Dissenting opinion of Judge Cuno Tarfusser

1. I respectfully dissent from the Majority's decision that Mr Gbagbo "shall remain in detention". I wish to stress at the outset that I agree that this outcome complies both with the wording of the relevant texts and with the existing case law of the Appeals Chamber. By the same token, however, I believe that the magnitude of the principles at stake, looked at through the lens of the specific circumstances both of the accused Laurent Gbagbo and of these proceedings as a whole, is such as to allow, and possibly demand, that a different, more case-tailored approach be taken. My dissent centres on the Majority's failure to directly address the following elements, and their impact on the risks justifying persisting detention: the amount of time already spent by Laurent Gbagbo in deprivation of personal liberty, a condition by its nature exceptional, and his age and state of health.

2. It is certainly true, as stated by the Majority that once the trial hearing commences a Trial Chamber is not obliged to conduct any further automatic reviews on detention pursuant to article 60(3) of the Statute. The absence of a positive obligation to this effect, however, is not tantamount to precluding that such review be undertaken. To the contrary, the very possibility for an accused to apply for interim release at any time pending trial pursuant to article 60(2) of the Statute confirms that such review might indeed occur at any stage after, and notwithstanding, the opening of the trial. A different reading would indeed cast doubt on the very consistency of the Court's statutory system with international human rights: as stated by the European Court of Human Rights ("ECHR"), courts "are under an obligation to review the continued detention of persons pending trial with a view to ensuring

release when circumstances no longer justify continued deprivation of liberty".[1]

3. Once this reviewing exercise is triggered, whether upon request of the accused or by the Chamber on its own motion, the review must be made against the overall situation of fact as it exists at the time when the exercise is undertaken and taking into account all circumstances which contribute to such scenario, with a view to determining whether there are changed circumstances *vis à vis* the last decision taken under Article 60(3).

4. The Appeals Chamber, as recalled by the Majority, stated that the requirement of changed circumstances "imports either a change in some or all the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary".[2] In my view, the overall time spent in detention not only can, but must be one of the facts considered when deciding on the state of detention, and one of the most critical.

5. The Tenth Decision was adopted on 2 November 2015. At the time, Laurent Gbagbo was seventy years old and had yet to complete his fourth year of detention in the custody of the Court. Since then, he has spent another additional year and almost five months in detention and is older by the same amount of time. With respect, I do not see how these simple facts, even if they stood alone, can be reconciled with the Majority's statement that "the circumstances have not changed to such an extent as to warrant Mr Gbagbo's release".[3]

[1] ECHR, Case of McKay v. the United Kingdom [GC], no. 543/03, 3 October 2006, paras 41-45; ECHR, Case of Bykov v. Russia [GC], no. 4378/02, 10 March 2009, paras 61-64; ECHR, Case of Idalov v. Russia [GC], no. 5826/03, 22 May 2012, paras 139-141; see also ECHR, Case of Labita v. Italy [GC], no. 26772/95, 6 April 2000, paras 152-153; and ECHR, Case of Kudla v. Poland [GC], no. 30210/96, 26 October 2010, paras 110-111.
[2] Majority Decision, para. 11.
[3] Majority Decision, para. 20.

6. I take the view that the time elapsed since the adoption of the Tenth Decision on 2 November 2015 qualifies *per se* as a "changed circumstance" worth being assessed for the purposes of a review under article 60(3), and possibly warranting a different outcome of such review. In my view, remaining silent on the significant extension of the period of detention endured by Laurent Gbagbo since the Tenth Decision, as well as on the absence of perspective that the trial might soon come to a conclusion (a point to which I will return), is tantamount to overlooking the spirit underlying article 60 of the Statute as a whole: namely, to vest the Chamber with the responsibility to ensure that a person is not detained for an unreasonable period and to equip it with tools capable of preventing that detention prior to the final determination of an accused's guilt or innocence be unduly protracted.

7. The case law of this Court is generous in recalling that an accused is presumed innocent until proved guilty and in acknowledging that detention shall be the exception rather than the rule. The Majority itself recalls the exceptional nature of detention, albeit only to say that the point was already addressed in previous decisions and therefore declining to adjudicate the arguments raised in connection with it.[4] However, if the amount of time spent in detention is not factored in as a significant element every time a concrete decision on detention pending trial is made, one may wonder whether those acknowledgements serve any purpose other than paying lip service to those lofty principles. The protracted deprivation of liberty for an individual who has to be presumed innocent until proved guilty is too consequential a measure to be taken merely on the basis of references to assessments made at an earlier stage in time and disregarding the time elapsed in the meantime.

[4] Majority Decision, para. 12.

8. The overall amount of time spent in detention becomes critical, with a view to determining whether, all considered, that time – and the *vulnus* inflicted to the personal liberty - can be justified as proportionate and adequate in light of various factors, including the nature of the charges and the personal circumstances of the accused. The absence from the statutory texts of a specific, pre-determined threshold of time to detention prior to the verdict must not be necessarily be considered as an unfortunate omission or lacuna; indeed, many domestic systems fail to stipulate a specific statutory limit as to the maximum amount of time which can be spent in detention pending trial. By the same token, human rights jurisprudence has since long clarified that, whilst the question whether or not a period of detention is reasonable cannot be assessed in the abstract and there is no fixed time-frame applicable to each case, a time-frame must be determined on a case-by-case basis and according to the special features and circumstances of that case. When those features and circumstances are such as to make continued deprivation of liberty no longer justified, release must ensue. In particular, the ECHR has clarified that lapse of time progressively weakens the justification provided by the initial existence of grounds to believe that the person has committed the charged crimes: "for at least an initial period, the existence of reasonable suspicion may justify detention but there comes a moment when this is no longer enough".[1]

9. Article 21 of the Statute prescribes that the Court must interpret and apply its applicable law "consistent with internationally recognized human rights": this consistency is therefore the ultimate benchmark in determining the legitimacy of the Court's own operation. In my view, to deny that the passage of time is one of the factors to be taken into account for the purposes of reviewing the continued detention of an accused would result not only in

[1] See above, footnote 1.

singling the Court out as an anomalous institution in the system of criminal justice but also in putting it in conflict with its own statutory texts.

10. Laurent Gbagbo has spent, to this day, 5 years and almost 11 months in captivity; 5 years and almost 4 months of this in the custody of the International Criminal Court. His pre-trial detention was also unusually extended due to the complex developments of the pre-trial proceedings, which remain an *unicum* before this Court: at the time of the confirmation of the charges, he had already totalled more than 2 years and 7 month, in days 925 days, in detention; to put things in perspective, the time spent in pre-trial custody by other suspects before the Court ranges from a minimum of 180 to a maximum of 444 days[9].

11. I agree that the seriousness of the crimes within the Court's jurisdiction, coupled with the flexibility of the system of penalties to be imposed before it, may indeed require some flexibility in the specific determination of the amount of detention time which would be acceptable in a given case. I am also persuaded that, as a general rule, a higher threshold *vis-à-vis* what would normally be considered adequate in the context of a national jurisdiction may be warranted. However, it is my belief that such flexibility cannot be stretched to such an extent as to result in the virtual abolition of any threshold, unless we want the system established by the Rome Statute to become tainted with an uncertainty so serious as to possibly open the door to abuses we would not want to see associated with international criminal justice.

12. Furthermore, I observe that the gravity of the crimes alleged can only play a limited role when assessing whether the time spent in detention by an accused has exceeded reasonable limits. Crimes investigated and prosecuted before the Court only concern the most serious crimes and even cases

[9] Respectively, in cases ICC-01/12-01/15 and ICC-01/04-02/06.

concerning those types of crimes are not admissible unless they meet the threshold of "sufficient gravity" pursuant to article 17(1)(d). Since the statutory instruments do envisage that an accused might retain his or her personal liberty during the proceedings (whether because he or she appeared before the Court pursuant to a summons to appear, or because a release following the initial arrest is ordered, with or without conditions), factors other than the gravity of the alleged crime must also be taken into account. To conclude otherwise would be tantamount to saying that proceedings for article 70 offences would be the only scenario allowing for interim release before the Court, an interpretative result which I do not consider reasonable.

13. It is my belief that, in the case of Laurent Gbagbo and in light of his personal circumstances of age and health, this reasonable limit has been reached and overcome and that, in the words of the ECHR, the moment where what previously stated "is no longer enough" has come.

14. First, Laurent Gbagbo is now a man of almost seventy-two years of age, a fact which *per se* should demand caution when prescribing detention. I find some reason for concern in the Majority's finding that "Mr Gbagbo's age is … not decisive", since "[o]n 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" and "[i]n the event of a conviction, he therefore has a clear incentive to abscond to avoid such a scenario".[7] I find this conclusion as astounding in its content as it is drastic and *tranchante* in its formulation. No reasoning is provided in support of the decision to reverse, in one stroke of pen, the observation of human compassion underlying several legal provisions enacted at the national level whereby age is considered as a factor militating against, rather than in favour of, protracted detention. In the absence of detailed reasoning on this point, I will simply note that, to this day,

[7] Majority Decision, para. 17.

Mr Gbagbo benefits, like all accused, of the presumption of innocence and that his advanced age should not be used as a factor to his detriment in the context of the assessment of his detention, even less so on the basis of the hypothetical scenario of a conviction.

15. Second, Laurent Gbagbo's state of health has been flagged as a matter requiring "heightened attention" as early as in November 2012, by then Pre-Trial Chamber I.[8] Since then, he has not become any healthier, according to the reports submitted by the Detention Medical Officer as recently as on 26 August 2016.[9] In the words of the Medical Officer, Mr Gbagbo is "considered to be a fragile person", due to factors ranging from his age to the ailments and chronic conditions from which he suffers.

16. In my view, the age and health conditions of Laurent Gbagbo diminish *per se* his very ability to even consider a prospective of flight, thereby significantly weakening the risk that he might abscond from justice. As such, they would *per se* mandate considering the feasibility of an alternative to detention. The scenario is made even more worrisome by the fact that, to this day, no specific outlook as to the timing for the conclusion of the trial is available or in sight. As highlighted in the recent "Order requesting the parties and participants to submit information for the purposes of the conduct of the proceedings pursuant to article 64(2) of the Statute and rule 140 of the Rules of Procedure and Evidence" on the basis of detailed figures extracted from the court records,[10] a projection based on the average pace of questioning so far and the average court calendar per year shows that the Prosecutor's case would only finish in mid-2019 at the earliest. Whilst the Prosecutor has since informed the Chamber of measures adopted or planned measures aiming at improving the overall expeditiousness of the trial, and

[8] ICC-02/11-01/11-286-Red.
[9] ICC-02/11-01/15-637-Conf.
[10] ICC-02/11-01/15-787.

notwithstanding the Chamber's determination to exercise its trial management powers so as to maximise efficiency, the fact remains that the Chamber is in no position today to make any educated guess as to the time which will be required for the completion of this trial. The submission by the Defence for Mr Gbagbo, to the effect that they will basically only be in a position to provide an estimate as to the expected duration of their own case once the Prosecutor's case will be completed, does not make this forecast exercise any easier; this especially so, when read in light of their recurrent – and, in my view, erroneous - submission that it is only for the accused to determine whether the requirement of the expeditiousness of the trial is met.

17. While all these factors heavily militate against the maintaining the state of detention, I do not see how any of the arguments developed by the Prosecutor, supported by the LRV and adhered to by the Majority might counterbalance this conclusion. I am struck, in particular, by the weakness of factors listed by both the Prosecutor and the LRV in support of the alleged risks which would justify persisting detention: in particular, by the insisted reference to the "network of supporters" on which Mr Gbagbo can rely. The Majority seems convinced that the existence of this "network" – 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 - would substantiate the persisting risk that Mr Gbagbo would abscond if released *ad interim*; this, in particular, in light of the fact that "on various occasions, court orders aimed at protecting witnesses at risk have been circumvented", prompting the adoption of unprecedented measures such as the delayed transmission of hearings involving protected witnesses or the exclusion of one – one – "purported member of this pro-Gbagbo network" from attending court hearings.[11]

[11] Majority Decision, para. 15.

18. With respect, I dissent from this conclusion. It is one thing to adopt a behaviour which might be disruptive of Court proceedings, or even to fail to comply with a Court's order on confidentiality; it is an entirely different thing to assist an accused for the purposes of evading justice. The first behaviour is deplorable, possibly conducive to sanctions and certainly justifies the adoption of measures aimed at preserving the orderly course of proceedings; however, it has little if anything to do with the second, and substantive elements are required before the first can be linked to, or used as an indicia pointing at the existence of, the second. Neither the Prosecutor, nor the LRV provide any information suitable to establishing such link. Rather, as acknowledged by the Majority, the truth is that to this day "there is no evidence before the Chamber that these groups or individuals have acted at the behest of Mr Gbagbo", nor there are any "specific indications that his supporters are willing to break the law for Mr Gbagbo's sake".[12]

19. Critically, as also acknowledged by the Majority, there is, at this stage, "no specific evidence … that Mr Gbagbo has any intention of absconding or obstructing the trial proceedings".[13] The Majority fails to consider the impact which Laurent Gbagbo's age and health might have on the risk of his flight and discards the relevance of the absence of concrete, specific elements supporting the existence of such risk on the basis of "the extreme gravity of the charges against him as well as the fact that he denies any responsibility"; instead, they submit, Mr Gbagbo might have "a clear incentive to abscond" to avoid spending the rest of his life in prison in light of this age.[14] As I noted above, Mr Gbagbo benefits from the presumption of innocence as well as of the ensuing right to defend himself from the charges as basic human rights

[12] Majority Decision, para. 16.
[13] Majority Decision, para. 17.
[14] Majority Decision, *ibidem*.

and I fail to see how the fact that "he denies any responsibility", or his age, might be turned against him for the purposes of substantiating a risk of flight.

20. The Majority also fails to elaborate how, against this background, they still come to the conclusion that they "cannot discount"[13] the possibility that indeed these supporters might end up breaking the law for the purposes of ensuring Mr Gbagbo's absconding. In so doing, their determination that a risk of flight still exists sounds hollow. I will add, *en passant*, that the Chamber has been consistently rejecting applications for in-court protective measures merely based on utterances posted on social media whenever those utterances did not translate into objective risks and that, to this day, none of those utterances has resulted in creating a concrete risk for the affected witnesses. I still stand by this approach: a court of law cannot take decisions, even less decisions affecting an accused's fundamental right to personal liberty, based on the *strepitus fori* wherever and whomever it comes from. The decision to deprive or not an accused of personal liberty pending trial can only depend on objective, substantiated, proven elements of risk: in this sense, behaviour in the public gallery, views expressed on social media, no matter how unpleasant, deplorable or even unlawful, cannot *per se* justify detention any more than the existence of an international petition can *per se* justify the release of the accused, no matter how popular the petition or "respectable" its signatories.

21. In light of the above, it is my view that the duration of the detention of Laurent Gbagbo, when considered in light of his personal circumstances, the weakness of the elements brought in support of the alleged persisting existence of a flight risk and the past and prospective duration of these proceedings, has become unreasonable. Accordingly, I would have ordered

[13] Majority Decision, para. 16.

his release, subject to appropriate conditions suitable to neutralise any and all risks for absconding which might still be outstanding or materialise.

22. I wish to stress that I am fully aware of the difficulties which might arise in the context of the implementation of such conditional release, both on the political and operational level, and that those difficulties might in the end well result in making such conditional release unfeasible. I am likewise keenly aware that, given the sensitivity surrounding this trial, particular caution should have been exercised in crafting a regime for conditional release suitable not only to neutralise any risk of flight, but also to prevent its exploitation for political purposes, whether in Ivory Coast or elsewhere. However, I believe that measures are available to devise such a regime, including by means of police surveillance, reporting mechanisms, prohibition to engage in activities of a political nature and the like. A Chamber cannot shy away from its duty to at least test, *motu proprio* if necessary, the existence of a solution and its feasibility before concluding that continued detention is the only option; all the more so when, as recalled by the Majority,[16] there exists the possibility to ask a State to accept Laurent Gbagbo on their territory and to provide him with any treatment his current state of health might require.

23. It is not enough to state, as the Majority does, that "it is far from clear how this would work in practice"[17] and to decline to even explore this possibility. In particular, I should add that I am not persuaded by the fact that the necessity for Laurent Gbagbo to attend trial during his treatment might constitute an insurmountable obstacle. There have already been examples, including in this trial, where either accused has been excused from attending one or more hearings, including on grounds of health, without this having any disruptive repercussion on the conduct of the proceedings, notably in

[16] Majority Decision, para. 22.
[17] Majority Decision, *ibidem*.

light of the presence of duly appointed counsel. No issue of compatibility of these scenarios with the provision that the accused "shall be present" arose on those occasions. I am persuaded that no such issue could indeed arise: what matters, for the conduct of the trial, is that the accused be duly represented by counsel and has consented to waive his right to be present. Not only is this reading, in my view, perfectly consistent with the wording of article 63(1) of the Statute, read in light of article 67 (1)(d), but it is the only one allowing for a meaningful application of the provision without virtually transforming it into a sort of "arrest" for any accused not detained and not having his permanent residence in The Hague. Furthermore, its adoption would have made it superfluous to resort to the introduction of rules 134*ter* and 134*quater* of the Rules of Procedure and Evidence. But this is another discussion, which is not necessary to develop here in full. What I wish to reiterate, in concluding these remarks, is my firm conviction that the current detention of Laurent Gbagbo has exceeded the threshold of a reasonable duration and that, in light of his age and health, the risk that he might abscond from justice becomes increasingly unlikely; it is high time that the feasibility of his *ad interim* conditional release be at least seriously considered.

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

Judge Cuno Tarfusser
Presiding Judge

Dated this 10 March 2017

The Hague, The Netherlands