



Original: English

No. ICC-02/11-01/15 OA14

Date: 18 January 2019

THE APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

**IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO AND
CHARLES BLÉ GOUDÉ**

Public document

**Decision on the Prosecutor's request for suspensive effect
of her appeal under article 81(3)(c)(ii) of the Statute and directions on the
conduct of the appeal proceedings**

Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Laurent Gbagbo
Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Legal Representatives of Victims
Ms Paolina Massidda

Counsel for Charles Blé Goudé
Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

REGISTRY

Registrar
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute of 16 January 2019 (ICC-02/11-01/15-T-234-Eng),

Having before it the ‘Prosecution’s Appeal pursuant to article 81(3)(c)(ii) of the Statute and urgent request for suspensive effect’ of 16 January 2019 (ICC-02/11-01/15-1236 (OA14)), in which a request for suspensive effect is made,

Renders, by majority, Judge Morrison and Judge Hofmański dissenting, the following

DECISION

The above-mentioned request for suspensive effect is granted. The detention of Mr Laurent Gbagbo and Mr Charles Blé Goudé shall be maintained pending the consideration of the present appeal.

And issues, unanimously, the following

DIRECTIONS

1. The Prosecutor is directed to file her appeal brief by 16h00 on Wednesday, 23 January 2019.
2. Mr Laurent Gbagbo, Mr Charles Blé Goudé and the victims participating in the proceedings may file their respective responses to the Prosecutor’s appeal brief by 16h00 on Tuesday, 29 January 2019.
3. A hearing before the Appeals Chamber will be held on Friday, 1 February 2019, beginning at 9h30, in order to hear further submissions on the appeal.

REASONS

I. PROCEDURAL HISTORY

1. On 15 January 2019, Trial Chamber I ('Trial Chamber') acquitted, by majority, Judge Herrera Carbuccia dissenting, Mr Laurent Gbagbo ('Mr Gbagbo') and Mr Charles Blé Goudé ('Mr Blé Goudé') of all charges against them in the present case.¹
2. On 16 January 2019, the Trial Chamber rendered, by majority, Judge Herrera Carbuccia dissenting, an oral decision pursuant to article 81(3)(c)(i) of the Statute² ('Impugned Decision'), in which it rejected the Prosecutor's request³ to find that there are exceptional circumstances to maintain the detention of Mr Gbagbo and Mr Blé Goudé, and release them subject to conditions, unless no State willing and able to enforce such conditions could be found ('Prosecutor's Request').
3. On 16 January 2019, the Prosecutor filed the 'Prosecution's Appeal pursuant to article 81(3)(c)(ii) of the Statute and urgent request for suspensive effect'⁴ ('Notice of Appeal'). In the Notice of Appeal, the Prosecutor requests, *inter alia*, that the Appeals Chamber order that her appeal against the Impugned Decision have suspensive effect, pursuant to article 82(3) of the Statute and rule 156(5) of the Rules of Procedure and Evidence ('Rules').⁵
4. On 16 January 2019, the Appeals Chamber issued the 'Order on the filing of responses to the request of the Prosecutor for suspensive effect', in which it ordered that responses to the Prosecutor's request for suspensive effect be filed by 12h00 on 17 January 2019.⁶
5. On 17 January 2019, Mr Gbagbo, Mr Blé Goudé and the victims participating in the proceedings filed their responses to the request for suspensive effect.⁷

¹ ICC-02/11-01/15-T-232-Eng, p. 4, lines 17-18.

² ICC-02/11-01/15-T-234-Eng.

³ 'Urgent Prosecution's request pursuant to article 81(3)(c)(i) of the Statute', 15 January 2019, [ICC-02/11-01/15-1235](#).

⁴ ICC-02/11-01/15-1236 (OA14).

⁵ Notice of Appeal, para. 30(ii).

⁶ ICC-02/11-01/15-1237 (OA14).

⁷ 'Réponse de la Défense à la « Prosecution's Appeal pursuant to article 81(3)(c)(ii) of the Statute and urgent request for suspensive effect » (ICC-02/11-01/15-1236).', ICC-02/11-01/15-1239 (OA14) ('Mr

II. MERITS

6. The Prosecutor submits that ordering suspensive effect of an appeal made pursuant to article 81(3)(c)(ii) of the Statute results in the acquitted person being kept in detention pending the determination of the Prosecutor's appeal.⁸ In support of her request for suspensive effect, the Prosecutor submits that the implementation of the Impugned Decision could create an irreversible situation, since, in case the Impugned Decision is reversed, resulting in the detention or conditional release of Mr Gbagbo and Mr Blé Goudé pending the Appeals Chamber's determination of the Prosecutor's appeal against the Trial Chamber's decision on acquittal, such a provisional measure could not be implemented.⁹ In particular, the Prosecutor contends that there is a concrete risk that Mr Gbagbo and Mr Blé Goudé will not appear for the continuation of the proceedings,¹⁰ due to the risk of a lack of cooperation of some States, and that Mr Gbagbo and Mr Blé Goudé have 'sufficient means and supporters to help them avoid the Court's jurisdiction'.¹¹

7. The Prosecutor submits that Ms Simone Gbagbo, against whom the Court has issued a warrant of arrest, is now living in Abidjan 'without any further restrictions or pending legal proceedings', and that the President of Côte d'Ivoire stated that 'he would not send more Ivoirians to the ICC'.¹² The Prosecutor contends that Mr Gbagbo still has a well-organised network of supporters and she refers in this context to the Trial Chamber's decisions of 25 September 2017 and 20 April 2018, confirming that there were 'demonstrable and clear risks' on account of the existence of such means and supporters.¹³ The Prosecutor submits that Mr Blé Goudé has

Gbagbo's Response'); 'Defence Response to the Prosecution's urgent request for suspensive effect (ICC-02/11-01/15-1236 OA14)', ICC-02/11-01/15-1238 (OA14) with annexes ('Mr Blé Goudé's Response'); 'Response to the Prosecution's Request for Suspensive Effect of its Appeal under article 81(3)(c)(ii) of the Statute', ICC-02/11-01/15-1240-Conf (a public redacted version was filed on the same day, ICC-02/11-01/15-1240-Red) ('OPCV Response').

⁸ Notice of Appeal, para. 19, referring to *Prosecutor v. Mathieu Ngudjolo Chui*, 'Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect', [ICC-01/04-02/12-12](#) (OA) ('*Ngudjolo* Decision on Suspensive Effect'), para. 17.

⁹ Notice of Appeal, paras 2, 22.

¹⁰ Notice of Appeal, para. 2.

¹¹ Notice of Appeal, paras 23-24, 26.

¹² Notice of Appeal, para. 25.

¹³ Notice of Appeal, paras 26-27, referring to 'Public Redacted Version of the Decision on Mr Gbagbo's Detention', 25 September 2017, [ICC-02/11-01/15-1038-Red](#), paras 22, 32, 63, 65; 'Decision on Mr Gbagbo's Request for Interim Release', 20 April 2018, [ICC-02/11-01/15-1156-Red](#), para. 38.

previously breached travel bans and the restriction on his assets, and that he was in possession of false passports and false identity cards.¹⁴

8. In response, Mr Gbagbo observes that since the Prosecutor does not oppose the conditional release of Mr Gbagbo, granting suspensive effect and ordering his continued detention would exceed both the Prosecutor's request and the issue which was before the Trial Chamber.¹⁵ He notes that the Prosecutor puts forward the same arguments which she presented to the Trial Chamber in support of her request under article 81(3)(c) of the Statute and that, therefore, should the Appeals Chamber consider these arguments, it would pronounce on the merits of the Prosecutor's appeal.¹⁶ Mr Gbagbo observes, *inter alia*, that the Prosecutor refers to him as 'the Accused', whereas he is no longer accused.¹⁷

9. Mr Gbagbo contends that since an accused person may not be deprived of liberty unless strict conditions are met, the detention of an acquitted person must, *a fortiori*, be exceptional and meet conditions of 'absolute necessity', which is reflected in the statutory requirement of 'exceptional circumstances'.¹⁸ He contends that the Trial Chamber found that the Prosecutor had failed to demonstrate any such exceptional circumstances.¹⁹ Mr Gbagbo avers that the Prosecutor has failed to advance 'particularly strong reasons' for ordering suspensive effect.²⁰ In particular, Mr Gbagbo contends that the fact that he enjoys popular support is not a sufficient reason to consider that he poses a flight risk.²¹ He argues that the Prosecutor's arguments regarding non-cooperating States are speculative.²² Mr Gbagbo submits that as a 73 year old man, weakened by 8 years of detention, well known and requiring regular treatment, he has no desire to go underground.²³ He reiterates that he

¹⁴ Notice of Appeal, para. 28.

¹⁵ Mr Gbagbo's Response, para. 16.

¹⁶ Mr Gbagbo's Response, paras 17-19.

¹⁷ Mr Gbagbo's Response, paras 23-24.

¹⁸ Mr Gbagbo's Response, paras 26-27.

¹⁹ Mr Gbagbo's Response, para. 28.

²⁰ Mr Gbagbo's Response, paras 30-34, referring to [Ngudjolo Decision on Suspensive Effect](#), para. 23.

²¹ Mr Gbagbo's Response, para. 35.

²² Mr Gbagbo's Response, para. 36.

²³ Mr Gbagbo's Response, para. 38.

has no intention to flee and refers to his assurances, signed on 16 January 2019, in which he undertakes to appear when summoned.²⁴

10. Mr Blé Goudé submits that there is a ‘natural right to be free in the case of an acquittal’,²⁵ and that therefore the standard of proof required to determine the existence of a concrete risk of absconding in the case of an acquittal is ‘much higher’ than in respect of interim release or stay of proceedings.²⁶ He contends that there are no exceptional circumstances in this case and that the risk of flight is not a relevant consideration in a request for suspension.²⁷ Mr Blé Goudé submits that, in any case, the Prosecution has failed to prove a concrete risk of absconding, beyond mere speculation, and that no information was provided as to the country to which Mr Blé Goudé would abscond.²⁸ He argues that the comments of the President of Côte d’Ivoire regarding refraining from sending more Ivoirians to the Court must be interpreted as applying to persons other than he and Mr Gbagbo.²⁹ Furthermore, Mr Blé Goudé submits that the fact that a State may not comply with a request for surrender does not mean that he would not appear voluntarily or on his own motion if summoned by the Court.³⁰

11. Mr Blé Goudé submits that the existence of the alleged network of supporters, upon which the Prosecutor seeks to rely, finds no basis in concrete evidence.³¹ He contends that, in any case, given the closure of the Prosecutor’s case and the acquittal, any risk of interference in the proceedings is non-existent.³² Mr Blé Goudé argues that the allegation that he would have recourse to sufficient means is unsubstantiated, particularly given his indigent status.³³ He submits that, to the contrary, the risk of absconding is non-existent in view of the acquittal, which has reinforced his incentive to cooperate,³⁴ confirmed by the assurances he has given to appear before the Court as

²⁴ Mr Gbagbo’s Response, para. 39.

²⁵ Mr Blé Goudé’s Response, para. 12.

²⁶ Mr Blé Goudé’s Response, para. 12.

²⁷ Mr Blé Goudé’s Response, paras 13-14, referring to [Ngudjolo Decision on Suspensive Effect](#), para. 24.

²⁸ Mr Blé Goudé’s Response, para. 16.

²⁹ Mr Blé Goudé’s Response, para. 17.

³⁰ Mr Blé Goudé’s Response, para. 17.

³¹ Mr Blé Goudé’s Response, para. 18.

³² Mr Blé Goudé’s Response, para. 21.

³³ Mr Blé Goudé’s Response, para. 22.

³⁴ Mr Blé Goudé’s Response, para. 23.

and when requested.³⁵ Mr Blé Goudé submits that the false identity documents in his possession upon his arrest were not adduced in evidence and do not constitute a concrete flight risk five years on, considering, *inter alia*, that the United Nations travel ban was lifted in resolution 2283 of 28 April 2016.³⁶ Mr Blé Goudé maintains that in the absence of strong reasons for suspensive effect and bearing in mind the exceptional nature of continued detention of the acquitted person pending appeal, the right to be released immediately should prevail.³⁷

12. The victims participating in the proceedings concur with the totality of the arguments put forward by the Prosecutor and contend that granting suspensive effect would avoid ‘causing irreparable prejudice to the Victims, the Prosecutor and the overall integrity of the proceedings [...]’.³⁸ In particular, they submit, *inter alia*, that the release of Mr Gbagbo and Mr Blé Goudé at this point in time will defeat the purpose of the present appeal as well as of the appeal to be filed by the Prosecutor against the decision on acquittal.³⁹ They further argue that the requested suspensive effect is necessary to prevent ‘irreversible consequences’ to the proceedings against Mr Gbagbo and Mr Blé Goudé that would be caused by their release, relating in particular to (i) the risk of their flight; and (ii) the risk of interfering with the proceedings, should the decision on acquittal be reversed.⁴⁰ The victims express a ‘great concern and deception’ following the decision on acquittal, as well as security concerns in relation to the issuance of the Impugned Decision.⁴¹

13. The Appeals Chamber notes that article 82(3) of the Statute provides that

[a]n appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

14. Rule 156(5) of the Rules provides that

³⁵ Mr Blé Goudé’s Response, para. 24.

³⁶ Mr Blé Goudé’s Response, para. 25.

³⁷ Mr Blé Goudé’s Response, para. 29.

³⁸ OPCV Response, ICC-02/11-01/15-1240-Red, para. 2.

³⁹ OPCV Response, ICC-02/11-01/15-1240-Red, paras 3, 13-17.

⁴⁰ OPCV Response, ICC-02/11-01/15-1240-Red, paras 3, 18-23.

⁴¹ OPCV Response, ICC-02/11-01/15-1240-Red, paras 4-6, 24.

[w]hen filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3.

15. The Appeals Chamber recalls that it found in the *Ngudjolo* case that it is possible for the Prosecutor to request suspensive effect in an appeal brought under article 81(3)(c)(ii) of the Statute in a situation where a trial chamber had rejected the Prosecutor's request for continued detention of the acquitted person and that, if the Appeals Chamber were to grant such a request, this would lead to the continued detention of the acquitted person pending the determination of the appeal against the decision under article 81(3)(c)(i) of the Statute.⁴²

16. The Appeals Chamber underlines that the interpretation adopted in the *Ngudjolo* case finds support not only in the text and context of article 81(3)(c) of the Statute, but also in the purpose of the provision. Article 81(3)(c) of the Statute stipulates the general rule that, in case of an acquittal by a Trial Chamber, the acquitted person is to be released immediately. Nevertheless, the Statute recognises that there may be situations – exceptional circumstances – where the continued detention of the acquitted person is justified, pending the determination of the Prosecutor's appeal against the acquittal. It therefore entrusts the Trial Chamber with the power to order the continued detention of the acquitted person, at the request of the Prosecutor. The Trial Chamber's decision on continued detention may itself be appealed to the Appeals Chamber, as per article 81(3)(c)(ii) of the Statute.

17. The continued detention of an acquitted person pursuant to article 81(3)(c)(i) of the Statute serves one principal purpose: to ensure that, in case of a successful appeal by the Prosecutor against the acquittal, the proceedings against the person may be continued without the need for a new arrest and surrender. It must also be noted that the continued detention pending the Prosecutor's appeal cannot be achieved by requesting that the Prosecutor's appeal against the acquittal have suspensive effect: article 81(3)(c) of the Statute is the *lex specialis* regarding an acquitted person's continued detention pending appeal.

18. The Prosecutor's right to request the continued detention of the acquitted person and, in case of a rejection of such request by the Trial Chamber, to appeal the Trial

⁴² [Ngudjolo Decision on Suspensive Effect](#), paras 15, 17.

Chamber's decision to the Appeals Chamber must be given practical effect. The very point of an appeal under article 81(3)(c)(ii) of the Statute is to allow the Prosecutor to make her case before the Appeals Chamber as to why the acquitted person should remain in detention pending the appeal against the acquittal. If the Appeals Chamber were unable, as a matter of law, to stop temporarily the immediate release of the acquitted person by granting suspensive effect until the Prosecutor's appeal under article 81(3)(c)(ii) of the Statute is determined, the Prosecutor's right to appeal would be potentially nugatory.

19. Thus, the Appeals Chamber finds, by majority, Judge Morrison and Judge Hofmański dissenting, that there is no reason to revisit the approach adopted in the *Ngudjolo* case with regard to the availability of suspensive effect in relation to the Prosecutor's appeal under article 81(3)(c)(ii) of the Statute and that, therefore, it can examine the merits of the Prosecutor's request for suspensive effect in the present case.

20. Turning to the merits of the request for suspensive effect, the Appeals Chamber recalls that its decision to order that an appeal have suspensive effect is discretionary and that, when examining a request for suspensive effect, it 'will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances'.⁴³ The Appeals Chamber has summarised the circumstances in which it has previously exercised its discretion to grant suspensive effect as follows:

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) 'would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant', (ii) would lead to consequences that 'would be very difficult to

⁴³ *Situation on registered vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia*, 'Decision on suspensive effect', 6 August 2015, [ICC-01/13-43](#) (OA), para. 7, referring to *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 'Decision on the Prosecutor's urgent request for suspensive effect of the "Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido" of 21 October 2014', 22 October 2014, [ICC-01/05-01/13-718](#) (OA9), para. 5.

correct and may be irreversible’, or (iii) ‘could potentially defeat the purpose of the appeal’.⁴⁴ [Footnotes omitted.]

21. Although these pronouncements were made in the context of appeals under article 82(1) of the Statute, the Appeals Chamber sees no reason not to apply them in the context of an appeal under article 81(3)(c)(ii). Nevertheless, while consideration of these criteria may inform the Appeals Chamber’s decision on suspensive effect, it must be underlined that they cannot be applied schematically. Rather, when deciding on suspensive effect, it is important to consider all circumstances that are relevant to the exercise of the Appeals Chamber’s discretion.⁴⁵

22. For the reasons that follow, the Appeals Chamber finds that in the present case it is appropriate to order that the Prosecutor’s appeal have suspensive effect. While, as stated in the *Ngudjolo* Decision on Suspensive Effect, there must be ‘particularly strong reasons’ for granting suspensive effect in an appeal of the Prosecutor against a decision under article 81(3)(c)(i) of the Statute, ‘which clearly outweigh [the acquitted person’s] statutory right to be released immediately following his acquittal’,⁴⁶ these ‘particularly strong reasons’ do not preclude the realistic view of the potential consequences that the implementation of the decision under appeal may have in case of a successful appeal. In this regard, the Appeals Chamber notes that, in her submissions before the Trial Chamber in support of her request under article 81(3)(c)(i) of the Statute, the Prosecutor submitted that continued detention was warranted, *inter alia*, because of a concrete flight risk.⁴⁷ The Prosecutor repeats these submissions in support of her request for suspensive effect, arguing on that basis that the purpose of the appeal could be defeated.⁴⁸ The question of whether the Trial Chamber erred in assessing these submissions is likely to be an important aspect of the merits of the present appeal, and the Appeals Chamber will therefore not address these submissions any further at this point. Nevertheless, the Appeals Chamber notes that the decision rejecting the Prosecutor’s request under article 81(3)(c)(i) of the

⁴⁴ *Ibid.*

⁴⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, ‘Decision on the Request of the Prosecutor for Suspensive Effect’, 3 September 2009, [ICC-01/05-01/08-499](#) (OA12), para. 11.

⁴⁶ [Ngudjolo Decision on Suspensive Effect](#), para. 23.

⁴⁷ [Prosecutor’s Request](#), para. 20.

⁴⁸ Notice of Appeal, paras 22 et seq.

Statute was taken by majority, Judge Herrera Carbuccia dissenting.⁴⁹ In the circumstances of the present case, there are therefore strong reasons to move the Appeals Chamber to exercise its discretion and grant suspensive effect, so as to avoid that the implementation of the Impugned Decision pending appeal potentially defeats the appeal's purpose because Mr Gbagbo and Mr Blé Goudé might no longer be available to be tried before the Court.

23. Accordingly, the request for suspensive effect is granted.

24. In light of the urgency of the matter, the Appeals Chamber considers it appropriate to give directions for the further conduct of the appeal proceedings, abridging the time limits for the submission of the appeal brief and responses thereto and scheduling a hearing on the appeal, as set out in the operative part.

Judge Morrison and Judge Hofmański append a dissenting opinion in respect of the admissibility of the request for suspensive effect.

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



Judge Chile Eboe-Osuji
Presiding Judge

Dated this 18th day of January 2019

At The Hague, The Netherlands

⁴⁹ Impugned Decision, ICC-02/11-01/15-T-234-Eng, p. 2, line 7; p. 6, lines 9-10, 15-17.