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

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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**

Second Public Redacted

**Judgment on the Prosecutor's appeal against the oral decision of
Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute**

Judgment 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),

After deliberation,

Delivers the following

JUDGMENT

1. 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) is amended in that the conditions set out in paragraph 60 of this judgment are imposed on Mr Laurent Gbagbo and Mr Charles Blé Goudé upon their release to a State willing to accept them on its territory and willing and able to enforce the conditions.
2. The Registrar is instructed to identify and enter into arrangements with States willing to accept Mr Laurent Gbagbo and/or Mr Blé Goudé on their territories and enforce the conditions set out in paragraph 60. Should the Registrar encounter challenges in this regard, he is instructed to inform the Appeals Chamber without delay.
3. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
4. The Appeals Chamber may review and vary the conditions of release in the future in its own motion or on the motion of a party or participant.
5. The Prosecutor's request that the Appeals Chamber instruct Trial Chamber I to provide a full and reasoned statement of its conclusions regarding the acquittal of Mr Laurent Gbagbo and Mr Charles Blé Goudé

as expeditiously as possible and preferably within 30 days of the delivery of the present judgment is rejected.

REASONS

I. KEY FINDINGS

1. Article 81(3)(c)(i) of the Statute must be interpreted restrictively. The onus of justifying the measure of continued detention upon acquittal lies squarely upon the Prosecutor, and continued detention must be limited to situations which are truly exceptional. In particular, before continued detention can be ordered, all reasonable measures less severe than detention must be considered and found to be insufficient. Continued detention can only be the last resort.

2. Although article 81(3)(c) of the Statute does not expressly provide that conditions may be imposed on the acquitted person once released, the Trial Chamber has the power to impose conditions on the released person in such a situation. The Trial Chamber's power to impose conditions extends to the Appeals Chamber once the case reaches it. Nevertheless, there must be compelling reasons for imposing conditions on the released person. In particular, consideration should be given to whether there appears to be a flight risk that could be mitigated by conditions. Any such conditions must be carefully balanced with the rights of the acquitted person and must be proportionately tailored to mitigate the risks identified.

II. PROCEDURAL HISTORY

3. 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

4. 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

¹ [ICC-02/11-01/15-T-232-Eng](#), p. 4, lines 17-18.

² [ICC-02/11-01/15-T-234-Eng](#).

(‘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.

5. On 16 January 2019, the Prosecutor filed the ‘Prosecution’s Appeal pursuant to article 81(3)(c)(ii) of the Statute and urgent request 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’).⁴

6. 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,⁵ pursuant to the Appeals Chamber’s ‘Order on the filing of responses to the request of the Prosecutor for suspensive effect’ of 16 January 2019.⁶

7. On 18 January 2019, the Appeals Chamber, by majority, Judge Morrison and Judge Hofmański dissenting, granted the request for suspensive effect of the Impugned Decision and issued directions on the further conduct of the proceedings⁷ (‘Decision on Suspensive Effect’).

8. On 22 January 2019, the Appeals Chamber ordered the Registrar to seek observations from the Host State as well as any other relevant State regarding the potential release of Mr Gbagbo and Mr Blé Goudé, including potential conditional release and file a report thereon.⁸

³ ‘Urgent Prosecution’s request pursuant to article 81(3)(c)(i) of the Statute’, [ICC-02/11-01/15-1235](#) (‘Prosecutor’s Request Under article 81(3)(c)(i)’).

⁴ [ICC-02/11-01/15-1236](#) (OA14) (‘Prosecutor’s Request for Suspensive Effect’), para. 30(ii).

⁵ ‘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); ‘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; ‘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 (OA14) (a public redacted version was filed on the same day, [ICC-02/11-01/15-1240-Red](#) (OA14)).

⁶ [ICC-02/11-01/15-1237](#) (OA14).

⁷ ‘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’, [ICC-02/11-01/15-1243](#) (OA14). See also ‘Dissenting Opinion of Judge Morrison and Judge Hofmański in respect of the decision on suspensive effect’, [ICC-02/11-01/15-1243-Anx](#) (OA14).

⁸ ‘Order to the Registrar regarding views of States’, [ICC-02/11-01/15-1244](#) (OA14).

9. On 23 January 2019, the Prosecutor filed her appeal brief⁹ ('Appeal Brief').
10. On 29 January 2019, Mr Gbagbo,¹⁰ Mr Blé Goudé,¹¹ and the victims participating in the proceedings¹² filed their responses to the Appeal Brief. On the same day, the Registrar filed a report on observations from States on release and conditional release.¹³
11. On 1 February 2019, the Appeals Chamber heard oral submissions from the parties and participants in the appeal.¹⁴

III. RELEVANT PARTS OF THE IMPUGNED DECISION

12. The Trial Chamber, by majority, Judge Herrera Carbuccion dissenting, rejected the Prosecutor's request to find that there are exceptional circumstances to maintain the detention of Mr Gbagbo and Mr Blé Goudé, and release them subject to conditions.¹⁵ In taking its decision, the Trial Chamber recalled that 'the measure of detention is and must remain exceptional'.¹⁶

13. With respect to the seriousness of the crimes, the Trial Chamber decided that 'although the charges are clearly serious in nature, this in itself is not an extraordinary circumstance that could warrant detaining acquitted persons'.¹⁷ The Trial Chamber recalled that it had found insufficient evidence to conclude that crimes against humanity attributed to Mr Gbagbo and Mr Blé Goudé had been committed in the Côte d'Ivoire and that the parties and participants had not pointed to any other factor that

⁹ 'Prosecution's Document in Support of Appeal pursuant to Article 81(3)(c)(ii) of the Statute', [ICC-02/11-01/15-1245](#) (OA14).

¹⁰ 'Réponse de la Défense au « Prosecution's Document in Support of Appeal pursuant to Article 81(3)(c)(ii) of the Statute » (ICC-02/11-01/15-1245)', [ICC-02/11-01/15-1248](#) (OA14) ('Mr Gbagbo's Response').

¹¹ 'Defence Response to the "Prosecution's Document in Support of Appeal pursuant to Article 81(3)(c)(ii) of the Statute" (ICC-02/11-01/15-1245 OA14)', [ICC-02/11-01/15-1247](#) (OA14) ('Mr Blé Goudé's Response').

¹² 'Response to the "Prosecution's Document in Support of Appeal pursuant to Article 81(3)(c)(ii) of the Statute"', [ICC-02/11-01/15-1246](#) (OA14) ('Victims' Response').

¹³ 'Transmission of the Observations of States', ICC-02/11-01/15-1249-Conf-Exp (OA14).

¹⁴ Transcript of 1 February 2019, ICC-02/11-01/15-T-235-Eng.

¹⁵ [Impugned Decision](#).

¹⁶ [Impugned Decision](#), p. 2, lines 1-2

¹⁷ [Impugned Decision](#), p. 2, lines 8-10.

could indicate that the charges were exceptionally serious in the sense of article 81 of the Statute.¹⁸

14. With respect to whether Mr Gbagbo and Mr Blé Goudé represented a flight risk, the Trial Chamber noted that it had not been provided with information as to where they wished to go, and that the statement of the President of the Côte d'Ivoire that due to its functioning judicial system, no more Ivoirians would be sent to the ICC, should be interpreted with reference to the principle of complementarity and only applying to new cases arising from the situation in the Côte d'Ivoire.¹⁹ The Trial Chamber refrained from commenting on the case against Ms Simone Gbagbo as it is *sub judice* before another Chamber, and stated that '[f]light risk must be evaluated in respect of the individuals concerned'.²⁰ Moreover, the Trial Chamber stated that the fact that a State may not comply with a request for surrender does not mean that the persons in question would not appear voluntarily or on their own motion if summonsed by the Court.²¹ In this vein, the Trial Chamber noted that Mr Gbagbo and Mr Blé Goudé had given assurances that they would comply with the orders of the Court and that it had no reason to doubt the genuineness of such assurances.²² It found that it would be unreasonable to rely on Mr Blé Goudé's possession of false identity documents upon his arrest more than five years ago to continue his detention.²³

15. With respect to the chances of success on appeal, the Trial Chamber emphasised that the acquittal had been entered *even before* Mr Gbagbo and Mr Blé Goudé had presented any evidence, demonstrating 'how exceptionally weak the Prosecutor's evidence is'.²⁴ It stated that the fact that its decision was not unanimous 'does not, in and of itself, make the acquittal exceptional', nor does the fact that one judge would have preferred to hear the Defence case imply that there is a high probability that the Appeals Chamber would overturn the acquittal.²⁵ The Trial Chamber stated that

¹⁸ [Impugned Decision](#), p. 2, lines 15-20.

¹⁹ [Impugned Decision](#), p. 2, line 22 to p. 3, line 3.

²⁰ [Impugned Decision](#), p. 3, lines 6-9.

²¹ [Impugned Decision](#), p. 3, lines 9-12.

²² [Impugned Decision](#), p. 3, lines 17-20.

²³ [Impugned Decision](#), p. 3, lines 21 to p. 4, line 1.

²⁴ [Impugned Decision](#), p. 4, lines 3-5.

²⁵ [Impugned Decision](#), p. 4, lines 6-10.

rendering the decision with reasons to follow is not *per se* an exceptional circumstance.²⁶

IV. SUBMISSIONS BY PARTIES AND PARTICIPANTS

A. Prosecutor

16. In the Appeal Brief, the Prosecutor sets out four grounds of appeal. Under the first ground, the Prosecutor submits that the Trial Chamber committed an error of law by failing to apply the ‘exceptional circumstances’ test under article 81(3)(c)(i) of the Statute in a cumulative manner.²⁷ The Prosecutor contends that the Trial Chamber ‘required that *each* factor considered in the overall assessment individually reach the threshold of “exceptionality”’.²⁸ According to the Prosecutor, this ‘piecemeal assessment’ is ‘legally incorrect and contrary to logic’ because the factors listed under article 81(3)(c)(i) of the Statute relate to each other.²⁹

17. Under the second ground of appeal, the Prosecutor submits that, when assessing whether there is a concrete risk of flight, the Trial Chamber erred in the exercise of discretion by giving weight to irrelevant considerations or by failing to consider or to give appropriate weight to relevant considerations.³⁰ She contends that the Trial Chamber took into consideration an irrelevant factor, namely that it ‘had no information’ as to where Mr Gbagbo and Mr Blé Goudé ‘wished to go’.³¹ In this regard, the Prosecutor argues that if Mr Gbagbo and Mr Blé Goudé were to move to a non-party State or to the Côte d’Ivoire, their future presence before the Court could not be compelled either because of a lack of a duty to cooperate in the case of non-party States or on the basis of the ‘Côte d’Ivoire’s failure to surrender Ms Simone Gbagbo to the Court’ and a recent statement by the President of that State indicating that, according to the Prosecutor, the Côte d’Ivoire will not further cooperate in the

²⁶ [Impugned Decision](#), p. 5, lines 21-23.

²⁷ [Appeal Brief](#), paras 12, 15.

²⁸ [Appeal Brief](#), para. 12 (emphasis in original).

²⁹ [Appeal Brief](#), para. 14.

³⁰ [Appeal Brief](#), paras 16-28.

³¹ [Appeal Brief](#), para. 18.

arrest and surrender of suspects to the Court (including Mr Gbagbo and Mr Blé Goudé).³²

18. The Prosecutor further contends that the Trial Chamber's finding that a person may voluntarily appear before the Court even in the absence of State cooperation, does not take into consideration that both Mr Gbagbo and Mr Blé Goudé have an incentive to abscond.³³ In support of her submissions, the Prosecutor refers to the decisions rendered by the Trial Chamber on interim release in which it noted the gravity of the charges, the resulting high sentence, the existence of a support network and the means available to Mr Gbagbo, considerations that, the Prosecutor contends, also apply to Mr Blé Goudé.³⁴ The Prosecutor contends that the assurances given by Mr Gbagbo and Mr Blé Goudé are 'manifestly inadequate'.³⁵ She contends that the Trial Chamber failed 'to give appropriate weight to the fact that Mr Blé Goudé fled to Ghana and was in possession of false identity documents' when arrested in 2013.³⁶

19. Under the third ground of appeal, the Prosecutor argues that the Trial Chamber erred in the exercise of its discretion by giving weight to irrelevant considerations and by failing to consider or to give appropriate weight to relevant considerations when assessing the seriousness of the charges.³⁷ She submits that for this assessment, it is irrelevant that the Trial Chamber dismissed the charges against Mr Gbagbo and Mr Blé Goudé, because article 81(3)(c)(i) of the Statute would not apply unless the charges had been dismissed and the persons acquitted.³⁸ She contends that, as previously stated by the Trial Chamber, the charges in this case are '*extremely grave*'.³⁹ The Prosecutor argues in this regard (i) that the charges 'involve crimes against people' as opposed to crimes against property; (ii) that 'the alleged crimes were politically motivated'; (iii) the impact of the crimes extends to the wider area of

³² [Appeal Brief](#), paras 18-22.

³³ [Appeal Brief](#), para. 23.

³⁴ [Appeal Brief](#), paras 23-24.

³⁵ [Appeal Brief](#), para. 24.

³⁶ [Appeal Brief](#), para. 26.

³⁷ [Appeal Brief](#), paras 29-33.

³⁸ [Appeal Brief](#), para. 29.

³⁹ [Appeal Brief](#), para. 31 (emphasis in original).

Abidjan; and (iv) the high level positions of Mr Gbagbo and Mr Blé Goudé in the State apparatus.⁴⁰

20. Under the fourth ground of appeal, the Prosecutor argues that the Trial Chamber applied an incorrect legal standard and erred in the exercise of discretion by giving weight to irrelevant considerations, by failing to consider or to give appropriate weight to relevant considerations and by failing to exercise its discretion judiciously when assessing the probability of success on appeal.⁴¹ She submits that the Trial Chamber adopted ‘a subjective approach by linking the probability of success on appeal to its own assessment of the strength of the Prosecution’s evidence’.⁴² According to the Prosecutor, the standard must be objective and should consist of an assessment of whether ‘the appeal is a viable one that *could* lead to a reversal of the decision’.⁴³ She further avers that the Trial Chamber incorrectly elevated the standard by requiring that there be a ‘high probability’ of success on appeal and that the acquittal ‘need somehow be “exceptional”’.⁴⁴

21. The Prosecutor argues that the Trial Chamber failed to give appropriate weight to the fact that Judge Herrera Carbuccion issued a dissenting opinion to the acquittal.⁴⁵ She submits that in the absence of a fully reasoned judgment by the Trial Chamber, she ‘has been significantly hampered in making fully informed arguments as to the probability of success on appeal’.⁴⁶ She further contends that the Trial Chamber erred by further explaining certain aspects of the acquittal and ‘using such clarifications to find that there is a low probability of success on appeal’.⁴⁷ The Prosecutor submits that it was incorrect for the Trial Chamber to consider as a ‘factor militating against the probability of success on appeal’ that ‘the weakness of the evidence’ caused the Majority to acquit Mr Gbagbo and Mr Blé Goudé before they presented any evidence.⁴⁸ In this regard, the Prosecutor states that at the ‘no case to answer’ stage,

⁴⁰ [Appeal Brief](#), para. 31.

⁴¹ [Appeal Brief](#), paras 34-46.

⁴² [Appeal Brief](#), para. 35.

⁴³ [Appeal Brief](#), para. 35 (emphasis in original).

⁴⁴ [Appeal Brief](#), para. 36.

⁴⁵ [Appeal Brief](#), paras 39-41.

⁴⁶ [Appeal Brief](#), para. 40.

⁴⁷ [Appeal Brief](#), para. 42.

⁴⁸ [Appeal Brief](#), para. 43.

the standard of proof is lower than the ‘beyond reasonable doubt’ standard.⁴⁹ Finally, she refers to a ‘number of procedural flaws’ that, in her view, characterised the trial such as (i) the manner in which the Trial Chamber applied the standard of proof at the ‘no case to answer’ stage; (ii) the assessment of the evidence at that stage; and (iii) the disagreements between the judges forming the Majority as to the applicable regime for the presentation of evidence.⁵⁰

22. In terms of appropriate relief, the Prosecutor requests that the Appeals Chamber reverse the Impugned Decision, substitute its discretion for that of the Trial Chamber and find that exceptional circumstances within the meaning of article 81(3)(c)(i) of the Statute exist, which justify the continued detention of Mr Gbagbo and Mr Blé Goudé pending appeal.⁵¹ In lieu of ordering detention, the Appeals Chamber is requested to use its powers under article 81(3)(c) and 83(1), read with article 64(6)(f) of the Statute to release Mr Gbagbo and Mr Blé Goudé to a State Party that is geographically close to the seat of the Court and willing to accept them subject to conditions.⁵² Finally, the Prosecutor requests the Appeals Chamber, if no such State can be found to accept Mr Gbagbo and Mr Blé Goudé subject to those conditions, to maintain their detention.⁵³ Furthermore, the Prosecutor requests that the Appeals Chamber ‘instruct the Trial Chamber to provide a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions as expeditiously as

⁴⁹ [Appeal Brief](#), para. 43.

⁵⁰ [Appeal Brief](#), paras 44-45.

⁵¹ [Appeal Brief](#), para. 50.

⁵² Such conditions would be that Mr Gbagbo and Mr Blé Goudé should be ordered to: (i) abide by all instructions and orders from the Chamber, including to be present in Court when ordered; (ii) provide the address where they reside and contact information to the Chamber and the State of residence and request authorisation from the Chamber for any change of address; (iii) not travel beyond the territorial limits of the municipality of residence without the explicit authorisation of the Chamber; (iv) surrender all identity documents, particularly their passports to the Registry; (v) report weekly to the law enforcement authorities of the State where they are released; (vi) not contact, either directly or indirectly, any Prosecution witness in this case, or any interviewed person in its ongoing investigation in Côte d’Ivoire as disclosed, except through counsel authorised to represent them before this Court and in accordance with the applicable protocols; (vii) not make any public statements, directly or indirectly, about the case or be in contact with the public or speak to the press concerning the case; (viii) abide by any additional conditions imposed by the Chamber and/or the State of release ([Appeal Brief](#), para. 50, referring to [Prosecutor’s Request Under article 81\(3\)\(c\)\(i\)](#), paras 21-26).

⁵³ [Appeal Brief](#), para. 50.

possible and preferably within 30 days from the date of the Appeals Chamber's decision on appeal'.⁵⁴

23. During the oral hearing, the Prosecutor submitted that although it would be preferable, in particular due to practical implications, for the Appeals Chamber to first identify exceptional circumstances within the meaning of article 81(3)(c)(i) of the Statute, the Appeals Chamber has the power to impose conditions on the release of an acquitted person regardless of whether exceptional circumstances within the meaning of article 81(3)(c)(i) of the Statute are identified.⁵⁵ The Prosecutor indicated that the imposition of her proposed conditions are sufficient to ensure the availability of Mr Gbagbo and Mr Blé Goudé in future proceedings.⁵⁶

B. Mr Gbagbo

24. In his response, Mr Gbagbo submits that the liberty of an individual is an essential right and that in the particular case of an acquittal, liberty can only be restricted in exceptional circumstances, meaning when there is an absolute necessity based upon objective criteria.⁵⁷ By reference to the legal framework of the European Court of Human Rights and jurisprudence of the Kosovo Specialist Chamber, he argues that the liberty of an acquitted person is absolute.⁵⁸ Mr Gbagbo therefore contends that article 81(3)(c)(i) of the Statute can only be applied cautiously, as a last resort and in case of absolute necessity.⁵⁹ Any such application must be consistent with internationally recognised human rights and cannot be based solely on assumptions or hypotheses such as the idea of an undemonstrated risk.⁶⁰

25. With respect to the standard of review and by reference to jurisprudence of the Appeals Chamber, Mr Gbagbo avers that the Appeals Chamber should be 'deferential to the determinations of the Trial Chamber' and should therefore not carry out a *de novo* review.⁶¹ With respect to the first ground of appeal, Mr Gbagbo submits that if none of the circumstances under article 81(3)(c)(i) of the Statute are exceptional in

⁵⁴ [Appeal Brief](#), paras 8, 50.

⁵⁵ Transcript of 1 February 2019, ICC-02/11-01/15-T-235-Eng.

⁵⁶ Transcript of 1 February 2019, ICC-02/11-01/15-T-235-Eng.

⁵⁷ [Mr Gbagbo's Response](#), paras 1-2. *See also* paras 20-26.

⁵⁸ [Mr Gbagbo's Response](#), paras 5-10.

⁵⁹ [Mr Gbagbo's Response](#), para. 11.

⁶⁰ [Mr Gbagbo's Response](#), paras 11-12.

⁶¹ [Mr Gbagbo's Response](#), paras 15-19.

themselves, then it is not possible that cumulatively they will reach such a level and that in fact the Prosecutor is requesting the adoption of a superficial approach to exceptional circumstances.⁶²

26. In relation to the second ground of appeal, Mr Gbagbo submits that the Prosecutor's assertion that there is a concrete risk of flight consists mainly of hypotheses and theories that are not based on any concrete evidence.⁶³ He further contends that by referring to past decisions on interim release rendered by the Trial Chamber, the Prosecutor overlooks that Mr Gbagbo has been acquitted which constitutes a fundamental change in the circumstances.⁶⁴ In terms of preserving the integrity of the proceedings as argued by the Prosecutor, Mr Gbagbo contends that this is an irrelevant consideration given that the Prosecutor's case is finished.⁶⁵

27. With respect to the third ground of appeal, Mr Gbagbo avers that all crimes adjudicated by the Court are serious.⁶⁶ He further argues that the remaining arguments of the Prosecutor to support her assertion that the charges in this particular case are more serious are based on arbitrary characterisations.⁶⁷

28. In relation to the fourth ground of appeal, Mr Gbagbo submits that the criteria of probability of success on appeal is without doubt subjective and that the Prosecutor aims at lowering the standard set out in article 81(3)(c)(i) of the Statute by suggesting that the probability of success on appeal is a 'viable' one.⁶⁸ He also contends that the existence of a dissenting opinion cannot be an indication of the probability of success on appeal referring in this regard to examples of acquittals confirmed on appeal before the *ad hoc* tribunals.⁶⁹ Mr Gbagbo further contends that at this stage, in the absence of a fully reasoned decision by the Trial Chamber, it is not possible to assess the probability of success on appeal and that the Appeals Chamber cannot rely on this factor to gauge the viability of an eventual appeal.⁷⁰ He further notes that Judge

⁶² [Mr Gbagbo's Response](#), paras 27-32.

⁶³ [Mr Gbagbo's Response](#), paras 33, 37.

⁶⁴ [Mr Gbagbo's Response](#), para. 37.

⁶⁵ [Mr Gbagbo's Response](#), para. 39.

⁶⁶ [Mr Gbagbo's Response](#), para. 41.

⁶⁷ [Mr Gbagbo's Response](#), para. 43.

⁶⁸ [Mr Gbagbo's Response](#), paras 47-48.

⁶⁹ [Mr Gbagbo's Response](#), para. 53.

⁷⁰ [Mr Gbagbo's Response](#), paras 56, 60.

Herrera Carbuccion did not explain the reasons demonstrating the existence of exceptional circumstances justifying detention pending appeal and that the alleged disagreement regarding the standard of proof noted by the Prosecutor cannot justify the existence of exceptional circumstances.⁷¹

29. In terms of the appropriate relief sought by the Prosecutor, Mr Gbagbo requests that the Appeals Chamber reject the Prosecutor's appeal and submits that, alternatively, if the Appeals Chamber were to find an error of law or fact, it would be inappropriate for the Appeals Chamber to substitute the Trial Chamber's evaluation with that of its own.⁷² In this regard, he submits that the Trial Chamber is best placed to carry out a factual assessment given its familiarity with the case and further contends that such an assessment by the Appeals Chamber would not be susceptible to appeal.⁷³ Mr Gbagbo argues that if the Appeals Chamber were to consider imposing conditions on his release, he should be afforded the opportunity to make detailed submissions in this regard, and that such conditions could be imposed only after a finding of an error.⁷⁴ Finally, Mr Gbagbo submits that there is no legal basis for the Prosecutor to request the Appeals Chamber to instruct the Trial Chamber to 'provide a full and reasoned statement of the Trial Chamber's findings on the evidence and conditions' within 30 days from the date of the Appeals Chamber's decision.⁷⁵ He further contends that such request is unacceptable and irrelevant to the issues on appeal.⁷⁶

30. During the oral hearing, Mr Gbagbo argued that there is no legal basis for the Appeals Chamber to impose conditions on release following an acquittal but submitted that if the Appeals Chamber were to find that it has such power and proceed to impose conditions, Mr Gbagbo would abide by those conditions.⁷⁷

⁷¹ [Mr Gbagbo's Response](#), para. 57-58.

⁷² [Mr Gbagbo's Response](#), paras 64-65.

⁷³ [Mr Gbagbo's Response](#), paras 66-67.

⁷⁴ [Mr Gbagbo's Response](#), para. 68.

⁷⁵ [Mr Gbagbo's Response](#), para. 69.

⁷⁶ [Mr Gbagbo's Response](#), paras 70-71.

⁷⁷ Transcript of 1 February 2019, ICC-02/11-01/15-T-235-Eng.

C. Mr Blé Goudé

31. With respect to the first ground, Mr Blé Goudé argues that contrary to the submissions of the Prosecutor, article 81(3)(c)(i) of the Statute requires the demonstration of exceptional circumstances which is a much higher standard than in the case of a suspension of immediate release upon acquittal, the former requiring a showing of particularly strong reasons, and resulting in different consequences.⁷⁸ Mr Blé Goudé argues that the use of the term ‘and’ in article 81(3)(c)(i) demonstrates that the existence of exceptional circumstances is a factor separate from the three other factors contained therein, whereas the Prosecutor has limited herself to the assessment of only those three factors.⁷⁹ He asserts that the Prosecutor’s submission that article 81(3)(c)(i) requires a cumulative assessment is flawed in that ‘three non-exceptional factors rarely make, even taken together, an exceptional circumstance’, especially where it is argued that the three factors relate to each other.⁸⁰ He further submits that if the seriousness of the charges and the probability of success on appeal relate to flight risk, as soon as flight risk is ruled out then the criterion of exceptionality cannot be met.⁸¹ Mr Blé Goudé argues that it cannot be ruled out that the Trial Chamber did not approach the factors cumulatively, and that, in any case, it considered all the relevant factors and did not err in balancing those factors.⁸²

32. Mr Blé Goudé contends that article 81(3)(c)(i) is ‘truly “exceptional” under international law’ and is neither ‘readily reconcilable with the Rome Statute, nor with international[ly] recognized human rights’,⁸³ which take precedent over any conflicting rule of the Court’s regime.⁸⁴ He stresses that a strict interpretation of article 81(3)(c)(i) is also supported by rule 99(B) of the Rules of Procedure and Evidence of the *ad hoc* tribunals, which is analogous to article 81(3)(c)(i) and has never been applied to order the detention of an acquitted person.⁸⁵ He argues that in

⁷⁸ [Mr Blé Goudé’s Response](#), para. 4.

⁷⁹ [Mr Blé Goudé’s Response](#), para. 6.

⁸⁰ [Mr Blé Goudé’s Response](#), paras 7-8.

⁸¹ [Mr Blé Goudé’s Response](#), para. 8.

⁸² [Mr Blé Goudé’s Response](#), para. 10.

⁸³ [Mr Blé Goudé’s Response](#), para. 13.

⁸⁴ [Mr Blé Goudé’s Response](#), para. 14.

⁸⁵ [Mr Blé Goudé’s Response](#), para. 16.

light of the Court's obligation pursuant to article 21(3), the criteria of article 81(3)(c)(i) must be interpreted narrowly.⁸⁶

33. With respect to the second ground, Mr Blé Goudé submits that the Trial Chamber's statement that it had no information as to where Mr Blé Goudé wished to go if immediately released is relevant to the assessment of the concrete flight risk, as the absence of any information makes the allegations of risk of flight purely speculative and thus unfounded.⁸⁷ He asserts that President Ouattara's statement and the alleged decisions of the Côte d'Ivoire taken with respect to Ms Simone Gbagbo are irrelevant in assessing whether Mr Gbagbo is a concrete flight risk.⁸⁸ He argues that the Prosecutor has failed to demonstrate his incentive to abscond. In this regard Mr Blé Goudé maintains that the Prosecutor has failed to demonstrate how past statements of the Trial Chamber with respect to whether Mr Gbagbo constituted a flight risk for the purpose of *interim release* apply to Mr Blé Goudé, that the Trial Chamber never made similar statements with respect to Mr Blé Goudé who did not request interim release on his own motion,⁸⁹ and that the Prosecutor did not demonstrate the existence of a network.⁹⁰ He argues that his incentive to cooperate with the Court has in fact been reinforced by the Trial Chamber's acquittal ruling; stating that his acquittal militates in favour of releasing him immediately as the probability of flight risk is no longer apposite.⁹¹

34. With respect to the third ground, Mr Blé Goudé argues that once there has been an acquittal of all charges, their seriousness should be appreciated specially.⁹² He argues further that since the Court deals with very serious charges, article 81(3)(c)(i) could lead to the systemic continued detention of acquitted persons which would be an unfair restriction to the right of liberty, '[t]herefore only charges of an extraordinary gravity could justify the continued detention of an acquitted person'.⁹³ He submits, first, that the charges, however, are not extraordinary when compared to

⁸⁶ [Mr Blé Goudé's Response](#), para. 20.

⁸⁷ [Mr Blé Goudé's Response](#), para. 24.

⁸⁸ [Mr Blé Goudé's Response](#), para. 25.

⁸⁹ [Mr Blé Goudé's Response](#), para. 26.

⁹⁰ [Mr Blé Goudé's Response](#), para. 29.

⁹¹ [Mr Blé Goudé's Response](#), para. 28.

⁹² [Mr Blé Goudé's Response](#), para. 33.

⁹³ [Mr Blé Goudé's Response](#), para. 35.

other cases at the Court;⁹⁴ second, the Prosecutor fails to justify why only property offences or offences against the administration of justice should be deemed of lesser gravity and fails to demonstrate why politically motivated crimes would be of an exceptional gravity.⁹⁵

35. With respect to the fourth ground, Mr Blé Goudé deems speculative the Prosecutor's argument that the reasoned decision will provide sufficient grounds in her support,⁹⁶ and argues that any doubt as to the probability of success on appeal in the absence of the reasoned decision should be guided by the principle *in dubio pro reo*.⁹⁷ He argues that the existence of a dissent is irrelevant to appreciate the probability of success on appeal, given that dissenting opinions are not exceptional and that the Appeals Chamber has validated the approach adopted by the Trial Chamber with respect to 'two major issues' in the proceedings (namely, the admission of documentary evidence and the application of rule 68(3) of the Rules).⁹⁸ He argues that the Prosecutor failed to show that the Majority applied a subjective approach and an incorrect legal standard to the criterion of probability of success on appeal, given that the weakness of the Prosecution evidence is an objective factor.⁹⁹ Nor did the Trial Chamber modify the acquittal or add to the substance of their decision, despite the assertion of the Prosecutor.¹⁰⁰

36. With respect to the request for conditions, Mr Blé Goudé argues that contrary to the interim release regime, a chamber does not have the power to attach conditions to the release of an acquitted person,¹⁰¹ but that he would be willing to abide by all conditions deemed necessary by the Appeals Chamber in the event that it reaches a different conclusion.¹⁰² In the event that the Appeals Chamber overturns the Trial Chamber's decision, he requests that it remand the matter back to that chamber for a new determination.¹⁰³ Finally, Mr Blé Goudé submits that the Appeals Chamber has

⁹⁴ [Mr Blé Goudé's Response](#), para. 38.

⁹⁵ [Mr Blé Goudé's Response](#), para. 38.

⁹⁶ [Mr Blé Goudé's Response](#), para. 41.

⁹⁷ [Mr Blé Goudé's Response](#), para. 42.

⁹⁸ [Mr Blé Goudé's Response](#), para. 43.

⁹⁹ [Mr Blé Goudé's Response](#), para. 50.

¹⁰⁰ [Mr Blé Goudé's Response](#), para. 52.

¹⁰¹ [Mr Blé Goudé's Response](#), para. 55.

¹⁰² [Mr Blé Goudé's Response](#), para. 56.

¹⁰³ [Mr Blé Goudé's Response](#), para. 57.

no legal power ‘to limit the number of days in which the Trial Chamber should issue’ its fully reasoned decision on acquittal.¹⁰⁴

37. During the oral hearing, Mr Blé Goudé submitted that there is no legal basis for the Appeals Chamber to impose conditions on the release of an acquitted person.¹⁰⁵ In case the Appeals Chamber were to find that it has the power to impose conditions on release following an acquittal and decide to impose conditions on his release, Mr Blé Goudé reiterated that he will abide by those conditions.¹⁰⁶ With respect to the proposed condition ‘not [to] make any public statements, directly or indirectly, about the case or be in contact with the public or speak to the press concerning the case’, Mr Blé Goudé requests the Appeals Chamber, if it were to impose this condition, to set it out in clear terms so that there is clarity as to its scope.¹⁰⁷

D. Victims

38. The victims fully support the Prosecutor’s arguments.¹⁰⁸ In relation to the first ground of appeal, the victims argue that the Trial Chamber ‘failed to apply the correct standard’ in assessing whether any of the elements under article 81(3)(c)(i) of the Statute individually constitutes an exceptional circumstance.¹⁰⁹ They submit that Trial Chamber II, in the case of the *Prosecutor v. Mathieu Ngudjolo Chui*, made a cumulative assessment of the exceptional circumstances.¹¹⁰ They further argue that such an approach ‘does not exclude cases in which one single circumstance has such a significant impact on the overall fairness of the proceedings, that there would be no need to assess any additional element’.¹¹¹ In the victims’ view, the Trial Chamber failed to properly assess how an acquittal without reasoning affected the fairness of the proceedings, thereby giving rise to an exceptional circumstance, as the lack of

¹⁰⁴ [Mr Blé Goudé’s Response](#), para. 57.

¹⁰⁵ Transcript of 1 February 2019, ICC-02/11-01/15-T-235-Eng.

¹⁰⁶ Transcript of 1 February 2019, ICC-02/11-01/15-T-235-Eng.

¹⁰⁷ Transcript of 1 February 2019, ICC-02/11-01/15-T-235-Eng.

¹⁰⁸ [Victims’ Response](#), para. 2.

¹⁰⁹ [Victims’ Response](#), paras 16-17.

¹¹⁰ [Victims’ Response](#), para. 17, referring to *Prosecutor v. Mathieu Ngudjolo Chui*, Transcript of 18 December 2012, ICC-01/04-02/12-T-3-ENG, p. 4, lines 16-19.

¹¹¹ [Victims’ Response](#), para. 18.

reasoning substantially obstructed the ability ‘to provide fully informed arguments on the chances of succeeding on appeal’.¹¹²

39. Separately, the victims indicate that, despite their fear for their security and well-being in the event of release, the Trial Chamber refused to consider such concerns.¹¹³ Overall, in the victims’ view, the Trial Chamber downplayed each individual circumstance, resulting in a clear error of law which materially affected the Impugned Decision.¹¹⁴

40. As to the second ground of appeal, the victims stress that the Trial Chamber has constantly and recently found that the flight risks are concrete in relation to Mr Gbagbo.¹¹⁵ The victims submit that the Appeals Chamber confirmed the existence of a network of supporters and the availability of financial means, which could facilitate absconding from the Court’s jurisdiction.¹¹⁶ In the victims’ view, those findings were not mitigated by the acquittal.¹¹⁷

41. They further submit that Mr Gbagbo’s supporters have threatened and attacked several victims after the acquittal.¹¹⁸ They submit that, in the Trial Chamber’s view, ‘the fact that Mr Gbagbo “knows the identity of witnesses and victims is a genuine risk”’.¹¹⁹ The victims aver that upon release, Mr Gbagbo and Mr Blé Goudé would be able to communicate freely and access social media, thereby creating a real risk that their supporters, who were very active and circumvented the court measures to protect witnesses, may threaten or exert coercive pressure upon witnesses and victims in an attempt to discontinue the proceedings in the event of a successful appeal.¹²⁰ The victims submit that the Trial Chamber should have considered the still volatile security situation in certain areas of Abidjan and the fact that only a few individuals, out of 729 participating victims, enjoyed protective measures as witnesses.¹²¹ They

¹¹² [Victims’ Response](#), para. 19.

¹¹³ [Victims’ Response](#), paras 4, 20.

¹¹⁴ [Victims’ Response](#), para. 21.

¹¹⁵ [Victims’ Response](#), para. 23, referring *inter alia* to ‘Decision on Mr Gbagbo’s Request for Interim Release’, 20 April 2018, [ICC-02/11-01/15-1156-Red](#), para. 39.

¹¹⁶ [Victims’ Response](#), para. 24.

¹¹⁷ [Victims’ Response](#), para. 24.

¹¹⁸ [Victims’ Response](#), para. 25.

¹¹⁹ [Victims’ Response](#), para. 25.

¹²⁰ [Victims’ Response](#), para. 26.

¹²¹ [Victims’ Response](#), para. 28.

thus argue that the Trial Chamber failed to properly assess these factors in the context of the overall flight risks contributing to the exceptionality of the circumstances for the purposes of article 81(3)(c)(i) of the Statute.¹²²

42. In response to the third ground of appeal, the victims argue that the Trial Chamber erred by considering its own finding that there was insufficient evidence to evaluate the seriousness of the charges.¹²³ The victims submit that in doing so, the Trial Chamber deprived article 81(3)(c)(i) of the Statute of its object and purpose, as the finding formed the basis of the acquittals and the reason why a determination under article 81(3)(c)(i) of the Statute was necessary.¹²⁴

43. In response to the fourth ground of appeal, the victims argue that the Trial Chamber erred in its assessment of the probability of success on appeal, insofar as it erroneously considered its own assessment of the strength of the evidence presented to date at trial,¹²⁵ required there to be ‘a “high probability that the Appeals Chamber would overturn the acquittal”’,¹²⁶ and characterised as ‘highly speculative’ the possibility that the Appeals Chamber would agree with Judge Herrera Carbuccion’s dissenting opinion.¹²⁷ The victims argue that it was ‘wholly inappropriate’ to consider the uncertain outcome of an appeal in the context of article 81(3)(c)(i) of the Statute and that, in any event, the existence of a dissenting opinion militated in favour of the prospects of success,¹²⁸ particularly having regard to the alleged disagreement regarding the applicable legal standard.¹²⁹ The victims contend that the Trial Chamber abused its discretion by simply stating that it was unpersuaded regarding the exceptionality of the circumstances.¹³⁰

44. In response to the Prosecutor’s suggestion that the Appeals Chamber may consider using its powers under article 81(3)(c) and 83(1), read together with article 64(6)(f), of the Statute to release Mr Gbagbo and Blé Goudé subject to conditions, the

¹²² [Victims’ Response](#), para. 27.

¹²³ [Victims’ Response](#), para. 30.

¹²⁴ [Victims’ Response](#), para. 30.

¹²⁵ [Victims’ Response](#), para. 34, referring to the [Impugned Decision](#), p. 4, lines 3-5, p. 5, lines 11-13.

¹²⁶ [Victims’ Response](#), para. 34, referring to the [Impugned Decision](#), p. 4, lines 7-10.

¹²⁷ [Victims’ Response](#), para. 35, referring to the [Impugned Decision](#), p. 5, lines 14-16.

¹²⁸ [Victims’ Response](#), para. 35.

¹²⁹ [Victims’ Response](#), para. 36, referring to the [Impugned Decision](#), p. 4, line 11 to p. 5, line 13.

¹³⁰ [Victims’ Response](#), para. 37, referring to the [Impugned Decision](#), p. 5, lines 18-23.

victims reiterate that exceptional circumstances exist to justify their continued detention.¹³¹ The victims submit that they reserve their right to develop further arguments in respect of conditional release, in response to any views that may be expressed by the relevant States.¹³² Finally, the victims agree with the Prosecutor's request for the Trial Chamber to render its reasoned decision on acquittal within a specific timeframe.¹³³

45. During the oral hearing, the victims argued that the Appeals Chamber has the power to impose conditions on the release of a person following acquittal.¹³⁴ In case the Appeals Chamber were to exercise such power and impose conditions on Mr Gbagbo and Mr Blé Goudé, the victims submit that the conditions proposed by the Prosecutor would suffice to ensure the future presence of Mr Gbagbo and Mr Blé Goudé and the integrity of the proceedings.¹³⁵

E. Views of relevant States

46. The Appeals Chamber has also received views of relevant States regarding the potential release of Mr Gbagbo and Mr Blé Goudé.¹³⁶ One State, the Kingdom of Belgium, has expressed its willingness to receive Mr Gbagbo, whilst the Registry is in consultations with other States with respect to Mr Blé-Goudé.

V. MERITS

47. The Appeals Chamber notes that the Prosecutor's primary request, both in her pleadings before the Trial Chamber and her pleadings before this Chamber, is that Mr Gbagbo and Mr Blé Goudé be released from detention with conditions; the Prosecutor seeks their continued detention only in the event that no State meeting the criteria put forward by the Prosecutor is willing to accept them on its territory and is able and willing to enforce the conditions she proposes.¹³⁷ Before addressing the Prosecutor's grounds of appeal any further, the Appeals Chamber considers it opportune to address the legal framework under the Statute for continued detention of

¹³¹ [Victims' Response](#), para. 40.

¹³² [Victims' Response](#), para. 42.

¹³³ [Victims' Response](#), para. 46.

¹³⁴ Transcript of 1 February 2019, ICC-02/11-01/15-T-235-Eng.

¹³⁵ Transcript of 1 February 2019, ICC-02/11-01/15-T-235-Eng.

¹³⁶ 'Transmission of the Observations of States', 29 January 2019, ICC-02/11-01/15-1249-Conf (OA14).

¹³⁷ [Prosecutor's Request Under article 81\(3\)\(c\)\(i\)](#), paras 1, 31; [Appeal Brief](#), paras 7, 50(c).

an acquitted person pending appeal and whether release with conditions may be ordered.

48. The continued detention pending appeal of a person acquitted by a trial chamber is addressed in article 81(3)(c) of the Statute, which provides as follows:

In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, *inter alia*, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

49. As recently held by the Appeals Chamber, ‘[t]he 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’.¹³⁸

50. Nevertheless, as the Trial Chamber correctly stated, ‘the measure of detention is and must remain exceptional’.¹³⁹ The continued detention of an acquitted person pending appeal is an extraordinary measure which should not be undertaken lightly and the Statute has imposed a rigorous test of ‘exceptional circumstances’ to justify such continued detention. This term must be understood and interpreted in light of internationally recognised human rights, as mandated by article 21(3) of the Statute. In this regard, the Appeals Chamber notes that the Specialist Chamber of the Constitutional Court of Kosovo found in 2017 that a draft rule of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers, which provided for the continued detention of an acquitted person pending appeal ‘under exceptional circumstances’, was incompatible with the Constitution of Kosovo as well as with article 5(1) of the European Convention on Human Rights.¹⁴⁰ The Specialist Chamber

¹³⁸ [Decision on Suspensive Effect](#), para. 16.

¹³⁹ [Impugned Decision](#), p. 2, lines 1-2.

¹⁴⁰ Kosovo Specialist Chambers, Specialist Chamber of the Constitutional Court, ‘Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the

had particular regard to ‘the paramount importance of the right to liberty in a democratic society, its relationship with the rule of law and the principles of legal certainty and proportionality’.¹⁴¹ Jurisprudence from the European Court of Human Rights also suggests that, under the European Convention on Human Rights, following an acquittal by a first-instance court, further detention pending appeal must be applied in a restrictive manner.¹⁴² Similarly, article 9(3) of the International Covenant on Civil and Political Rights refers to the detention of persons ‘awaiting trial’ (and not of persons whose acquittal is being appealed), while article 7(5) of the American Convention on Human Rights guarantees the right of detained persons to ‘*trial* within reasonable time’ (emphasis added) and article 6 of the African Charter on Human and Peoples’ Rights guarantees the right to liberty generally.

51. Furthermore, the Appeals Chamber notes, as also argued by Mr Blé Goudé,¹⁴³ that rules 99 of the Rules of Procedure and Evidence of the *ad hoc* tribunals¹⁴⁴ are similar to article 81(3)(c) of the Statute and that, in applying this legal provision, trial chambers of the International Criminal Tribunal for Rwanda (‘ICTR’) have

Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office’, 26 April 2017, [KSV-CC-PR-2017-01/F00004/1](#) (‘Judgment on the Referral of the Rules of Procedure and Evidence of the Kosovo Specialist Chambers’), paras 194 *et seq.*

¹⁴¹ [Judgment on the Referral of the Rules of Procedure and Evidence of the Kosovo Specialist Chambers](#), para. 197.

¹⁴² ECtHR, Grand Chamber, *Labita v. Italy*, ‘Judgment’, 6 April 2000, application no. [26772/95](#), para. 171; ECtHR, *Assanidze v. Georgia*, 8 April 2004, ‘Judgment’, application no. [71503/01](#), paras 172-176.

¹⁴³ [Mr Blé Goudé’s Response](#), para. 16.

¹⁴⁴ Rule 99 of the International Criminal Tribunal for the former Yugoslavia Rules of Procedure and Evidence provides, as amended on 8 July 2015, [IT/32/Rev.50](#):

(A) Subject to paragraph (B), in the case of an acquittal or the upholding of a challenge to jurisdiction, the accused shall be released immediately.

(B) If, at the time the judgement is pronounced, the Prosecutor advises the Trial Chamber in open court of the Prosecutor’s intention to file notice of appeal pursuant to Rule 108, the Trial Chamber may, on application in that behalf by the Prosecutor and upon hearing the parties, in its discretion, issue an order for the continued detention of the accused, pending the determination of the appeal.

Rule 99 of the ICTR Rules of Procedure and Evidence provides, as amended on 13 May 2015, [ITR/3/Rev.24](#):

(A) In case of acquittal, the accused shall be released immediately.

(B) If, at the time the judgement is pronounced, the Prosecutor advises the Trial Chamber in open court of his intention to file notice of appeal pursuant to Rule 108, the Trial Chamber may, at the request of the Prosecutor, issue a warrant for the arrest and further detention of the accused to take effect immediately.

consistently ordered the conditional release of acquitted persons pending the determination of the relevant appeals, as opposed to continued detention.¹⁴⁵

52. The foregoing all suggests that article 81(3)(c)(i) of the Statute must be interpreted restrictively. The onus of justifying the measure of continued detention upon acquittal lies squarely upon the Prosecutor, and continued detention must be limited to situations which are truly exceptional. In particular, before continued detention can be ordered, all reasonable measures less severe than detention must be considered and found to be insufficient. Continued detention can only be the last resort.

53. It is important to stress that the primary request of the Prosecutor in this case is not continued detention. It is, rather, release with conditions. Although article 81(3)(c) of the Statute does not expressly provide that conditions may be imposed on the acquitted person once released, the Trial Chamber has the power to impose conditions on the released person in such a situation. This power is incidental to the Trial Chamber's power under article 81(3)(c)(i) of the Statute: if it is possible under the Statute for the Trial Chamber to maintain the acquitted person in detention, it must also be possible to impose conditions on the acquitted person upon his or her release. The possibility to impose conditions on an acquitted person is justified by the Court's continued jurisdictional interest in the acquitted person pending the appeal against the acquittal. The Trial Chamber's power to impose conditions extends to the Appeals Chamber by virtue of article 83(1) of the Statute once the case reaches the appellate stage. Furthermore, the Appeals Chamber is satisfied that the power to impose conditions on the acquitted person pending appeal also results from the construction of rule 149 of the Rules read with articles 57(3)(a), 60(2) and 64(6)(f) of the Statute and rule 119 of the Rules, in addition to the incidental powers of the Appeals Chamber to protect the integrity of its process.

¹⁴⁵ ICTR, *The Prosecutor v. André Ntagurera et al.*, 'Decision on the Prosecutor's Request Pursuant to Rule 99(B)', 26 February 2004, [ICTR-99-46-T](#); ICTR, *The Prosecutor v. Ignace Bagilishema*, 'Decision on the Prosecutor's Request Pursuant to Rule 99(B)', 8 June 2001, [ICTR-95-1A-T](#); ICTR, *The Prosecutor v. Théoneste Bagosora et al.*, 'Decision on Prosecution Motion to Impose Conditions on Kabiligi's Liberty', 31 December 2008, [ICTR-98-41-T](#).

54. As to the circumstances under which a Chamber may impose conditions pending appeal on a person who is released following an acquittal, the Appeals Chamber considers that it is not necessary to establish ‘exceptional circumstances’, which is the threshold pursuant to article 81(3)(c) of the Statute for continued *detention* following an acquittal. Nevertheless, there must be compelling reasons for imposing conditions on the released person. In particular, consideration should be given to whether there appears to be a flight risk that could be mitigated by conditions. Any such conditions must be carefully balanced with the rights of the acquitted person and must be proportionately tailored to mitigate the risks identified.

55. Turning to the case at hand, the Appeals Chamber notes that the Prosecutor in her request before the Trial Chamber submitted that there were exceptional circumstances warranting continued detention, but conceded that Mr Gbagbo and Mr Blé Goudé could be released with conditions. The Trial Chamber assessed whether there were ‘exceptional circumstances’ in terms of article 81(3)(c) of the Statute warranting continued detention, but did not address whether there were compelling reasons to impose conditions upon release. In doing so, the Trial Chamber misdirected itself. As noted above, continued detention following an acquittal must be the strictly confined *ultima ratio*, reserved for the most exceptional cases. In the instance where the Prosecutor’s stated view is that release with certain conditions would sufficiently address her concerns, her submissions, and, in turn, a trial chamber’s decision should focus on whether there are compelling reasons to impose conditions. Only once it has been established that it is inappropriate to release with conditions, should the question of whether there are exceptional circumstances justifying the continued detention be addressed (if continued detention is indeed sought by the Prosecutor), bearing in mind the truly exceptional character of such a measure.

56. In sum, the approach of the Trial Chamber in the Impugned Decision, which focused on whether there were exceptional circumstances warranting continued detention, amounted to an error of law. Rather than addressing the existence of ‘exceptional circumstances’, the Trial Chamber should first have addressed whether there were compelling reasons to impose conditions on the two acquitted persons. This error of law materially affected the Impugned Decision as the Trial Chamber did not consider the question of conditions.

57. Pursuant to rule 158(1) of the Rules, in an appeal under, *inter alia*, article 81(3)(c)(ii) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed. In the particular circumstances of the present case, the Appeals Chamber deems it appropriate to amend the Impugned Decision and itself determine whether conditions should be imposed on the release of Mr Gbagbo and Mr Blé Goudé. This is particularly so in light of the urgency of the matter, given that Mr Gbagbo and Mr Blé Goudé have been acquitted by the Trial Chamber and still remain in detention pursuant to the Appeals Chamber's Decision on Suspensive Effect. Furthermore, given that the Prosecutor has already expressed her intention to appeal the acquittals¹⁴⁶ and that the merits of the case against Mr Gbagbo and Mr Blé Goudé may thus soon be before this chamber, the Appeals Chamber is of the view that it is in the best position to address the question of whether conditions should be imposed at this stage.

58. In her Appeal Brief, the Prosecutor submits that there are circumstances justifying restrictions on the liberty of Mr Gbagbo and Mr Blé Goudé. She refers in particular to 'a concrete risk that Mr Gbagbo and Mr Blé Goudé will not appear for the continuation of the proceedings in this case.'¹⁴⁷

59. The Appeals Chamber finds merit in the Prosecutor's submissions that there is a flight risk. In line with its jurisprudence in relation to interim release, the Appeals Chamber is of the view that the seriousness of the charges is relevant to the assessment of absconding.¹⁴⁸ In particular, the Appeals Chamber notes the numerous decisions in the present case in which it was determined that the seriousness of the charges with the resulting potential high sentence, the existence of a network of supporters and the means available to Mr Gbagbo constitute incentives to abscond.¹⁴⁹

¹⁴⁶ [Prosecutor's Request for Suspensive Effect](#), para. 8; [Appeal Brief](#), paras 6, 34-46.

¹⁴⁷ [Appeal Brief](#), para. 4.

¹⁴⁸ See e.g. *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"', 12 February 2007, [ICC-01/04-01/06-824](#) (OA7), para. 136

¹⁴⁹ See e.g. 'Decision on Mr Gbagbo's Detention', 10 March 2017, [ICC-02/11-01/15-846](#), para. 17; 'Decision on Mr Gbagbo's Detention', 25 September 2017, ICC-02/11-01/15-1038-Conf (a public redacted version was filed on the same day, [ICC-02/11-01/15-1038-Red](#)), para. 20; 'Decision on Mr Gbagbo's Request for Interim Release', 20 April 2018, ICC-02/11-01/15-1156-Conf (a public redacted version was filed on the same day, [ICC-02/11-01/15-1156-Red](#)), para. 38; 'Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled "Decision on

With respect to Mr Blé Goudé, the Appeals Chamber considers that the seriousness of the charges with the resulting potentially high sentence constitute incentives to abscond.

60. In light of the foregoing, the Appeals Chamber considers that there is a sufficient factual indication that Mr Gbagbo and Mr Blé Goudé might abscond if released unconditionally. The flight risk identified can be mitigated by the imposition of conditions. The Appeals Chamber thus finds that there are compelling reasons to exercise its powers under the Statute to impose conditions on Mr Gbagbo and Mr Blé Goudé, as set out below, and to amend the Impugned Decision accordingly. The Appeals Chamber also notes in this context that both Mr Gbagbo and Mr Blé Goudé have indicated that they are willing to accept conditions. In addition, the Kingdom of Belgium, which has expressed generally its willingness to accept Mr Gbagbo, has indicated that certain conditions would need to be imposed. The conditions imposed on Mr Gbagbo and Mr Blé Goudé are the following:

- (i) To sign an undertaking that they will abide by all instructions and orders from the Court, including to be present at the Court when ordered, and accepting that the proceedings before the Appeals Chamber may proceed in their absence, should they fail to appear before the Court when ordered to do so;
- (ii) To provide the address in the receiving State and contact information to the Court and the receiving State and request authorisation from the Court for any change of address;
- (iii) Not to travel beyond the territorial limits of the municipality of the receiving State without the explicit and prior authorisation of the Court;
- (iv) To surrender all identity documents, particularly their passports, to the Registry;

Mr Gbagbo's Detention", 19 July 2017, ICC-02/11-01/15-992-Conf (a public redacted version was filed on the same day, [ICC-02/11-01/15-992-Red](#)), para. 54.

- (v) To report weekly to the law enforcement authorities of the receiving State or the Registry;
- (vi) Not to contact, either directly or through any other party, any Prosecution witness in this case, or any interviewed person in the ongoing investigation in the Côte d'Ivoire as disclosed, except through counsel authorised to represent them before this Court and in accordance with the applicable protocols;
- (vii) Not to make any public statements, directly or through any other person, about the case or be in contact with the public or speak to the press concerning the case; and
- (viii) To abide by any additional reasonable conditions imposed by the State of release.

61. Should Mr Gbagbo or Mr Blé Goudé not comply with the above conditions, the Appeals Chamber will revisit the matter.

62. The Appeals Chamber notes that the Registrar has already entered into consultations with States Parties to the Statute as to their willingness to accept Mr Gbagbo and Mr Blé Goudé on their territories, and their willingness and ability to enforce conditions ordered by the Court. The Registrar is instructed to conclude such arrangements as soon as possible and, on that basis, facilitate the transfer of the two acquitted persons to the receiving State or States. Should the Registrar encounter challenges in this regard, he is instructed to inform the Appeals Chamber without delay.

63. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

64. [REDACTED]

65. As to the Prosecutor’s request that the Appeals Chamber instruct the Trial Chamber to ‘provide a full and reasoned statement of [its] findings on the evidence and conclusions [regarding the acquittal of Mr Gbagbo and Mr Blé Goudé] as expeditiously as possible and preferably within 30 days from the date of the Appeals Chamber’s decision on this appeal’,¹⁵⁰ the Appeals Chamber considers that, while the

¹⁵⁰ [Appeal Brief](#), para. 50(e).

need for expeditious proceedings must be underlined, it would not be appropriate to issue the sought instructions in the context of the present proceedings.

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



Judge Chile Eboe-Osuji
Presiding Judge

Dated this 1st day of February 2019

At The Hague, The Netherlands