Dissenting opinion of Judge Cuno Tarfusser

1. It will come as no surprise that, for the third time in a little more than one year, I find myself in the position to dissent from the Majority's Decision that Laurent Gbagbo shall remain in detention. Today, as in March ("First Dissent")[1] and September 2017 ("Second Dissent"),[2] I believe that the Majority's conclusions, and its failure to adopt a proactive approach in this matter, are not consistent with the established case law on fundamental human rights and fail the Court's duties and responsibilities *vis-à-vis* the paramount right to personal liberty.

2. Today, as in the 10 March and 25 September 2017 Decisions, the Majority omits, in contravention of the recent clear directions of the Appeals Chamber to this effect, 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, in order to determine whether, all factors being considered, the detention continues to be reasonable.[3] Instead, it points out that the Defence for Mr Gbagbo "has not demonstrated any new circumstances warranting the release of Mr Gbagbo upon medical grounds", "[n]either has it demonstrated any change in circumstances".[4] Its conclusion relies to a great extent on the consideration that, in light of the Medical Officer's most recent report, "Mr Gbagbo is receiving holistic treatment, not only from the ICC's Detention Centre Medical Officer, but also from a wide

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[1] ICC-02/11-01/15-846-Anx.
[2] ICC-02/11-01/15-1038-Anx.
[3] ICC-02/11-01/15-992, para. 79.
[4] Majority Decision, para. 34. This finding is redacted from the public version of the Majority's Decision: however, since I consider redactions of general statements or principles unwarranted, I will make reference to those findings to the extent that this is necessary to my reasoning.

array of health professionals",[5] his health is "stable" and "he is receiving optimal treatment for his current state of health and age".[6]

3. I reiterate my view that the duration of Laurent Gbagbo's detention has exceeded the threshold of reasonableness even by the broadest and least restrictive standards, and becomes less and less reasonable or justified by the day. The reasons supporting this view are developed in detail in my First and Second Dissent and there is no need for me to rehearse them here again. Suffice it to say that I still subscribe to each and all of them.

4. Today, I find myself unable to join the Majority in their specific conclusion that Mr Gbagbo shall remain in detention since (i) there is no change in circumstances as regards his health; and, (ii) "[a]s regards the other criteria that needs to be considered under Article 58(1)(b), the Chamber does not have before it any information that would justify ordering the release of the accused".[7]

5. The main reason for this dissent arises from the fact that since the issuance of the September Decision - as also acknowledged by the Majority[8] - there is at least one factor which qualifies as a "changed circumstance" within the meaning and for the purposes of Article 60(3) of the Statute: in January 2018, the last witness called by the Prosecutor took the stand and the submission of the Prosecutor's evidence pursuant to paragraphs 43 and 44 of the Directions is now virtually[9] completed. In these circumstances, I believe that well-established principles as regards the right to personal liberty, as mirrored in particular by abundant case law of the European Court of Human Rights ("ECtHR") and supported in legal writing, would have made it

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[5] Majority Decision, para. 36.
[6] Majority Decision, para. 37.
[7] Majority Decision, para. 38.
[8] Majority Decision, para. 38.
[9] The qualification is due to the recurrent filing by the Prosecutor of additional requests for submission of documentary evidence, in spite of the Chamber's order dated 23 January 2017 (ICC-02/11-01/15-787) to the effect that those requests should have been submitted in a consolidated manner. See ICC-02/11-01/15-1138 and annexes for the latest example.

necessary for the Majority to include a *prima facie* assessment of the strength of the evidence among the factors relevant to its decision on the Defence Request.

6. For a long time now,[10] the ECtHR's jurisprudence has been repeatedly stating that, "since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him";[11] "reasonable suspicion" has been defined as the "existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence".[12] This requirement can be pushed so far as making it necessary for the Court "to hear witnesses whose testimony appears *prima facie* to have a material bearing on the continuing lawfulness of the detention".[13] More specifically, treating as irrelevant or disregarding a factor such as the alleged weakness of the evidence would be tantamount to depriving of substance the guarantees set forth in article 5.4 of the Convention, this constituting one of those "concrete facts … capable of putting in doubt the existence of the conditions essential for the 'lawfulness', in the sense of the Convention, of the deprivation of liberty".[14] Even more on point, the ECtHR has held that "[t]he length of the deprivation of liberty may also be material to the level of suspicion (i.e., that the person concerned may

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[10] ECtHR, *Stögmüller v. Austria*, "Judgment", 10 November 1969, application no. 1602/62, page 35, para. 4.

[11] ECtHR, Grand Chamber, *A. and others v. the United Kingdom*, "Judgment", 19 February 2009, application no. 3455/05, para. 204.

[12] ECtHR, *Stepuleac v. Moldova*, "Judgment", 6 November 2007, application no. 8207/06, para. 68; *Fox, Campbell and Hartley v. the United Kingdom* , "Judgment", 30 August 1990, application no. 12244/86, 12245/86, 12383/86, para. 32.

[13] ECtHR, Grand Chamber, *A. and others v. the United Kingdom*, "Judgment", 19 February 2009, application no. 3455/05, para. 204.

[14] ECtHR, *Nikolova v. Bulgaria*, "Judgment", 25 March 1999, application no. 31195/96 , para. 61. See also *Mammadov v. Azerbaijan*, "Judgment", 22 May 2014, application no. 15172/13, para. 114.

have committed the charged offence) required";[15] thus making the persistence of reasonable suspicion an even more stringent requirement in cases of prolonged detention.

7. This approach is also mirrored in the jurisprudence of the International Tribunal for the Former Yugoslavia ("ICTY"), stating that "additional evidence" adduced by the accused in the course of the trial (in particular, "irrefutable facts") is to be included among the facts and circumstances to be considered by a Chamber within the context of the review of the continued necessity for detention, albeit this is to be done "in a cursory manner, keeping in mind that this is not the proper time to consider the merits of the case".[16] In the same perspective, the ICTY Appeals Chamber acknowledged "circumstances at trial" among the factors suitable to affect a Chamber's assessment of the risk that the accused will not return from provisional release.[17]

8. Accordingly, a determination of the persisting lawfulness of the restriction of liberty must take into account both the procedural and substantive conditions which are required for such lawfulness to be met; the reasonableness of the suspicion leading to the initial arrest and the ensuing detention must be the subject of an ongoing assessment and must be considered for the purposes of each request for release.[18] A similar point is made by scholars to the effect that "changes to the nature or quality of the evidence that come to light" might constitute "changed circumstances"

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[15] ECtHR, *Mammadov v. Azerbaijan*, "Judgment", 22 May 2014, application no. 15172/13, paras 88, 90. See also Grand Chamber, *Murray v. the United Kingdom*, "Judgment", 28 October 1994, application no. 14310/88, para. 56.
[16] ICTY, Trial Chamber, *Prosecutor v. Delalic et al.*, "Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic", 25 September 1996, IT-96-21-T, para. 24.
[17] ICTY, Appeals Chamber, *Prosecutor v. Milutinovic et al.*, "Decision on Interlocutory Appeal of Denial of Provisional Release During Winter Recess", 14 December 2006, IT-05-87-AR65.2, para. 15.
[18] ECtHR, *Brogan and others v. the United Kingdom*, "Judgment", 29 November 1988, application no. 11209/84, 11234/84, 11266/84, 11386/85, para. 65.

suitable to lead a Chamber to reconsider its initial position and order provisional release.[19]

9. I should first say that I was struck not to find any mention of this element in the Defence Request. Instead, the Request focuses entirely and exclusively either on circumstances and developments relating to the health condition of Mr Gbagbo, or on complaints about the alleged inadequacy of the treatment Mr Gbagbo would have and would still be receiving at the Detention Centre, in particular under the responsibility of its Chief Medical Officer. As rightly highlighted by the Majority, most of these developments occurred in the past (some as early as 2011, prior to Mr Gbagbo's transfer to the Court, and all prior to the Chamber's latest decision on the matter) and are as such already covered in the previous decisions of the Chamber. The Request does not mention, not even *en passant*, the stage reached by the trial and developments in the courtroom as additional relevant factors to be considered. In so doing, the Defence for Mr Gbagbo not only contradicts clear instructions given by the Chamber upon rejecting its request for an extension of the page number,[20] but neglects to acknowledge a consolidated body of case law.

10. I wish to clarify that, for the purposes of this dissent, I am not taking (and there is no need for me to take) here a position as to the strength of the evidence in the present case. I am only saying that, if providing the accused with an opportunity to challenge the substantive grounds for his detention is a requirement for a legal system compliant with the system of internationally recognised human rights (and, in light of the ECtHR case law referred to above, I am persuaded it is), it must also be a requirement for counsel to trigger this challenge for the purpose of obtaining a provisional release each

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[19] K. A. A. Khan, "Article 60: Initial proceedings before the Court", in O. Triffterer and K. Ambos (eds), *Commentary to the Rome Statute of the International Criminal Court* (Beck *et al.*, 3rd ed., 2016), p. 1472, at p. 1479.

[20] ICC-02/11-01/15-1115-Conf, para. 4.

and every time that circumstances allow, at least when the trial has reached such a stage which would make such challenge not frivolous. Accordingly, I find this silence and this omission concerning from the perspective of the duties and responsibilities of counsel. This all the more so, when one considers that Counsel's notice of appeal against the 25 September 2017 Decision was dismissed by the Appeals Chamber on the basis of a technical flaw,[21] that more than four months have elapsed between that dismissal and the filing of the Defence Request and that none of the circumstances relied upon by the Defence in its Request is specific to this period of time.

11. I also find reasons for concern in the Majority's approach. As stated above,[22] the Majority does acknowledge that, since the September Decision, "[t]he only change in circumstances … is that the Prosecutor has concluded with the presentation of her case".[23] By the same token, however, it notes that, since the Defence for Mr Gbagbo "has not satisfied the Chamber that the risks under Article 58(1)(b) of the Statute no longer exist at this stage of the proceedings", it finds itself "without any new evidence or information" before it and, accordingly, concludes that there are "no new facts that would justify divergence from the Chamber's previous findings contained in its Decision of 25 September 2017".[24]

12. I am unable to follow the Majority in this conclusion. It continues to be my view that the importance of the right to personal liberty requires a proactive attitude by the Chamber, including when it comes to remedy counsel's failures or omissions. Today, as in March and September 2017, it is my firm belief that it is the Chamber's duty to explore, *motu proprio* if necessary, both the persisting lawfulness of the detention and the existence of feasible solutions which would make it possible to order Laurent Gbagbo's

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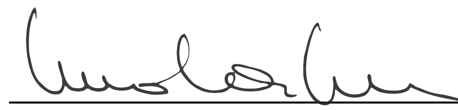
[21] ICC-02/11-01/15-1047+Anx.
[22] Para. 5.
[23] Majority Decision, para. 38.
[24] Majority's Decision, para. 38.

conditional release while neutralising any and all risks for his absconding, before concluding that continued detention is the only option. In deliberately choosing to confine itself to the path traced by the Defence Request, I believe that the Majority fails to exercise its own powers, which certainly include the fact of going *ultra petita* when required by the need to preserve a right as fundamental as the one to personal liberty.

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



Judge Cuno Tarfusser
Presiding Judge

Dated this 20 April 2018

At The Hague, The Netherlands