, (ii) communication between the accused and his counsel pursuant to Article 67(1)(b)(d) and (e) of the

Statute; and (iii) specific part or parts of his trial in which this provision would apply, considering the subject matter of the specific hearings in question.

- e. Concrete application of Rule 134^{ter} of the Rules, particularly (i) logistics and bearing of costs of communication between the accused and his counsel pursuant to Article 67(1)(b)(d) and (e) of the Statute; (ii) exceptional circumstances to justify Mr Gbagbo's absence given his fitness to attend trial and present state of health; (iii) reasons why alternative measures would be inadequate; and (iv) ways in which Mr Gbagbo's rights will be fully ensure in his absence.

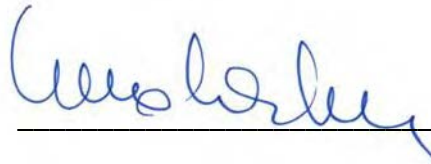
74. As noted above, at this moment in time and given the risks identified above detention continues to be the only measure that guarantees Mr Gbagbo's attendance in trial and thus is reasonable, appropriate and necessary.

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

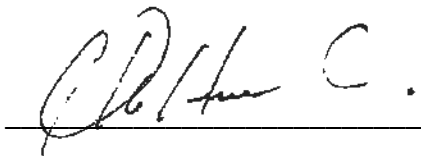
DECIDES that Mr Gbagbo shall remain in detention.

ORDERS the Registry to reclassify as “Confidential” the Medical Report (ICC-02/11-01/15-1018-Conf-Exp + Conf-Exp-Anxs).

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



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuca



Judge Geoffrey Henderson

Dated 25 September 2017

At The Hague, The Netherlands