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**International
Criminal
Court**

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No.: **ICC-02/11-01/15**
Date: **17 October 2019**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

Public redacted version of "Response to « *Requête de la Défense afin d'obtenir que la Chambre d'appel restitue à Laurent Gbagbo, acquitté de toutes les charges portées contre lui, l'intégralité de ses droits humains fondamentaux* », 7 October 2019, ICC-02/11-01/15-1272", 17 October 2019

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

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I. Introduction

1. The Request filed by Mr Gbagbo's Defence,¹ asking the Appeals Chamber to (1) reconsider its judgment imposing conditions on Mr Gbagbo's release ("Conditional Release Judgment");² and (2) order Mr Gbagbo's immediate unconditional release,³ should be rejected. Reconsideration is unnecessary and inappropriate because the Conditional Release Judgment, the Rome Statute ("Statute") and the Rules of Procedure and Evidence ("Rules") provide that the Appeals Chamber may review the conditions of release at a party's request. In its Request, Mr Gbagbo's Defence also fails to justify reviewing the Conditional Release Judgment to unconditionally release Mr Gbagbo.

II. Confidentiality

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidentially following the classification of the application it responds to and because it refers to confidential information. A public redacted version of this response will be filed at the earliest opportunity.

III. Procedural Background

3. In an oral hearing on 15 January 2019, Trial Chamber I by Majority, Judge Herrera Carbuccia dissenting, issued its verdict acquitting Mr Gbagbo and Mr Blé Goudé of all charges. The Majority ordered their immediate release subject to any Prosecution request under article 81(3)(c)(i) of the Statute.⁴ On 16 January 2019, the Trial Chamber by Majority, Judge Herrera Carbuccia dissenting, orally rejected the Prosecution's request under article 81(3)(c)(i) to release Mr Gbagbo and Mr Blé

¹ *Requête de la Défense afin d'obtenir que la Chambre d'appel restitue à Laurent Gbagbo, acquitté de toutes les charges portées contre lui, l'intégralité de ses droits humains fondamentaux*, ICC-02/11-01/15-1272-Conf. The public redacted version (ICC-02/11-01/15-1272-Red) will be referred to as the "Request".

² Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, ICC-02/11-01/15-1251-Conf. The second public redacted version of this judgment (ICC-02/11-01/15-1251-Red2) will be referred to as the "Conditional Release Judgment."

³ Request, p. 22.

⁴ 15 January 2019 Oral Acquittal Decision, ICC-02/11-01/15-T-232-ENG ET, 4:15-5:1.

Goudé with conditions.⁵ The Majority also refused the Prosecution's request for a stay pending appeal of this decision.⁶

4. Following the Prosecution's filing of its appeal pursuant to article 81(3)(c)(ii),⁷ on 18 January 2019 the Appeals Chamber by Majority, Judge Morrison and Judge Hofmański dissenting, granted the Prosecution's request for suspensive effect.⁸ The Prosecution filed its appeal brief on 23 January 2019.⁹ The Defence for Mr Gbagbo¹⁰ and Mr Blé Goudé,¹¹ as well as the victims participating in the proceedings,¹² filed their responses on 29 January 2019. On the same day, the Registry filed a confidential report on observations from States on release and conditional release.¹³ A hearing before the Appeals Chamber was held on 1 February 2019. On 1 February 2019, the Appeals Chamber issued the Conditional Release Judgment and amended the Trial Chamber's 16 January Decision by imposing specific conditions on Mr Gbagbo and Mr Blé Goudé upon their release to a State willing to accept them on its territory and willing and able to enforce the conditions.¹⁴

5. On 16 July 2019, the Trial Chamber issued its written reasons,¹⁵ to which the "Opinion of Judge Cuno Tarfusser",¹⁶ the "Reasons of Judge Geoffrey Henderson"¹⁷

⁵ 16 January 2019 Decision, ICC-02/11-01/15-T-234-ENG ET, 6:9-17. *See also* Conditional Release Judgment, para. 4.

⁶ 16 January 2019 Decision, ICC-02/11-01/15-T-234-ENG ET, 6:2-8, 6:20.

⁷ 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.

⁸ 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. *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.

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

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.

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.

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.

¹³ Transmission of the Observations of States, ICC-02/11-01/15-1249-Conf.

¹⁴ Conditional Release Judgment, para. 1 (judgment).

¹⁵ Reasons for oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquiescement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, and on the Blé Goudé Defence no case to answer motion, ICC-02/11-01/15-1263.

and Judge Herrera Carbuccia's "Dissenting Opinion"¹⁸ were annexed (collectively, "16 July 2019 Reasons").

6. On 16 September 2019, the Prosecution Notice of Appeal was filed.¹⁹ A confidential version of the document in support of the appeal was filed on 15 October 2019,²⁰ and a public redacted version on 17 October 2019.²¹

7. The Office of Public Counsel for Victims filed its confidential response to the Request on 16 October 2019.²²

IV. Submissions

A. Reconsideration is unnecessary and inappropriate because the Conditional Release Judgment, the Statute and the Rules provide that conditions may be reviewed

8. Mr Gbagbo's Defence justifies its Request on the basis that reconsideration is the only procedural avenue available to it to obtain Mr Gbagbo's unconditional release.²³ However, in the Conditional Release Judgment, the Appeals Chamber expressly provided for its review:²⁴

"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."

¹⁶ ICC-02/11-01/15-1263-AnxA.

¹⁷ ICC-02/11-01/15-1263-Conf-AnxB.

¹⁸ ICC-02/11-01/15-1263-Conf-AnxC.

¹⁹ Prosecution Notice of Appeal, ICC-02/11-01/15-1270. *See also* Corrected version of 'Prosecution Notice of Appeal', 16 September 2019, ICC-02/11-01/15-1270, ICC-02/11-01/15-1270-Corr. The corrected version ICC-02/11-01/15-1270-Corr will be referred to as the "Notice of Appeal".

²⁰ Prosecution Document in Support of Appeal, ICC-02/11-01/15-1277-Conf.

²¹ Public redacted version of 'Prosecution Document in Support of Appeal', ICC-02/11-01/15-1277-Conf, 15 October 2019, ICC-02/11-01/15-1277-Red.

²² ICC-02/11-01/15-1278-Conf.

²³ Request, para. 28 (« *la reconsidération est dans les circonstances actuelles la seule avenue procédurale disponible à la Défense.* »)

²⁴ Conditional Release Judgment, para. 4 (judgment).

9. In addition to being specifically reflected in the Conditional Release Judgment, the Appeals Chamber’s ability to review the imposition of conditions can be found in the Statute and the Rules.

10. The Appeals Chamber’s power to impose conditions on the acquitted person pending appeal stems from the interplay between the incidental power under article 81(3)(c), and article 83(1) once the case reaches the appellate stage.²⁵ It “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.”²⁶

11. The construction of these and additional provisions also allows the Appeals Chamber to review the exercise of its power to impose conditions. Thus, under article 60(3) of the Statute, the Appeals Chamber—“at any time on the request of the Prosecutor or the person”—may review and modify its ruling as to conditions of release. Under rule 119(2), the Appeals Chamber “[a]t the request of the person concerned or the Prosecutor or on its own initiative [...] may at any time decide to amend the conditions” restricting liberty.²⁷

12. Given the express provision of a way to review the Conditional Release Judgment, found in the judgment itself, the Statute and the Rules, it is unnecessary and inappropriate to resort to the exceptional measure of reconsideration.²⁸

13. Therefore, reconsideration is unnecessary because review is expressly provided for. Mr Gbagbo’s Defence relies on Judge Tarfusser’s Opinion of 16 July 2019—

²⁵ Conditional Release Judgment, para. 53. *See also* para. 2.

²⁶ Conditional Release Judgment, para. 53.

²⁷ Rule 119(2), referring to “the conditions set” pursuant to rule 119(1). Rule 119(1) contains a non-exhaustive list of conditions restricting liberty.

²⁸ *See* Decision on the Defence request for reconsideration and clarification, ICC-01/04-02/06-483, para. 13 (“The Statute does not provide guidance on reconsideration of interlocutory decisions, but the Chamber considers that the powers of a chamber allow it to reconsider its own decisions [...] Reconsideration is exceptional”); Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, ICC-01/04-01/06-2705, paras. 12, 18 (the Statute “does not explicitly provide a procedure for general reconsideration of decisions”; reconsideration test must be applied strictly).

issued *after* the Conditional Release Judgment—to argue that reconsideration is justified because the decision to impose conditions on Mr Gbagbo’s release was taken by the Appeals Chamber acting as court of first instance, thus depriving the Defence from appellate review.²⁹ However, the Conditional Release Judgment was the result of an appeal by the Prosecution against the Trial Chamber’s decision—by Majority—to unconditionally release Mr Gbagbo and Mr Blé Goudé. It was issued by the Appeals Chamber acting in its appellate court capacity. The fact that the Appeals Chamber may have decided to amend the decision of release by imposing conditions, as it is entitled to do under the Statute,³⁰ did not deprive the Parties of second instance review.³¹ Furthermore, as stated, in addition to the Statute and the Rules, the Conditional Release Judgment itself provides for a way to review the conditions imposed, thus belying the Defence’s claim that there is no remedy from it.

14. The timing of the Request further indicates that reconsideration is not the appropriate remedy. For the sake of coherence, reconsideration based on arguing—as here—that the decision challenged contains a “clear error of reasoning”, is “manifestly unsound” and its consequences “manifestly unsatisfactory”,³² must be filed at the earliest opportunity when said characteristics or effects become apparent. Mr Gbagbo’s Defence filed the Request around eight months after the Conditional Release Judgment was issued.³³

²⁹ Request, para. 28 (« *la demande en reconsidération est d’autant plus justifiée que la décision de limiter la liberté de l’acquitté a été prise par la Chambre d’appel agissant pour l’occasion comme une Chambre de première instance, ce qui a privé la Défense de tout recours devant un second degré de juridiction, comme le notait le Juge Président Tarfusser dans son opinion du 16 juillet 2019.* », citing the translation into French of ICC-02/11-01/15-1263-AnxA, para. 123). Cf. ICC-02/11-01/15-1263-AnxA, para. 123 (“made all the more serious by the absence of any remedy for the parties to have this rectified”).

³⁰ Conditional Release Judgment, para. 57 (pursuant to rule 158(1), in an appeal under article 81(3)(c)(ii), the Appeals Chamber may *inter alia* amend the decision appealed).

³¹ Conditional Release Judgment, para. 57 (giving reasons why it was appropriate for the Appeals Chamber to amend the decision appealed and itself determine whether conditions on release should be imposed).

³² See Request, paras. 25-27, p. 10.

³³ The confidential version of the Conditional Release Judgment was filed on 1 February 2019 (ICC-02/11-01/15-1251-Conf). The French version was filed on 8 February 2019 (ICC-02/11-01/15-1251-Conf-tFRA).

B. Mr Gbagbo's Defence fails to substantiate any circumstance justifying review of the Conditional Release Judgment by revoking the conditions imposed

15. Even if the Appeals Chamber were to regard the Request as a motion by Mr Gbagbo's Defence to "review and vary the conditions of release" by revoking them, the Defence has failed to substantiate any circumstance justifying review of the Conditional Release Judgment to unconditionally release Mr Gbagbo.

16. Although the Appeals Chamber did not specify the standard of review in the Conditional Release Judgment, and rule 119(2) is also silent in this regard, guidance can be found in the standard under article 60(3) for reviewing rulings on release or detention.³⁴ Article 60(3) provides in relevant part that:

"Upon such review, [the Chamber] may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require."

17. The arguments advanced by Mr Gbagbo's Defence in the Request do not demonstrate changed circumstances requiring Mr Gbagbo's unconditional release.

18. The only new development identified by Mr Gbagbo's Defence is that the Prosecution filed its Notice of Appeal.³⁵ While in the Conditional Release Judgment, the Appeals Chamber considered that the Prosecution had already expressed its intention to appeal the acquittals of Mr Gbagbo and Mr Blé Goudé,³⁶ by filing the Notice of Appeal the Prosecution has gone beyond intention to actually appealing the acquittals.

19. According to the Defence, as a consequence of the Notice of Appeal, Mr Gbagbo will be deprived of his rights during additional time pending the rendering of the

³⁴ See Conditional Release Judgment, para. 53; *see also* para. 59 (considering factors relevant to flight risk "[i]n line with its jurisprudence in relation to interim release").

³⁵ See Request, para. 73, citing Prosecution Notice of Appeal, ICC-02/11-01/15-1270 and Corrected version of 'Prosecution Notice of Appeal', 16 September 2019, ICC-02/11-01/15-1270, ICC-02/11-01/15-1270-Corr.

³⁶ Conditional Release Judgment, para. 57.

Appeal Judgment unless conditions are revoked.³⁷ However, the filing of the Notice of Appeal cannot be considered a changed circumstance warranting review of conditions. This is because it does not constitute a “change in some or all the facts” underlying the Conditional Release Judgment, “or a new fact satisfying a Chamber that a modification of its prior ruling is necessary.”³⁸

20. The filing of the Notice of Appeal does not constitute a change in the facts underlying the Appeals Chamber’s finding that Mr Gbagbo might abscond if released unconditionally.³⁹ For its finding on flight risk, the Appeals Chamber relied on “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.”⁴⁰ None of these factors decrease with the Notice of Appeal, and the identified flight risk continues to need to be mitigated by the conditions imposed.

21. Similarly, the filing of the Notice of Appeal does not constitute a new fact requiring modification of the Conditional Release Judgment. According to the Appeals Chamber, “[t]he 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”.⁴¹ The Notice of Appeal places the merits of the case against Mr Gbagbo before the Appeals Chamber,⁴² demonstrating such continued jurisdictional interest justifying conditions during the appeal proceedings.⁴³ That the relief sought in the Notice of Appeal is for the Appeals

³⁷ Request, para. 73 («*A présent que le Procureur a confirmé son intention de faire appel du Jugement d’acquiescement, le maintien du régime restrictif de liberté ordonné par la Chambre d’appel le 1^{er} février 2019 aurait pour conséquence de priver Laurent Gbagbo de ses droits pour de longs mois encore, pendant le déroulé de la procédure d’appel et la rédaction du Jugement d’appel.* »).

³⁸ Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled ‘Decision on Applications for Provisional Release’, ICC-01/05-01/08-1626-Red, para. 71 (*mutatis mutandis*).

³⁹ Conditional Release Judgment, para. 60.

⁴⁰ Conditional Release Judgment, para. 59.

⁴¹ Conditional Release Judgment, para. 53.

⁴² See Conditional Release Judgment, para. 57.

⁴³ [REDACTED].

Chamber to reverse the 15 January 2019 Oral Acquittal Decision and enter a declaration of mistrial does not affect this conclusion.⁴⁴

22. In addition to the Notice of Appeal, at date of filing of this response, the Prosecution has also submitted its document in support of the appeal, further detailing the relief sought.⁴⁵ As with the Notice of Appeal, this does not require the Appeals Chamber to modify the Conditional Release Judgment.⁴⁶

23. The arguments challenging the legal and factual bases for the Conditional Release Judgment do not demonstrate the existence of changed circumstances warranting review.⁴⁷ Rather, Mr Gbagbo's Defence sometimes repeats submissions made before the Appeals Chamber when it decided the Conditional Release Judgment.⁴⁸

24. The arguments relating to the consequences of the conditions imposed also do not demonstrate changed circumstances warranting review.⁴⁹ The Appeals Chamber noted that Mr Gbagbo had indicated that he was willing to accept conditions.⁵⁰ It also noted that a certain state "which has expressed generally its willingness to accept Mr Gbagbo, has indicated that certain conditions would need to be imposed."⁵¹

⁴⁴ [REDACTED].

⁴⁵ Public redacted version of 'Prosecution Document in Support of Appeal', ICC-02/11-01/15-1277-Conf, 15 October 2019, ICC-02/11-01/15-1277-Red, para. 266.

⁴⁶ The Prosecution is not aware of any other new relevant development. The 16 July 2019 Reasons do not demonstrate a changed circumstance warranting review because the acquittals became effective through the 15 January 2019 Oral Acquittal Decision.

⁴⁷ Request, paras. 18-24, 30-47, 55-59 (legal basis) and 48-54 (factual basis).

⁴⁸ See e.g.: submissions (i) regarding freedom as a human right and the impossibility of subjecting an acquitted person to measures restricting liberty (Request, paras. 18-24); (ii) the incompatibility between article 81(3)(c) of the Statute and internationally recognised human rights (Request, paras. 55-59). Compare with *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, paras. 2-14, 20-26. See also Conditional Release Judgment, paras. 24, 30. The Appeals Chamber took these submissions into account when it found that the continued detention of an acquitted person pending appeal is an extraordinary measure and the Statute has imposed a rigorous test of exceptional circumstances to justify such continued detention, which must be understood and interpreted in light of internationally recognised human rights, so that continued detention must be limited to situations which are truly exceptional and can only be the last resort: Conditional Release Judgment, paras. 50-52, 55.

⁴⁹ Request, paras. 60-72.

⁵⁰ Conditional Release Judgment, para. 60. See also para. 30, citing ICC-02/11-01/15-T-235-ENG. [REDACTED]

⁵¹ Conditional Release Judgment, para. 60.

[REDACTED]⁵² [REDACTED]. In addition, rather than depriving Mr Gbagbo of his fundamental human rights to a significant degree amounting to an attack on his dignity,⁵³ the conditions imposed by the Appeals Chamber were carefully balanced with Mr Gbagbo's rights and proportionately tailored to mitigate the risks it identified.⁵⁴

V. Relief sought

25. For the reasons explained above, the Appeals Chamber should dismiss the Request.



Fatou Bensouda, Prosecutor

Dated this 17th day of October 2019

At The Hague, The Netherlands

⁵² [REDACTED]

⁵³ See Request, p. 17, paras. 29, 60, 72, 74.

⁵⁴ See Conditional Release Judgment, paras. 2, 54. *Contra* Request, para. 47.