Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/11-01/15**
Date: **23 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 Balugi Bosa

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

Prosecution's Document in Support of Appeal pursuant to Article 81(3)(c)(ii) of the Statute

Source: **Office of the Prosecutor**

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Introduction

1. The Majority of Trial Chamber I erred in its decision of 16 January 2019 to reject the Prosecution's request to maintain Laurent Gbagbo and Charles Blé Goudé (the "Accused")[1] in detention pending appeal, or in the alternative, to release them on conditions ("Decision").[2] Despite the Majority's oral announcement acquitting the Accused of all charges (the "Acquittals"),[3] followed by an order to release the Accused,[4] exceptional circumstances exist justifying the continued detention, or in the alternative, the conditional release, of the Accused pending the Prosecution's appeal against the Majority's full and reasoned statement of findings on the evidence and conclusions ("Judgment").[5]

2. In its Decision, the Majority committed both errors of law and errors in the exercise of its discretion, including when assessing the concrete risk that the Accused will evade justice if released unconditionally, the seriousness of the offences charged, and the probability that the Prosecution's appeal against the Judgment will succeed.

3. The situation in this case is exceptional, and indeed unprecedented, which the Majority failed to appreciate.

4. First, if released unconditionally, there is a concrete risk that the Accused will not appear for the continuation of the proceedings in this case (including the appeal and possible further trial proceedings). On three occasions the Trial Chamber—albeit in a differently-composed Majority—has denied Mr Gbagbo's interim release, finding that he has an incentive to abscond and the support of a network and means to do so. The Chamber has also held that his detention was necessary to ensure that he does not obstruct or endanger the court proceedings.[6] Although during most of the trial Mr Blé Goudé did not seek

[1] The Prosecution notes that, while article 81(3)(c) of the Statute refers to "the accused" ("In case of an acquittal, the accused shall be released immediately, subject to the following"), subparagraph (i) instead refers to "the person" ("Under exceptional circumstances […] the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal"). For ease of reference, the Prosecution in this submission refers to "the Accused" to mean Laurent Gbagbo and Charles Blé Goudé.
[2] ICC-02/11-01/15-T-234-ENG ET. Judge Herrera Carbuccia dissented. In her view, "in light of the particular circumstances of the detention without a full and reasoned statement the accused should remain in detention pending appeal pursuant to Article 81(3)(c)(i) of the Statute" (*see* Decision, 6:15-17). For the procedural background, see ICC-02/11-01/15-1236 OA14, paras. 5-10; ICC-02/11-01/15-1243 OA14 , paras. 1-5.
[3] ICC-02/11-01/15-T-232-ENG-ET. Judge Herrera Carbuccia issued a dissenting opinion: ICC-02/11-01/15-1234 ("Dissenting Opinion").
[4] Acquittals, 4:19.
[5] The Majority indicated that it "will provide its full and detailed reasoned decision as soon as possible" (Acquittals, 3:18).
[6] ICC-02/11-01/15-846; ICC-02/11-01/15-1038-Red; ICC-02/11-01/15-1156-Red.

interim release, and the Trial Chamber did not need to rule on the issue, the rationale of these findings applies equally to Mr Blé Goudé. These findings must further be considered in light of the failure by the Government of Côte d'Ivoire to comply with its duty to surrender Ms Simone Gbagbo to the Court, even after the Court found that the case against her was admissible; compounded by President Ouattara's statement of 4 February 2016 that he would not send more Ivoirians to the ICC; and his signing of an amnesty decree on 6 August 2018 granting amnesty to 800 detainees, among them Ms Simone Gbagbo.

5. Second, the charges against the Accused are very serious and, if the appeal is successful and proceedings continue, likely to carry a high sentence. The Trial Chamber itself has previously acknowledged that the charges against the Accused are *extremely* grave.[7] They are at the upper end of the scale of crimes that can be charged at the Court. They involve crimes against people—murder, inhumane acts, rape and persecution—as opposed to property offences or offences against the administration of justice. In addition, the alleged crimes were politically motivated—to retain power by all means—and their impact is not limited to the direct victims of the crimes but extends at least to the wider area of Abidjan. Also, the two Accused are alleged to have participated in these crimes from their positions at the highest levels of the State apparatus.

6. Third, there is a real probability that the Prosecution's appeal against the Judgment will succeed. Judge Herrera Carbuccia's Dissenting Opinion, which highlighted some of the problems generated by the Majority's approach in pronouncing the Acquittals while at the same time deferring their underlying reasons to an unspecified date in the future, is particularly relevant to assessing the probability of success on appeal and the broader notion of exceptional circumstances. The lack of proper written reasons by the Majority has greatly hampered the Prosecution's present ability to make fully informed arguments about the probability of success on appeal. However, even without these written reasons, at this early stage it is already apparent that the trial and the Acquittals were affected by a number of procedural flaws. Some of these were highlighted by Judge Herrera Carbuccia in her Dissenting Opinion, including the manner in which the Majority applied the standard of proof and how it assessed the evidence at the no-case-to-answer ("NCTA") stage. The Prosecution also notes that the Single Judge of the Trial Chamber failed to give guidance to the Parties on the applicable standard of proof and the manner in which the

[7] ICC-02/11-01/15-846, para. 17.

evidence was to be assessed at the NCTA stage, and during the trial the two judges forming the Majority of the Acquittals strongly disagreed with each another on whether to apply the "admission" or the "submission" regime to the presentation of evidence.[8] Judge Henderson stated that it would be difficult to reconcile the "submission" regime used in the trial with NCTA proceedings, and went further to state that if the Chamber were to find that there is a case to answer it would create "serious prejudice" to the Defence and "significantly affect[…] the expeditiousness of the proceedings".[9] Finally, while the Trial Chamber ordered the Defence to file NCTA motions,[10] and acquitted the Accused by granting these motions,[11] one judge in the Majority, Judge Tarfusser, even opined that "the notion [and] procedure of no case to answer is extraneous to the statutory texts of the Court",[12] thereby further contributing to the uncertainty of proceedings that were already lacking legal certainty and predictability. These are relevant objective indicators, relating to potential procedural errors or errors of law, for assessing the Prosecution's probability of success on appeal, which the Majority failed to consider.

7. Because of the errors in the Decision identified in this appeal, the Appeals Chamber should overturn it. It should then 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 and that the factors identified in that provision justify the continued detention of the Accused pending the Prosecution's appeal against the Judgment. The Appeals Chamber has all relevant information necessary to make these findings, and doing so, instead of

[8] See e.g. ICC-02/11-01/15-405 with dissenting opinion of Judge Henderson (ICC-02/11-01/15-405-Anx); ICC-02/11-01/15-1172 with dissenting opinion of Judge Henderson (ICC-02/11-01/15-1172-Anx).
[9] ICC-02/11-01/15-1197-Anx, see in particular paras. 3-4: "To reason that the Chamber cannot make final admissibility rulings at this stage because evidence that the Defence may or may not present might change the Chamber's assessment of the admissibility criteria, makes it difficult to not conclude how warped the Majority's approach really is. The question is not whether there is enough evidence to convict the accused at the end of the trial. The question is whether there is enough evidence at this stage of the proceedings that could support a conviction. Whether there is enough evidence now depends, in no small part, on how much of the evidence the Prosecutor has submitted is ruled inadmissible. The Majority's approach therefore seems to put the cart before the horse by ruling on whether there is enough evidence before knowing how much evidence there actually is. […] Of course, the Chamber can decide a no case to answer motion on the assumption that none of the evidence presented by the Prosecutor is inadmissible. If the Chamber still finds that the evidence is insufficient, from a practical point of view – as opposed to a principled position- neither the Prosecutor nor the Defence will have much to complain about. However, if the Chamber finds that there is a case to answer based on that assumption, the Defence may well be forced to put up a lengthy and costly defence case to challenge evidence which the Chamber may not even be allowed to consider, if the admissibility criteria are applied properly. This not only creates serious prejudice, it also significantly affects the expeditiousness of the proceedings."
[10] ICC-02/11-01/15-1174. The Trial Chamber noted the Appeals Chamber's decision in the *Ntaganda* case according to which a chamber has discretion to entertain a NCTA motion (para. 8) and ordered the Defence to "file […] submissions addressing the issues for which, in their view, the evidence presented by the Prosecution is not sufficient to sustain a conviction" (p. 7).
[11] Acquittals, 1:15-22, 4:14-18.
[12] ICC-02/11-01/15-T-230-ENG ET, 22:11-12.

remanding the matter back to the Trial Chamber for a new determination, would expedite the proceedings. It would also permit the Trial Chamber to focus on rendering its full and reasoned statement of findings on the evidence and its conclusions. However, as argued before the Trial Chamber, the Prosecution does not oppose the Accused being conditionally released. Accordingly, it invites the Appeals Chamber to use its powers under articles 81(3)(c) and 83(1), read with article 64(6)(f) of the Statute, to release the Accused subject to the conditions specified in the Prosecution's request under article 81(3)(c)(i).[13] These conditions should be contingent on the availability of a State that is (i) willing to accept Laurent Gbagbo and/or Charles Blé Goudé to be released in its territory; and (ii) willing and able to enforce the conditions imposed by the Appeals Chamber. If no such State(s) can be found, the Accused should be detained pending appeal.

8. If the Appeals Chamber imposes restrictions on the Accused's liberty pending appeal, the Prosecution respectfully submits that it should take steps to expedite proceedings to fully protect the rights of the Accused. To this end, the Appeals Chamber should further 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 possible and preferably within 30 days from the date of the Appeals Chamber's decision on this appeal.

Submissions

9. The Majority committed several appealable errors set out in the following four grounds of appeal, each of which materially affected the Decision.[14]

I. The Errors

(a) First Ground of Appeal: The Majority incorrectly applied the standard of "exceptional circumstances" under article 81(3)(c)(i)

10. In case of an acquittal, the continued detention of an accused may be ordered pursuant to article 81(3)(c) only "under exceptional circumstances".[15] Similarly to decisions ordering suspensive effect of an appeal under article 81(3)(c)(ii), for a Chamber to maintain the detention of an acquitted accused, there must be "particularly strong reasons […], which

[13] ICC-02/11-01/15-1235, paras. 21-26; see also ICC-02/11-01/15-1236 OA14, paras. 4, 23.
[14] ICC-02/04-01/05-408 OA3, para. 48; ICC-01/05-01/08-962 OA3, paras. 102, 106, 133-134; ICC-01/05-01/08-1019 OA4, para. 69; ICC-01/04-01/10-283 OA , para. 18.
[15] ICC-01/04-02/12-12 OA, para. 22; ICC-02/11-01/15-1243 OA14, para. 16.

clearly outweigh [the Accused's] statutory right to be released immediately following [their] acquittal".[16]

11. Under article 81(3)(c)(i), to assess whether exceptional circumstances exist, a Chamber must consider, at least, "the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal".[17] After assessing these factors (and any additional relevant factor(s)), the Chamber must determine whether cumulatively, they reach the exceptional circumstances standard. There is no need to show that each individual factor informing the Chamber's decision, assessed separately, is exceptional.[18]

12. While the Majority articulated the correct standard,[19] it failed to apply the exceptional circumstances test under article 81(1)(c)(i) properly, in a cumulative manner. Rather, it required that *each* factor considered in the overall assessment individually reach the threshold of "exceptionality".

13. In particular, when assessing the seriousness of charges, the Majority held that "this *in itself is not an extraordinary circumstance* that could warrant detaining acquitted persons. […] The parties and participants have not pointed to any other factor that could indicate *that the charges in the present case were exceptionally serious*, in the sense of […] Article 81".[20] When examining the probability of success on appeal, the Majority used similar language: it referred to the Acquittals taking place before the Defence had presented its evidence, "*to the extent that this is exceptional*".[21] It also remarked that "the fact that this decision was not rendered unanimously does not, *in and of itself, make the acquittal exceptional*".[22] The Majority took the same erroneous approach when evaluating an additional relevant factor: it said that "it is unpersuaded that either the rendering of the decision with detailed reasons to follow or the novelty of the majority's approach before this Court *is per se an exceptional circumstance*".[23] The language used in this last example clearly indicates that the Majority required that each individual factor *per se*

[16] ICC-01/04-02/12-12 OA, para. 23; ICC-02/11-01/15-1243 OA14, para. 22.
[17] *See also* Decision, 1:17-22.
[18] For some of the individual underlying factors, it must be shown that there is a concrete risk of a future occurrence. This is consistent with the wording of article 81(3)(c)(i), which requires proof of a "concrete risk of flight", as opposed to a mere possibility of flight.
[19] Decision, 1:17-22: "the continued detention of an acquitted person can only occur when there are exceptional circumstances, having regard to at least the following factors: Concrete risk of flight. The seriousness of the offence charged. The probability of success on an appeal." See also Decision, 5:18: "I come to talk about other indicators of exceptional circumstances".
[20] Decision, 2:19-20 (emphasis added).
[21] Decision, 4:3-4 (emphasis added).
[22] Decision, 4:6-7 (emphasis added).
[23] Decision, 5:21-23 (emphasis added).

amount to an exceptional circumstance. Further illustrating this approach, after assessing each factor individually, the Majority failed to weigh all factors together to determine whether cumulatively they met the exceptional circumstances standard.[24]

14. This piecemeal assessment of the individual factors in article 81(3)(c)(i) is legally incorrect and contrary to logic, as these factors relate to each other. For instance, as has already been held by the Appeals Chamber, the seriousness of the charges directly impacts on the risk of flight.[25] The probability of success on appeal is also relevant to assessing the flight risk of the Accused, as it makes the continuation of the proceedings, which may potentially result in a high sentence, more likely. Together, these factors are relevant to assessing the overall exceptionality of the circumstances.

15. Accordingly, the Majority committed an error of law by incorrectly applying the standard of "exceptional circumstances" under article 81(3)(c)(i). Had the Majority applied the standard to a cumulative consideration of the factors in article 81(3)(c)(i), it would have reached the conclusion that the detention of the Accused should be maintained, or that they should be released subject to conditions.

(b) Second Ground of Appeal: The Majority erred in the exercise of discretion by giving weight to irrelevant considerations and by failing to consider or to give appropriate weight to relevant considerations when assessing whether there is a concrete risk of flight by the Accused

16. The Accused's concrete risk of flight is "an important aspect of the merits of the present appeal".[26] As the Appeals Chamber has noted when granting the Prosecution's request for suspensive effect, "[t]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".[27] In that decision, the Appeals Chamber already found that "particularly strong reasons" justify the suspensive effect of this appeal and therefore that the Accused should be detained pending

[24] See remainder of the hearing: Decision 5:24-6:22.
[25] ICC-01/04-01/06-824 OA7, para. 136; ICC-01/04-01/07-572 OA4, paras. 21, 24; ICC-01/05-01/08-323 OA, para. 55; ICC-01/05-01/08-631-Red OA2, paras. 67-68; ICC-01/04-01/10-283 OA, para. 21; ICC-02/11-01/11-278-Red OA, 26 October 2012, para. 54.
[26] ICC-02/11-01/15-1243 OA14, para. 22.
[27] ICC-02/11-01/15-1243 OA14, para. 17.

this appeal, noting the Prosecution's submissions that there is a concrete risk that the Accused will evade justice if they are released.[28]

17. The Majority made several errors in assessing the concrete risk of flight under article 81(3)(c)(i) posed by the Accused's unconditional release upon their Acquittals.

18. First, the Majority stated that it had no information as to where the Accused "wish to go".[29] This was an irrelevant consideration that the Chamber should not have taken into account. If the Accused are released without conditions, they are free to go to whichever State they wish—including to a State not party to the Rome Statute—as long as that State's domestic law permits it. The Chamber failed to acknowledge that, if the Accused move to a non-party State, their presence could not be compelled as those States have no duty to cooperate with the Court under the Rome Statute.

19. The Majority also erred by failing to properly consider that the Accused's presence for the continuation of the proceedings could not be compelled if they went to Côte d'Ivoire—the only State obliged to accept them as a matter of law.

20. In particular, the Majority failed to give proper weight to President Ouattara's statement of 4 February 2016 that he would not send more Ivoirians to the ICC because the country has a functioning judicial system.[30] The Majority interpreted President Ouattara's statement to "only apply to new cases arising from the situation in Ivory Coast".[31] In doing so, the Majority failed to explain its interpretation. To the contrary, the statement suggests the opposite, namely that the now operational Ivorian justice system is "judging everyone without exception".[32] Côte d'Ivoire's failure to surrender Ms Simone Gbagbo to the Court without delay shows that President Ouattara's statement is not merely limited to "new cases" but could also apply to these Accused if they move to Côte d'Ivoire.

[28] ICC-02/11-01/15-1243 OA14, para. 22.
[29] Decision, 2:22-23.
[30] Decision, 2:23-25.
[31] Decision, 3:2-3.
[32] *Le président Alassane Ouattara a affirmé jeudi qu' "il n'enverrait plus d'Ivoiriens" à la Cour pénale internationale (CPI), estimant que son pays avait désormais une "justice opérationnelle", à l'issue d'une rencontre à Paris avec le président François Hollande. "La CPI a joué le rôle qu'il fallait. A la sortie de la crise électorale, nous n'avions pas de justice, le pays était totalement en lambeaux (...) maintenant, nous avons une justice qui est opérationnelle et qui a commencé à juger tout le monde sans exception. Ces procès commenceront très rapidement et je souhaite que ça aille plus vite que la CPI", a-t-il lancé*) – see https://www.europe1.fr/international/alassane-ouattara-je-nenverrai-plus-divoiriens-a-la-cpi-2663075 (last accessed 23 January 2019); https://www.youtube.com/watch?v=ryVMd1_wDDo (last accessed 23 January 2019).

21. The Majority also incorrectly relied on a false dichotomy, namely that the statement that Côte d'Ivoire has a functioning judiciary and abides by the rule of law is inconsistent with the Côte d'Ivoire government's potential failure to comply with a request from the Court.[33] In the case against Ms Simone Gbagbo, the Pre-Trial Chamber, without judging on the functionality of Côte d'Ivoire's judicial system, concluded on 11 December 2014 that the case against Ms Simone Gbagbo is admissible before the Court because it was not subject to domestic proceedings.[34] The Pre-Trial Chamber then ordered Côte d'Ivoire to "surrender Simone Gbagbo to the Court without delay".[35] The Appeals Chamber upheld that decision on 27 May 2015.[36] Yet, to date, the Government of Côte d'Ivoire has failed to comply with its duty to surrender Ms Simone Gbagbo to the Court, nor has it sought leave to challenge the admissibility of the case for a second time.[37] This not only disproves the Majority's incorrect assumption embodied in the false dichotomy mentioned above, but also shows that President's Ouattara's statement is not limited to "new cases".

22. Rather than addressing Côte d'Ivoire's failure to surrender Ms Simone Gbagbo and its implications for the risk of flight posed by the Accused's unconditional release, the Majority merely noted that "this matter is *sub judice* before another Chamber of this Court".[38] Although it did not specify further, the Prosecution considers that the Majority was probably referring to the fact that on 14 September 2018, Pre-Trial Chamber II *proprio motu* requested the Côte d'Ivoire authorities to provide any updated information on potential judicial proceedings involving Ms Simone Gbagbo.[39] The Prosecution is not aware as to whether the Côte d'Ivoire authorities have provided any such information.[40] In any event, regardless of the Pre-Trial Chamber's request, the Majority erred by failing to consider the relevant, publicly known and objectively ascertainable facts before it. These include the history of the admissibility proceedings in the case against Ms Simone Gbagbo, and the fact that, to date, the Government of Côte d'Ivoire has not sought leave to challenge the admissibility for a second time, and yet has failed to comply with its duty under the Rome Statute to surrender Simone Gbagbo to the Court without delay. In addition, on 28 March 2017, Ms Simone Gbagbo was acquitted of crimes against

[33] Decision, 3:3-5.
[34] ICC-02/11-01/12-47-Red, para. 79.
[35] ICC-02/11-01/12-47-Red, para. 80.
[36] ICC-02/11-01/12-75-Red.
[37] Article 19(4).
[38] Decision, 3:6-8.
[39] ICC-02/11-01/12-84.
[40] On 25 September 2018, the Prosecution requested to be given access to any materials that the Government of Côte d'Ivoire may provide pursuant to the Chamber's order (ICC-02/11-01/12-85).

humanity and war crimes by the Abidjan *Cour d'Assises*, which judgment was overturned on 26 July 2018 by the *Cour Suprême*, paving the way for new proceedings. President Ouattara then signed an amnesty decree on 6 August 2018 granting amnesty to 800 detainees, among them Ms Simone Gbagbo.[41] To the Prosecution's knowledge, Ms Gbagbo is now living in Abidjan and without any further restrictions or pending legal proceedings.

23. The Majority's further finding that a person may voluntarily appear if summonsed by the Court to do so, even if a State does not enforce a warrant,[42] fails to take into consideration that the Accused have an incentive to abscond. In a similar vein, on three occasions the Trial Chamber—albeit in a differently-composed Majority—has held that Mr Gbagbo has an incentive to abscond given the gravity of the charges and the resulting high sentence, if convicted.[43] The same considerations would apply to Mr Blé Goudé.

24. Similarly, the Majority erred by inappropriately giving weight to the assurances both Accused gave to comply with any order of the Court.[44] These assurances are manifestly inadequate and it is simply incorrect that "[t]here is no information before the Chamber that cast doubts as of the genuineness of these assurances".[45] As mentioned above, the Trial Chamber (by Majority) has repeatedly denied Mr Gbagbo's interim release, finding, among other things, that he has an incentive to abscond.[46] It also held that he has the support of a network and the means that would enable him to abscond.[47] As the Prosecution argued before the Trial Chamber,[48] the same considerations apply to Mr Blé Goudé, particularly given his past conduct demonstrating the existence of a network supporting him and the provision of means to enable him to abscond.

25. The Prosecution also notes that the Majority instructed the Accused not to interfere with victims and witnesses, while rejecting—without further consideration—the Prosecution's

[41] https://www.jeuneafrique.com/612201/societe/cote-divoire-alassane-ouattara-amnistie-simone-gbagbo/ (last accessed 23 January 2019).
[42] Decision, 3:9-12.
[43] ICC-02/11-01/15-846, para. 17; ICC-02/11-01/15-1038-Red, para. 20; ICC-02/11-01/15-1156-Red, para. 38. See also the Appeals Chamber's decision ICC-02/11-01/15-992-Red, paras. 54, 66-67.
[44] Decision, 3:17-18.
[45] Decision, 3:19-20.
[46] ICC-02/11-01/15-846, para. 17; ICC-02/11-01/15-1038-Red, para. 20; ICC-02/11-01/15-1156-Red, para. 38. See also the Appeals Chamber's decision ICC-02/11-01/15-992-Red, para. 54.
[47] ICC-02/11-01/15-846, paras. 15-16; ICC-02/11-01/15-1038-Red, paras. 19, 65. The Appeals Chamber upheld the findings of the Trial Chamber regarding Mr Gbagbo's means and network of supporters that may assist him in absconding, see e.g. ICC-02/11-01/15-846, paras. 12-20; ICC-02/11-01/15-992-Red, paras 22-28, 35-36, 41-43, 54, 66-67.
[48] See Prosecution's arguments regarding the need for continued detention of Mr Blé Goudé: ICC-02/11-01/15-T-231-CONF-ENG ET, 4:11-11:15; ICC-02/11-01/15-1235, para. 20(a).

request for conditions that were, among other things, intended to preserve the integrity of the proceedings.[49] This instruction is inconsistent with the rest of the Decision. While the Majority trusts "the genuineness of [the Accused's] assurances"[50] that they will return to the Court if and when requested to do so, the Majority deemed it necessary to warn the Accused not to engage in conduct that would amount to Article 70 offences.

26. Finally, the Majority erred by failing to give appropriate weight to the fact that Mr Blé Goudé fled to Ghana and was in possession of false identity documents when he was arrested in Ghana in March 2013. The Majority simply dismissed these facts by stating that they "date back more than five years and that a lot has changed since then".[51] The Majority fails to explain why it matters that the events took place five years ago and what exactly has changed since then, especially considering that Mr Blé Goudé has been detained during the intervening five years. The Majority failed to consider that Mr Blé Goudé, although acquitted, continues to be the subject of proceedings before this Court and has an incentive to abscond and the means and the support to do so.

27. From the Accused's perspective, the situation at hand may be viewed as a unique opportunity to evade justice. As further elaborated in the third ground of appeal, there is a real probability that the Prosecution's appeal against the Judgment will succeed based on some of the problems with the trial and the Acquittals highlighted by Judge Herrera Carbuccia in her Dissenting Opinion, as well as other objective indicators referred to in this document. As such, the Acquittals could be overturned and proceedings in this case could resume. If, on the other hand, the Accused are released without conditions, it may be impossible to do so.

28. By giving weight to irrelevant considerations and failing to consider or give appropriate weight to relevant considerations when assessing whether there is a concrete risk of flight, the Majority erred in the exercise of its discretion.[52] Had the Majority properly considered and weighed these factors, it would have concluded that the detention of the Accused be maintained during appeal, or that they should be released subject to conditions.

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[49] Decision, 6:18-19. The relevant conditions intended to preserve the integrity of the proceedings are the following: not to contact either directly or indirectly, any Prosecution witness [or victims] in this case, or any interviewed person in its ongoing investigation in Côte d'Ivoire as disclosed, except through counsel authorised to represent him before this Court and in accordance with the applicable protocols; and 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. ICC-02/11-01/15-1235, paras. 24(vi)-(vii).
[50] Decision, 3:19-20.
[51] Decision, 3:21-4:1.
[52] ICC-02/04-01/05-408 OA3, para. 81.

(c) Third Ground of Appeal: The Majority erred in the exercise of 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

29. When assessing the seriousness of the charges as a factor under article 81(3)(c)(i), the Majority noted that it had dismissed the charges against the Accused.[53] This is irrelevant because article 81(3)(c)(i) would not apply unless the charges had been dismissed and the Accused acquitted. What must inform the Majority's assessment about the seriousness of the charges are the charges which were confirmed by the Pre-Trial Chamber in this case.[54]

30. At the same time the Majority failed to take into account relevant considerations: it simply noted that the Parties and participants had failed to point to any factor that could indicate that the charges in the present case were exceptionally serious under article 81(3)(c)(i).[55] In so doing, the Majority erred.

31. The Trial Chamber (by Majority) has previously held that the charges in this case are *extremely* grave.[56] On appeal against that decision, the Appeals Chamber found no error in the charges being qualified as such.[57] The charges against both Accused are at the upper end of the scale of the crimes that can be charged at the Court.[58] They involve crimes against people—murder, inhumane acts, rape and persecution—as opposed to property offences or offences against the administration of justice. The Appeals Chamber found the latter to be of a lesser gravity.[59] In addition, the alleged crimes were politically motivated—to retain power by all means—and their impact is not limited to the direct victims of the crimes but extend at least to the wider area of Abidjan. Also, the two Accused are alleged to have participated in these crimes from their positions at the highest levels of the State apparatus.

32. In addition, and as argued in the first ground, the gravity of the charges must not be considered in isolation, but as part of a cumulative assessment on whether exceptional circumstances justify the continued detention, or the conditional release, of the Accused.

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[53] Decision, 2:15-17.
[54] Mr Blé Goudé is charged for the second incident (25-28 February 2011), while Mr Gbagbo is not. The Prosecution did not oppose the dismissal of the charges against Mr Blé Goudé related to the third and fourth incidents. *See* ICC-02/11-01/15-1207, para. 25.
[55] Decision, 2:18-20.
[56] ICC-02/11-01/15-846, para. 17.
[57] ICC-02/11-01/15-992-Red, para. 67.
[58] Mr Blé Goudé is charged for the second incident (25-28 February 2011), while Mr Gbagbo is not. The Prosecution does not oppose the dismissal of the charges against Mr Blé Goudé related to the third and fourth incidents. *See* ICC-02/11-01/15-1207, para. 25.
[59] ICC-01/05-01/13-558 OA2, para. 64; ICC-01/05-01/13-559 OA3, paras. 1, 88; ICC-01/05-01/13-560 OA4, para. 113.

In particular, the gravity of the charges informs the risk of flight assessment. The Trial Chamber has previously held that "given the gravity of the charges against him and the eventual sentence if convicted, Mr Gbagbo has a clear incentive to abscond to avoid such a scenario."[60] This is consistent with Appeals Chamber jurisprudence, according to which the gravity of the charges should not be considered in isolation, but in the context of the impact that it has on the risk that an accused might abscond.[61]

33. By giving weight to irrelevant considerations and by failing to consider or give appropriate weight to relevant considerations when assessing the seriousness of the charges, the Majority erred in the exercise of its discretion.[62] Had the Majority properly considered and weighed these factors, it would have concluded that the detention of the Accused be maintained during appeal, or that they should be released subject to conditions.

(d) Fourth Ground of Appeal: The Majority 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

34. When assessing the probability of success of appeal under article 81(3)(c)(i), the Majority applied an incorrect legal standard.

35. First, the Majority took a subjective approach by linking the probability of success on appeal to its own assessment of the strength of the Prosecution's evidence.[63] Instead, the test of probability of success on appeal is an objective one. It does not require the Trial Chamber to *agree* with the Prosecution's appeal, nor does it require the Trial Chamber to re-assess the merits of its decision. It would be nonsensical for the standard under article 81(3)(c)(i) to require the Prosecution to convince a Trial Chamber that its decision is probably incorrect. Instead, the Trial Chamber should merely assess whether, on an objective basis, the appeal is a viable one that *could* lead to a reversal of the decision.

36. Second, the Majority incorrectly elevated the standard of "probability of success on appeal" by requiring that there be a "high probability that the Appeals Chamber would

[60] ICC-02/11-01/15-1038-Red, para. 20; ICC-02/11-01/15-846, para. 17.
[61] ICC-01/04-01/06-824 OA7, para. 136; ICC-01/04-01/07-572 OA4, paras. 21, 24; ICC-01/05-01/08-323 OA, para. 55; ICC-01/05-01/08-631-Red OA2, paras. 67-68; ICC-01/04-01/10-283 OA, para. 21; ICC-02/11-01/11-278-Red OA, 26 October 2012, para. 54.
[62] ICC-02/04-01/05-408 OA3, para. 81.
[63] Decision, 4:3-5: "This is an acquittal before the Defence has even presented any evidence. To the extent that this is exceptional, it is so in the sense that it shows, in the view of the majority, how exceptionally weak the Prosecutor's evidence is".

overturn the acquittal",[64] and that the acquittal need somehow be "exceptional".[65] As argued in Prosecution's first ground, the exceptionality standard does not apply to the individual factors in article 81(3)(c)(i), but to the overall circumstances that derive from a cumulative assessment of all relevant considerations. For the purposes of article 81(3)(c)(i), the standard of probability of success on appeal may be compared with the one used in some national jurisdictions when considering whether to grant bail to a convicted person pending their appeal: that requires a showing that the appeal should be "reasonably arguable and not manifestly doomed to failure".[66]

37. By applying a subjective standard and requiring proof of a high probability that the Appeals Chamber would overturn the acquittal or proof that the acquittal was somehow exceptional, the Majority committed errors of law.

38. The Majority further erred in the exercise of its 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[67] when assessing the probability of success on appeal.

39. In particular, the Majority erred by failing to give appropriate weight to the fact that Judge Herrera Carbuccia issued a Dissenting Opinion to the Acquittals.[68] A previous Trial Chamber (*Ngudjolo*) already found that this was a relevant factor to take into account in assessing the probability of success on appeal.[69] The Appeals Chamber when finding that

[64] Decision, 4:7-10: "the fact that one judge would have preferred to continue with the trial and hear from the Defence does not imply that there is a high probability that the Appeals Chamber would overturn the acquittal".
[65] Decision, 4:6-7: "The fact that this decision was not rendered unanimously does not, in and of itself, make the acquittal exceptional".
[66] South Africa, *Abraham Coetzee v. State*, A25/2017, 27 February 2017, para. 14 (High Court); "the question is not whether the appeal 'will succeed' but on a lesser standard, whether the appeal is free from predictable failure to avoid imprisonment." *S v Anderson* 1991 (1) SACR 525, (also cited in *Coetzee* above, para. 15); "If, for example, the view of this court should be that the appeal … is hopeless, this Court would probably be reluctant to alter a judgment refusing bail" (*Pataka Vhonani Donald v. State*, a337/2017, at para. 18). *See* further, Botswana: "There appears to be the *faintest prospect* of success on appeal (…). The persons assisting the appellant should be informed that in the opinion of this Court, there is no likelihood of success on appeal." *Laing v. State*, 1989 BLR (High Court). Zambia: "[i]t is not for the court to delve into the merits of each ground of appeal. But it suffices that all the grounds are examined and a conclusion is made that prima facie the prospects of success of the appeal are dim." *Krishnan v. The People*, SCZ 19 of 2011, [2011] ZMSC 17, para. 7 (Supreme Court of Zambia). Uganda: Factors considered include "whether the appeal is not frivolous and has a reasonable prospect of success." *Mellan Mareere v. Uganda*, Misc. App. No. 52 of 2017, also referring to *Arvind v. Uganda*, Supreme Court Criminal Appeal No. 1 of 2003 (Justice Oder).
[67] ICC-01/05-01/13-2276-Red A6 A7 A8 A9, para. 22.
[68] Decision, 4:6-10.
[69] *See* ICC-01/04-02/12-T-3-ENG-ET, 4:10-12.

there were "particularly strong reasons" to order suspensive effect of the present appeal,[70] also noted that Judge Herrera Carbuccia had issued a Dissenting Opinion.

40. In this case, Judge Herrera Carbuccia's Dissenting Opinion is particularly relevant to assessing the probability of success on appeal and the broader notion of exceptional circumstances. In the absence of a full and reasoned statement of reasons by the Majority for acquitting the Accused,[71] the Prosecution has been unable to examine the Majority's legal and factual reasoning and as a result has been significantly hampered in making fully informed arguments as to the probability of success on appeal. In these circumstances, requiring the Prosecution to argue the probability of success on appeal is so unfair and unreasonable, warranting the conclusion that the Majority failed to exercise its discretion judiciously.[72]

41. In any event, rather than accepting the Prosecution's arguments that the Dissenting Opinion is an indicator of the probability of success of an appeal, the Majority instead challenged Judge Herrera Carbuccia's qualification of the Majority's standard of proof and process of assessing evidence.[73] The Majority incorrectly found that these disagreements had no impact on the probability of success on appeal within the meaning of article 81(3)(c)(i).[74] Disagreements among the Trial Chamber Judges on these fundamental legal and procedural issues are relevant considerations to which the Majority failed to give appropriate weight.[75]

42. The Prosecution also notes that in its Decision unconditionally releasing the Accused, the Majority, while criticising the Dissenting Opinion, appeared to re-interpret or further explain the Acquittals it rendered the previous day, both with respect to the applicable standard of proof[76] and the process for assessing evidence,[77] and even appeared to dispute

[70] ICC-02/11-01/15-1243 OA14, para. 22.
[71] Article 74(5). *See also* Dissenting Opinion, paras. 11-26.
[72] ICC-01/05-01/13-2276-Red A6 A7 A8 A9, para. 22.
[73] Decision, 4:11-5:10.
[74] Decision, 5:11-5:13.
[75] The Majority acknowledges that "it is, of course, possible that the Appeals Chamber will agree with the dissenting Judge in respect of the applicable standard for motions for acquittal at this stage of the proceedings. However, this is entirely speculative and unexceptional and, therefore, cannot serve as a reason to maintain the accused in detention." (Decision, 5:14-16).
[76] In the Acquittals, the Majority held as follows: "the Prosecutor has failed to satisfy the burden of proof to the requisite standard as foreseen in Article 66 of the Rome Statute" (4:15-16). In the Decision it disputed that it had applied the beyond reasonable doubt standard (which is found under article 66(3) of the Statute) and held that "the Majority limited itself to assessing the evidence submitted and whether the Prosecutor has met the onus of proof to the extent necessary for warranting the Defence to respond. Adopting this standard, it is not appropriate for these proceedings to continue." (4:11-16).

that the Acquittals were a "decision pursuant to Article 74" that would require the Majority to "consider the relevance, probative value and potential prejudice of each item of evidence".[78] In so doing, the Majority appears to have modified the Acquittals. The Appeals Chamber has previously disapproved of the practice of using such clarifications to alter, or to add to, the substance of a decision. According to the Appeals Chamber, "clarifications of this kind are of questionable legality and are undesirable."[79] In any event, the Majority erred by using such clarifications to find that there is a low probability of success on appeal. Such clarifications further illustrate the difficulties encountered by the Prosecution, which now finds itself in the position of arguing the probability of success on appeal without having seen the full underlying reasons for the Acquittals. This should increase the probability of success on appeal rather than reduce it.

43. The Majority also erroneously considered the fact that, in its view, the weakness of the evidence caused the Majority to acquit the Accused before the Defence presented any evidence, was a factor militating against the probability of success on appeal.[80] This is incorrect because it appears that the Majority does not consider that at the NCTA stage the standard of proof is lower. That the Acquittals were made at that stage can therefore at best be a neutral factor in assessing the probability of success on appeal, because during the appeal the correctness of the Acquittals will equally be assessed against this lower standard of proof.

44. Finally, the Majority stated that "it is unpersuaded that either the rendering of the decision with detailed reasons to follow or the novelty of the Majority's approach before this Court

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[77] In the Acquittals, the Majority held as follows: "the Chamber, having thoroughly analysed the evidence and taken into […] consideration all legal and factual arguments […]" (2:25-3:1). In the Decision, the Majority expanded by stating as follows: "The majority also strongly reject the suggestion in paragraph 47 of Judge Herrera's dissenting opinion that the majority had a duty to consider the relevance, probative value and potential prejudice of each item of evidence for the purpose of this decision […]. This is not now relevant given the Chamber's direction to the parties and participants that for the purpose of this procedure, all evidence submitted is to be considered. The majority understands that Judge Herrera Carbuccia conducted a superficial *prima facie* review of the submitted evidence and that she is of the view that such a superficial review leaves open the possibility that the reasonable Trial Chamber might enter a conviction. Even so, it does not follow that a finding of sufficiency at this stage will necessary actually result in a conviction. It is worth pointing out that even the standard adopted by Judge Herrera Carbuccia leaves open the possibility to go beyond a mere superficial assessment. This may take place in exceptional cases such as the present one where the credibility and reliability of the evidence is seriously questioned and where the Prosecutor contends that guilt is based in whole or in part on questionable inferences to be drawn. In these cases it is not appropriate for the trial to continue on the tenuous basis of such superficial assessment." (4:17-5:10).

[78] "The Majority also strongly reject the suggestion in paragraph 47 of Judge Herrera Carbuccia's dissenting opinion that the Majority had a duty to consider the relevance, probative value and potential prejudice of each item of evidence for the purpose of this decision. *This only arises in the context of admissibility rulings when giving the Chamber's decision pursuant to Article 74*" (4:17-23, emphasis added).

[79] ICC-01/04-01/06-2205 OA15 OA16, para. 92.

[80] Decision, 4:3-5.

is *per se* an exceptional circumstance".[81] The Majority appears to consider the "novelty of [its] approach" as a separate factor under article 81(3)(c)(i), but for the purposes of this appeal it may be best assessed in the context of assessing the probability of success on appeal. The Majority erred by failing to give appropriate weight to the impact that its novel approach has on the probability of success on appeal. In particular, even without having read the full and detailed reasons for the Acquittals, the Prosecution submits that this trial was characterised by a number of procedural flaws.[82]

45. Some of these matters were highlighted by Judge Herrera Carbuccia in her Dissenting Opinion, including the manner in which the Majority applied the standard of proof at the NCTA stage and how the evidence is to be assessed at that stage. The Prosecution also notes that the Single Judge of the Trial Chamber did not give guidance to the Parties on the applicable standard of proof or the manner in which the evidence is to be assessed at the NCTA stage and held that the *Ruto and Sang* case was not authoritative.[83] Moreover, during the trial the two judges now forming the Majority in the Acquittals have strongly disagreed with one another at trial on whether to apply the "admission" or the "submission" regime to the presentation of evidence.[84] Judge Henderson further opined that it would be difficult to reconcile the "submission" regime used in the trial with NCTA proceedings, and that if the Chamber were to find that there is a case to answer it would create "serious prejudice" to the Defence and "significantly affect[…] the expeditiousness of the proceedings".[85] Finally, while the Trial Chamber ordered the Defence to file NCTA

[81] Decision, 5:21-23.
[82] Whether these procedural flaws amount to appealable errors may be the subject of the Prosecution's appeal under article 81(1)(a).
[83] On 13 June 2018, Judge Tarfusser, acting as Single Judge, held as follows: "In light of the above, the Single Judge takes the view that it is not necessary to take a position either as to the standards adopted by Trial Chamber V(a) or to the application of those principles in the final decision in that case. The Single Judge only notes that, the *Ruto* and *Sang* case being the only precedent in the jurisprudence of this Court to this day, the Prosecutor's statement to the effect that the standards enunciated in it are representative of the jurisprudence at the Court sounds far-fetched" (ICC-02/11-01/15-1182, para. 13). During the hearing of 1 October 2018, the Prosecution again made submissions as to the applicable standard to decide a no-case-to-answer motion. The Presiding Judge made it clear that he disagreed with the Prosecution's position, but did not give any instructions as to what standards would be followed by the Trial Chamber in this case: ICC-02/11-01/15-T-221-CONF-ENG ET, pp. 16-18: "Do you really think that if the Chamber evaluates the evidence, somehow it goes against its impartiality? I think this is the very job of a Trial Chamber to evaluate the evidence. […] Where do you find in the structure of the Statute the no case, the procedure for a no case to answer motion for all what you said?".
[84] See e.g. ICC-02/11-01/15-405 with dissenting opinion of Judge Henderson (ICC-02/11-01/15-405-Anx); ICC-02/11-01/15-1172 with dissenting opinion of Judge Henderson (ICC-02/11-01/15-1172-Anx).
[85] ICC-02/11-01/15-1197-Anx, see in particular paras. 3-4: "To reason that the Chamber cannot make final admissibility rulings at this stage because evidence that the Defence may or may not present might change the Chamber's assessment of the admissibility criteria, makes it difficult to not conclude how warped the Majority's approach really is. The question is not whether there is enough evidence to convict the accused at the end of the trial. The question is whether there is enough evidence at this stage of the proceedings that could support a conviction. Whether there is enough evidence now depends, in no small part, on how much of the evidence the

motions,[86] and acquitted the Accused by granting their NCTA motions,[87] one judge in the Majority, Judge Tarfusser, had opined that "the notion [and] procedure of no case to answer is extraneous to the statutory texts of the Court".[88] These are relevant objective indicators, relating to potential procedural errors or errors of law, for assessing the probability of success on appeal, which the Majority failed to consider.

46. In conclusion, 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, the Majority erred in the exercise of its discretion.[89] Had the Majority properly considered and weighed these factors and exercised its discretion judiciously, it would have concluded that the detention of the Accused be maintained pending appeal, or that they should be released subject to conditions.

II. The Errors Materially Impacted the Decision

47. Had the Majority applied the correct standard of "exceptional circumstances" under article 81(3)(c)(i) and not committed the error articulated in the first ground, the Decision would have been substantially different, not only with respect to the process to be followed, but also with respect to the outcome.[90] The Majority would have conducted a cumulative assessment of all factors under article 81(3)(c)(i) and concluded that exceptional circumstances justify the continued detention of the Accused pending appeal, or their release on conditions. This is illustrated by the fact that the Majority found that the charges against the Accused are serious[91] and acknowledged that it was possible that the Appeals Chamber would agree with the dissenting Judge in respect of the standard to be

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Prosecutor has submitted is ruled inadmissible. The Majority's approach therefore seems to put the cart before the horse by ruling on whether there is enough evidence before knowing how much evidence there actually is. […] Of course, the Chamber can decide a no case to answer motion on the assumption that none of the evidence presented by the Prosecutor is inadmissible. If the Chamber still finds that the evidence is insufficient, from a practical point of view – as opposed to a principled position- neither the Prosecutor nor the Defence will have much to complain about. However, if the Chamber finds that there is a case to answer based on that assumption, the Defence may well be forced to put up a lengthy and costly defence case to challenge evidence which the Chamber may not even be allowed to consider, if the admissibility criteria are applied properly. This not only creates serious prejudice, it also significantly affects the expeditiousness of the proceedings."

[86] ICC-02/11-01/15-1174. The Trial Chamber noted the Appeals Chamber's decision in the *Ntaganda* case according to which a chamber has discretion to entertain a NCTA motion (para. 8) and ordered the Defence to "file […] submissions addressing the issues for which, in their view, the evidence presented by the Prosecutor is not sufficient to sustain a conviction" (p. 7).

[87] Acquittals, 1:15-22; 4:17-18.

[88] ICC-02/11-01/15-T-230-ENG ET, 22:11-12.

[89] ICC-02/04-01/05-408 OA3, para. 81.

[90] ICC-01/04-01/06-3121-Red A5, para. 31, *see also* paras. 18-19.

[91] Decision, 2:8-9: "the charges are clearly serious in nature".

applied.[92] Its positive finding regarding two of the factors expressly mentioned in article 81(3)(c)(i) indicates that had it not made the error of law set out in the first ground, it would have found the standard of "exceptional circumstances" was met and concluded that the Accused be detained, or conditionally released, pending appeal.

48. Similarly, the legal error set out in the fourth ground materially impacts the Impugned Decision because it affected the manner in which the Majority assessed a key factor under article 81(3)(c)(i). Because the probability of success on appeal must be assessed cumulatively to inform the ultimate conclusion on whether exceptional circumstances warrant continued detention of the Accused, the legal error argued in the fourth ground materially impacted the Majority's Decision. Had the Majority not made the error of law it would have found the standard of "exceptional circumstances" was met and concluded that that the Accused be detained, or conditionally released, pending appeal.

49. Further, as demonstrated above, most of the findings underlying the Majority's analysis of the concrete risk of flight, the seriousness of the charges and the probability of success on appeal resulted from errors in the Majority's exercise of discretion, as set out in the second, third and fourth grounds. This demonstrates that these errors materially impacted the Majority's assessment of the relevant factors under article 81(3)(c)(i). Had the Majority correctly assessed these factors, it would have found the standard of "exceptional circumstances" was met and concluded that the Accused be detained, or conditionally released, pending appeal.

Relief Sought

50. For the foregoing reasons, the Prosecution requests that the Appeals Chamber:

    a. Reverse the Decision, in which the Majority denied the Prosecution's request pursuant to article 81(3)(c)(i);

    b. Substitute its discretion for that of the Trial Chamber, and find that having regard, *inter alia*, to the concrete risk of flight, the seriousness of the charges and the probability of success on appeal, exceptional circumstances within the meaning of article 81(3)(c)(i) of the Statute exist, which justify the continued detention of Laurent

[92] Decision, 5:14-16: "it is, of course, possible that the Appeals Chamber will agree with the dissenting Judge in respect of the applicable standard for motions for acquittal at this stage of the proceedings."

Gbagbo and Charles Blé Goudé pending the Appeals Chamber's decision on the Prosecution's article 81(1)(a) appeal against the Judgment;

c. In lieu of ordering continued detention, consider using its powers under articles 81(3)(c) and 83(1), read with article 64(6)(f) of the Statute,[93] to release Laurent Gbagbo and Charles Blé Goudé subject to the conditions in the Prosecution's request under article 81(3)(c)(i).[94] These conditions are intended to ensure that, in case of a successful appeal by the Prosecution against the Judgment, the proceedings in this case may continue without the need for a new arrest and surrender,[95] and to safeguard the integrity of the proceedings. These conditions should be contingent on the availability of a State that is (i) willing to accept Laurent Gbagbo and/or Charles Blé Goudé to be released in its territory; and (ii) willing and able to enforce the conditions imposed by the Chamber;

d. If no such State(s) can be found, then order that detention of the Accused should be maintained pending appeal; and

e. Ensure that proceedings move forward expeditiously by instructing the Trial Chamber to provide a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions as expeditiously as possible and preferably within 30 days from the date of the Appeals Chamber's decision on this appeal.

51. During the 1 February 2019 hearing,[96] the Prosecution will develop its arguments as to the reasons underlying these remedies.

Fatou Bensouda, Prosecutor

Dated this 23rd day of January 2019,
At The Hague, The Netherlands

[93] The commentary to the Rome Statute confirms that in the context of a decision under article 81(3)(c), a chamber may release a person subject to conditions under rule 119: *see C. Staker and F. Eckelmans*, Appeal against decision or sentence, in Triffterer/Amboss, The Rome Statute of the International Criminal Court, Commentary, Third Edition, p. 1922 mn, 16.
[94] ICC-02/11-01/15-1235, paras. 21-26; see also ICC-02/11-01/15-1236 OA14, paras. 4, 23.
[95] ICC-02/11-01/15-1243 OA14, para. 17.
[96] ICC-02/11-01/15-1243 OA14, p. 3.