Dissenting opinion of Judge Cuno Tarfusser

1. For the second time in a little more than six months, I find myself in the position to dissent from the Majority's Decision that Laurent Gbagbo "shall remain in detention". As it was the case for the decision issued on 10 March 2017, I do so in full awareness of the complexity of the balancing exercise required from the Chamber under the circumstances of the current trial. I also wish to highlight that I welcome both the Appeals Chamber's reversal of the 10 March 2017 Decision and the ensuing Majority's decision to broaden their approach so as to specifically address the issues of Laurent Gbagbo's age and health, and their impact on the risk of flight. Whilst indeed considering such factors, however, I believe that the Majority's conclusion as to the persisting existence of a risk of flight still falls short in at least three respects: first, in failing to adequately appreciate the exceptional nature of the measure consisting in depriving an individual of his or her personal liberty pending the determination of his or her guilt, and hence the need that any assessment of risks be made on the basis of strict criteria; second, in failing to adequately consider the amount of time already spent by Laurent Gbagbo in detention as a factor which, in light of all other relevant circumstances, might also have an impact on the assessment of the relevant risks; third, in making the submission of a detailed plan for conditional release an obligation, and hence a burden, for the defence, as opposed to something in respect of which the Chamber should be actively engaged once it has determined that total deprivation of liberty is no longer justified.

2. I acknowledge that the Majority's Decision implemented the Appeals Chamber's instruction to spell out in detail the elements leading it to establish that the risks entailed by the network supporting Laurent Gbagbo, as ascertained in the past, still exist. I also acknowledge the considerable amount of discretion which is inevitably entailed when assessing any kind of risk.

Nevertheless, I am not persuaded that the type of elements and facts on which the Majority bases its findings are solid and genuine enough so as to adequately support yet another finding affirming the persistent existence of such risk.

3. Back in March, I already highlighted the weakness of factors listed by both the Prosecutor and the LRV, and accepted by the Majority, in support of the alleged risks which would justify persisting detention: in particular, the insisted reference on the "network of supporters" on which Laurent Gbagbo can allegedly rely. I then noted that this "network" seemed essentially composed by individuals from time to time organising public gatherings in The Hague, some of them also attending the trial hearings and variously active on social media, and that I failed to see how this activity might substantiate the persisting risk that Mr Gbagbo would abscond if released *ad interim*. I also observed that one thing is to adopt a behaviour which might be disruptive of Court proceedings, or even to fail to comply with a Court's order on confidentiality; an entirely different thing would be to assist an accused for the purposes of evading justice. Whilst both behaviours may indeed be regarded as consisting in "breaking the law", I believe that they are too far apart in terms of seriousness for one to be considered as measure of the likelihood of the other; accordingly, substantive elements are required before the first can be linked to, or used as an indicia pointing at the existence of, the second. I am unable to find such substantive elements in the Majority's Decision.

4. Most of the facts adopted by the Majority in support of the persistent existence of a risk of flight do not go beyond material which had already been referred to in the 10 March 2017 Decision; large excerpts of that decision are indeed reproduced *verbatim*. In my view, they still fail to adequately

substantiate the finding that an objective risk of flight exists. Moreover, most of these facts date back to the early stages of the trial[1], when a significant amount of uncertainty still existed as to whether and in which way this trial might have been affected by social and political circumstances in Ivory Coast, including by the role to be played by individuals to various extents supportive of Laurent Gbagbo. In those days it was certainly warranted not only to adopt a cautious approach, but also to err on the side of caution: hence the Chamber's initial decisions to grant in-court protective measures, in particular to the benefit of vulnerable witnesses and the implementation of measures variously limiting the publicity of the proceedings. Since then, however, the Chamber's unanimous assessment of the situation on the ground has significantly evolved, in particular in light of the security assessments provided by the professional analysts in the VWU both prior to the testimonies and as a consequence of the follow-up monitoring done in their wake. These analyses and this monitoring have permitted to realise that, to this day, the disruption to the proceedings caused by the "network of supporters" has been limited to a few instances where unpleasant comments, or even insults and veiled threats, have been uttered in some social media outlets. None of such utterances has ever materialised in a concrete risk to any of the affected witnesses, even less in concrete or specific harm. The result of this is that, in this trial, in-court protective measures have since long become the exception rather than the rule and that even vulnerable witnesses have been able to appear publicly before the Chamber and subsequently resume their lives.

5. The experience of this first year of trial is that the only form of interaction of the network with the trial has consisted in the expression of

[1] See Majority Decision, paras 19, 23-25, referring to statements made and measures taken in May, June and September 2016.

views; while some of these views may indeed sound unpalatable and inappropriate, I am not persuaded that they can, by themselves, adequately substantiate the finding that a risk of flight still exist and therefore justify that detention be protracted.

6. Neither am I persuaded that adequate substantiation of the risk could be provided by other elements referred to by the Majority[2]: in particular, the comments made by the Defence for Mr Gbagbo on some of these utterances as instances of the exercise of the right to freedom of speech and expression. Whether one may debate as to the accuracy of this characterisation, I consider it too stretched a conclusion to view them as possibly "suggest[ing] that Mr Gbagbo, if released, could disrespect such future court orders"[3]; especially so, when this conclusion is left undisturbed by the fact – likewise mentioned by the Majority - that, following the issuance of the Appeals Judgement, Laurent Gbagbo was also reported as having indeed discouraged his supporters from publicly expressing views on the ongoing testimonies[4].

7. I am also unable to follow the Majority in their findings that recent press reports on Laurent Gbagbo's alleged involvement in the current Ivorian political debate[5], or some third-party statements deploring his detention and predicting his imminent return[6], would further substantiate such risks. Laurent Gbagbo, presumed innocent, is certainly entitled to envisage his own future as a free person, as such capable of engaging in the political arena as he may wish, and no statements expressed by a third party can be considered "as an indication that if released, Mr Gbagbo would likely refuse to comply with

[2] I note that many of the Majority's findings are redacted from the current public version of the decision: however, since I consider redactions referring to elements already in the public domain unwarranted, I will make reference to those findings to the extent that this is necessary to my reasoning.
[3] Majority Decision, para. 25.
[4] Majority Decision, para. 29.
[5] Majority Decision, paras 30-31.
[6] Majority Decision, para. 30.

court directions"[7], or otherwise used to his detriment when debating of his release. I also note *en passant* that there seems to be a certain degree of contradiction in attributing to the same individual a desire of absconding from justice, on the one hand, and a political ambition, on the other. I am also not persuaded by the weight attributed by the Majority to the press coverage of recent disturbances in Ivory Coast, referred to by the Prosecutor and suggesting that "members of the network of supporters of Mr Gbagbo… have been implicated with alleged violence in Côte d'Ivoire"[8]. The Chamber has no direct, reliable information on any such events and, as I have already said in my first dissent, a court of law cannot take decisions, even less decisions affecting an accused's fundamental right to personal liberty, based on the *strepitus fori*.

8. The weakness of the elements used by the Majority in support of their finding as to the persisting existence of a flight risk appears to me all the more striking if considered in light of the Majority's persistent failure to give appropriate weight to the considerable amount of time already spent by Laurent Gbagbo in detention, in spite of the directions clearly given by the Appeals Chamber to this effect. The Appeals Chamber, whilst reiterating that the length of detention does not *per se* constitute a changed circumstance warranting release, also reiterated its jurisprudence to the effect that "the duration of time in detention pending trial is a factor that needs to be considered along with the risks being reviewed under article 60(3) of the Statute, in order to determine whether, all factors being considered, the continued detention 'stops being reasonable' and the individual needs to be released"[9]. In the words of the Appeals Chamber, "such a determination requires balancing the risks under article 58(1) of the Statute that were found

[7] Majority Decision, para. 31.
[8] Majority Decision, para. 27, footnote 42.
[9] ICC-02/11-01/15-992-Red, para. 76.

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"[10]; accordingly, it found that the Trial Chamber erred in its 10 March 2017 Decision also because it "should have considered the duration of time Mr Gbagbo has spent in detention alongside the risks being reviewed and it should have determined whether, all factors being considered, Mr Gbagbo's detention continues to be reasonable"[11]. This statement, which I submit should have featured as a "key finding" of the Appeals Chamber's Judgement, could not be more univocal in mandating the Trial Chamber to engage in a balancing exercise between the overall duration of the detention, on the one hand, and the objective nature of the risks, on the other.

9. I see no trace of this balancing act in the Majority's Decision, despite the statement that this particular finding by the Appeals Chamber "has served as guidance for the present determination of the Chamber"[12]; not if balancing means, as I believe it does, that the longer the detention, the stronger the risks must be. In the words of the ECHR, "for at least an initial period, the existence of reasonable suspicion may justify detention but there comes a time when this is no longer enough"; [13] otherwise stated, since the lapse of time progressively weakens *per se* the justification provided by the initial existence of grounds to believe that the person has committed the charged crimes, the approach taken *vis-à-vis* the assessment of the risks must become increasingly stricter as time passes for detention to remain justified.

10. I reiterate my belief that the duration of Laurent Gbagbo's detention has exceeded the threshold of reasonableness, even taking into account – as I am certainly willing to do – the need to preserve the flexibility prescribed by

[10] ICC-02/11-01/15-992-Red, ibidem.
[11] ICC-02/11-01/15-992-Red, para. 79.
[12] Majority Decision, para. 62.
[13] ECHR, Case of McKay v. the United Kingdom [GC], no. 543/03, 3 October 2006, para. 45.

the Statute and to raise such threshold in light of the seriousness of the crimes at stake. Flexibility, however, cannot be stretched as far as to virtually abolish any limit and Laurent Gbagbo's detention has indeed already exceeded - by some measure - the limits permitted by most legal systems, where crimes of particular complexity are also tried and proceedings with vast amounts of evidence are also held. I am personally unable to find any relief or comfort in the fact that this duration "cannot be attributed solely to the Prosecution or to lack of diligence of the judicial authorities"[14]. First, one thing is the duration of the proceedings and another thing is the duration of the detention. The fact that the duration of the proceedings – all circumstances considered, and in particular in light of developments having indeed contributed to their expeditiousness since the 10 March 2017 Decision - might be considered reasonable does not detract from the need to separately assess whether the duration of the detention pending trial can also be considered reasonable. Second, notwithstanding an acceleration of pace in the presentation of the Prosecutor's evidence, the reality is that it is still not possible at this stage to make any educated guess as to the time which will still be required before the completion of these proceedings. Third, and more fundamentally, the point is not to determine whether anybody can be blamed for the duration of the detention, but rather whether this duration can be considered reasonable and warranted, including – as instructed by the Appeals Chamber - in light of the nature of the risks still allegedly existing. It continues to be my belief that, in spite of the diligence exercised by the Chamber and all the parties to avoid unnecessary delays and to preserve the efficiency of the trial, the duration of Laurent Gbagbo's detention is no longer reasonable; all the more so in light of the experience of this first year and a half of trial, which goes rather and univocally in the direction of a progressive weakening even of those risks

[14] Majority Decision, para. 52.

which might have been reasonably considered as outstanding in the early days.

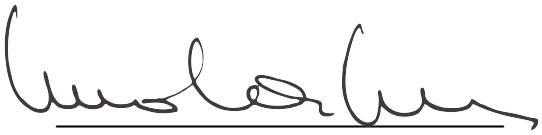
11. In light of the above, there is no need for me to discuss the Majority's conclusion that the age and health conditions of Laurent Gbagbo, as recently re-assessed by the Medical Officer of the Detention Centre, are not such as to mitigate the risks of flight. Even if that were the case, it remains that, at this stage of the proceedings and after these many years of detention, the facts alleged in support of the existence of a risk of flight are simply not strong enough to provide adequate justification for the protracted deprivation of liberty.

12. As it continues to be my view that the duration of the detention of Laurent Gbagbo has become unreasonable, it also continues to be my view – coming to the third reason for my dissent - that, under these circumstances, it is the Chamber's duty to devise and explore appropriate conditions which would neutralise any and all risks for absconding which might still be outstanding or materialise, and therefore make it possible to order his conditional release. The Majority takes the view that, whilst submitting a couple of scenarios for Laurent Gbagbo's conditional release, "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"[15] and lists a number of factors which, in their submission, should have been specified by the Defence for the Chamber to be able to make a ruling on conditional release (including logistical and financial details of proposed arrangements)[16]. Even assuming *arguendo* that it were in the purview of the defence's abilities to provide this kind and level of information (and I am far from being persuaded that this is the case), I fail to see how failure to provide such details

[15] Majority Decision, para. 71.
[16] Majority Decision, para. 73.

might be used not only to a detainee's detriment, but even as a bar to the Chamber's very power to consider and order conditional release. It is a Chamber's duty to at least test, *motu proprio* if necessary, the existence of a solution for conditional release and its feasibility before concluding that continued detention is the only option. In my view, to do otherwise is tantamount to putting an unjustified burden on the Defence and, ultimately, to failing the Court's duties and responsibilities *vis-à-vis* the paramount right to personal liberty.

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



Judge Cuno Tarfusser
Presiding Judge

Dated this 25 September 2017

At The Hague, The Netherlands