

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/15
Date: 29 January 2019

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public

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

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of the Victims admitted to participate in the proceedings (the “Legal Representative”)¹ submits that the Prosecution’s Appeal against the oral decision on the Prosecutor’s request under article 81(3)(c)(i) of the Rome Statute (the “Statute”) to maintain Mr Gbagbo and Mr Blé Goudé (the “Defendants”) in detention pending appeal (the “Impugned Decision”)² should be granted.

2. The Legal Representative fully supports the Prosecution’s arguments showing that the Majority of Trial Chamber I (the “Chamber”) committed several errors when issuing the Impugned Decision.

3. While endorsing all Prosecution’s grounds of appeal and reasoning, the Legal Representative deems it necessary to underline and elaborate on specific aspects of the errors identified in the Appeal Brief in the interests of the Victims she represents.

4. The Legal Representative also conveys to the Appeals Chamber the great concern and disappointment expressed by the Victims participating in the proceedings following the decision to acquit Mr Gbagbo and Mr Blé Goudé and the ruling on their release. In this regard, and relevant for the present appeal, Victims have indicated, as recently as last week during meetings with their counsel, that they fear for their security and well-being should the Defendants be released.

¹ See the “Directions on the conduct of the proceedings” (Trial Chamber I), No. [ICC-02/11-01/15-205](#), 3 September 2015, p. 24.

² See the transcripts of the hearing held on 16 January 2019, No. [ICC-02/11-01/15-T-234-ENG ET](#), page 1, line 14 to page 6, line 21 (the “Impugned Decision”).

II. BACKGROUND

5. On 15 January 2019, the Majority of the Chamber - Judge Herrera Carbuccion dissenting (the “Dissenting Opinion”)³ – orally issued the Decision on the Defence motions for acquittal (the “Decision on acquittal”),⁴ (i) granting the Defence motions for acquittal from all charges against the Defendants; (ii) indicating that the reasons for said acquittals will be provided as soon as possible; (iii) ordering the immediate release of both Defendants pursuant to article 81(3)(c) of the Statute; and (iv) suspending the effects of the Decision to permit the Prosecution to file a request under article 81(3)(c)(i) of the Statute.

6. On the same day, the Prosecution filed the “Urgent Prosecution’s request pursuant to article 81(3)(c)(i) of the Statute” (the “Prosecution’s Request on continued detention”).⁵

7. On 16 January 2019, the Legal Representative⁶ and the Defence⁷ responded orally to the Prosecution’s Request on continued detention during an *ad hoc* hearing convened to discuss the matter. On the same day, the Majority of the Chamber issued the Impugned Decision orally, rejecting the Prosecution’s Request and confirming the order for the release of the Defendants.⁸

³ See the “Dissenting Opinion to the Chamber’s Oral Decision of 15 January 2019” (Judge Herrera Carbuccion), No. [ICC-02/11-01/15-1234](#), 15 January 2019 (the “Dissenting Opinion”).

⁴ See the transcripts of the hearing held on 15 January 2019, No. [ICC-02/11-01/15-T-232-ENG ET](#), page 1, line 15 to page 5, line 7 (the “Decision on acquittal”). See also 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”, No. [ICC-02/11-01/15-1199-Corr](#), 26 September 2018 (dated 23 July 2018) and the “Blé Goudé Defence No Case to Answer Motion”, No. [ICC-02/11-01/15-1198-Conf-Corr](#), 3 August 2018 (dated 23 July 2018).

⁵ See the “Urgent Prosecution’s request pursuant to article 81(3)(c)(i) of the Statute”, No. [ICC-02/11-01/15-1235](#), 15 January 2019 (the “Prosecution’s Request on continued detention”).

⁶ See the transcripts of the hearing held on 16 January 2019, No. [ICC-02/11-01/15-T-233-CONF-ENG ET](#), page 2, line 7 to page 4, line 17.

⁷ *Idem*, page 4, line 20 to page 20, line 10.

⁸ See the Impugned Decision, *supra* note 2.

8. On the same day, the Prosecution filed the “Prosecution’s Appeal pursuant to article 81(3)(c)(ii) of the Statute and urgent request for suspensive effect” indicating its intention to appeal the entirety of the Impugned Decision and requesting suspensive effect of the appeal.⁹

9. On the same day, the Appeals Chamber issued the “Order on the filing of responses to the request of the Prosecutor for suspensive effect” instructing the Legal Representative and the Defence to file their submissions by 17 January 2019.¹⁰ Said submissions were filed accordingly.¹¹

10. On 18 January 2019, the Appeals Chamber issued the “Decision on the Prosecution’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” (the “Decision on suspensive effect”),¹² granting the suspensive effect of the appeal and directing the Prosecution to submit its Appeal Brief by 23 January 2019 and the Legal Representative and the Defence to submit their responses thereto by 29 January 2019.

11. On 22 January 2019, the Appeals Chamber issued an “Order to the Registrar regarding views of States” requesting the Registrar to seek observations from the

⁹ See the “Prosecution’s Appeal pursuant to article 81(3)(c)(ii) of the Statute and urgent request for suspensive effect”, No. [ICC-02/11-01/15-1236 OA14](#), 16 January 2019.

¹⁰ See the “Order on the filing of responses to the request of the Prosecutor for suspensive effect” (Appeals Chamber), No. [ICC-02/11-01/15-1237 OA14](#), 17 January 2019.

¹¹ See the “Response to the Prosecution’s Request for Suspensive Effect of its Appeal under article 81(3)(c)(ii) of the Statute”, No. [ICC-02/11-01/15-1240-Red OA14](#), 17 January 2019; the “Defence Response to the Prosecution’s urgent request for suspensive effect (ICC-02/11-01/15-1236 OA14)”, No. [ICC-02/11-01/15-1238 OA14](#), 17 January 2019; and the “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)”, No. [ICC-02/11-01/15-1239 OA14](#), 17 January 2019.

¹² See the “Decision on the Prosecution’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” (Appeals Chamber), No. [ICC-02/11-01/15-1243 OA14](#), 18 January 2019 (the “Decision on suspensive effect”).

Host State as well as any relevant State regarding the potential release of the Defendants and to file a report by 29 January 2019.¹³

12. On 23 January 2019, the Prosecution filed the “Prosecution’s Document in Support of Appeal pursuant to Article 81(3)(c)(ii) of the Statute” (the “Appeal Brief”).¹⁴

13. Pursuant to regulation 64(4) of the Regulations of the Court and the Decision on suspensive effect,¹⁵ the Legal Representative files her response to the Appeal Brief.

III. SUBMISSIONS

1. On the Prosecution’s Grounds of Appeal

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

14. The Legal Representatives concurs with the Prosecution that the Majority erred in its application of the “*exceptional circumstances*” standard under article 81(3)(c)(i) of the Statute,¹⁶ by failing to assess the cumulative significance of the factors identified by the Prosecution and the Legal Representative.

15. In this regard, the Legal Representative recalls that, if the Appeals Chamber were to find an error of law arising from the application of an erroneous legal

¹³ See the “Order to the Registrar regarding views of States” (Appeals Chamber), No. [ICC-02/11-01/15-1244 OA14](#), 22 January 2019.

¹⁴ See the “Prosecution’s Document in Support of Appeal pursuant to Article 81(3)(c)(ii) of the Statute”, No. [ICC-02/11-01/15-1245 OA14](#), 23 January 2019 (the “Appeal Brief”).

¹⁵ See the Decision on suspensive effect, *supra* note 12, p. 3 and para. 24.

¹⁶ See the Appeal Brief, *supra* note 14, paras. 10-15.

standard, it shall articulate the correct legal standard and review the relevant findings of the Trial Chamber accordingly.¹⁷

16. In the Impugned Decision, the Majority assessed whether any of the following elements constitutes *individually* an exceptional circumstance under article 81(3)(c)(i) of the Statute: (i) the concrete risk of flight;¹⁸ (ii) the seriousness of the crimes charged;¹⁹ (iii) the probability of success of an appeal,²⁰ and other indicators such as (iv) having rendered the Decision on acquittal without concurrently providing the reasons justifying it,²¹ including the novelty of such an approach before the Court,²² and (v) the Victims' security concerns.²³

17. In so doing, the Majority failed to apply the correct standard to assess said elements and committed an error of law. In this regard, the Legal Representative recalls that Trial Chamber II in the *Ngudjolo* case adopted a cumulative standard in assessing the notion of "*exceptional circumstances*" under article 81(3)(c)(i) of the Statute.²⁴ In particular, Trial Chamber II found that the criteria of the seriousness of the charges was "*certainly met*" but clearly stated that it could not "*base itself on [a] single criterion to maintain the accused person in detention after a unanimous acquittal*".²⁵ Said Chamber further explained that the "*ruling was issued unanimously and the*

¹⁷ See the "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'" (Appeals Chamber), No. [ICC-01/04-169-US-Exp](#), 13 July 2006, para. 89 (reclassified as public pursuant to Decision [ICC-01/04-538-PUB-Exp](#), 23 September 2008). See also, MICT, *The Prosecutor v. Ngirabatware*, Appeal Judgment, [MICT-12-29](#), 18 December 2014, para. 9; ICTY, *The Prosecutor v. Stanišić & Simatović*, Appeal Judgment, [IT-03-69](#), 9 December 2015, para. 17; ICTR, *The Prosecutor v. Nyiramasuhuko et al.*, Appeal Judgment, [ICTR-98-42](#), 14 December 2015, para. 31.

¹⁸ See the Impugned Decision, *supra* note 2, page 2, line 21 to page 4, line 1.

¹⁹ *Idem*, page 4, line 2 to page 5, line 17.

²⁰ *Ibidem*, page 2, lines 8-20.

²¹ *Ibid.*, page 5, lines 18-22.

²² *Ibid.*, page 5, lines 22-23.

²³ *Ibid.*, page 5, line 24 to page 6, line 1.

²⁴ See the transcripts of the hearing held on 18 December 2012, No. [ICC-01/04-02/12-T-3-ENG ET](#), page 4, lines 16-19.

²⁵ *Idem*, page 4, lines 16-19.

probability of a successful appeal might be different if there had been a dissenting opinion, or separate opinions, but that was not the case".²⁶ Thereby, calling for a cumulative assessment of all the factors that, once considered together, could make exceptional the circumstances of the case, in the terms of article 81(3)(c)(i) of the Statute.

18. As rightly submitted in the Appeal Brief,²⁷ this approach is the only reasonable one as the identified circumstances complement each other and, as such, do not need individually to be *exceptional*. Certainly, this 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 in order to establish that exceptional circumstances exist.²⁸

19. In this sense, the Majority also failed to correctly exercise its discretion and to properly assess how the unreasoned ruling on the acquittal of the two Defendants affects the fairness of the proceedings and, by so doing, gives rise to an exceptional circumstance in the terms of article 81(3)(c)(i) of the Statute. The lack of reasoning has indeed put the Prosecution and the Legal Representative in an impossible situation, by substantially obstructing their very ability to provide fully informed arguments on the chances of succeeding on appeal.

20. Thus, the Majority created a *vacuum* in which the rights of the Prosecution and of the Victims to a fair trial might be nullified. The Impugned Decision downplayed this factor and failed to recognise in it the exceptionality of the present circumstances. In addition, the Majority failed to assess this specific circumstance both cumulatively with the others identified by the Prosecution and the Legal Representative, and within the specific context of examining the relevant elements

²⁶ *Ibidem*, page 4, lines 10-12.

²⁷ See the Appeal Brief, *supra* note 14, para. 14.

²⁸ See the Legal Representative's submissions on this point, transcripts of the hearing held on 16 January 2019, No. [ICC-02/11-01/15-T-233-CONF-ENG ET](#), page 2, line 22 to page 3, line 2.

supporting the chances of succeeding on appeal.²⁹ Similarly, as discussed *infra*,³⁰ the Majority refused to take into consideration any security concerns expressed by the Victims and to assess those together with the other indicators pointing to the existence of exceptional circumstances.³¹

21. To conclude, the Majority circular approach of downplaying each individual circumstance identified by the Prosecution and the Legal Representative and the failure to proceed adopting a cumulative assessment, resulted in the overall failure to apply the correct standard of review and in a clear error of law which materially affected the Impugned Decision. Had the Majority properly assessed each factor discussed *supra* and considered their cumulative significance, it would have reached the conclusion that exceptional circumstances exist to justify the continued detention of the two Defendants throughout the appeals proceedings against the Decision on acquittal.

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

22. The Legal Representative concurs with the totality of the Prosecution's arguments in relation to the Second Ground of Appeal,³² and submits that the Majority failed to properly exercise its discretion in assessing the flight risks, and the consequences thereof, in relation to both Defendants.

²⁹ See the Appeal Brief, *supra* note 14, para. 44. See *infra*, paras. 33-38.

³⁰ See *infra*, paras. 25-28.

³¹ See the Impugned Decision, *supra* note 2, page 5, line 24 to page 6, line 1.

³² See the Appeal Brief, *supra* note 14, paras. 16-28.

23. In this regard, the Legal Representative recalls her arguments on the flight risks³³ and stresses that the Chamber has constantly found³⁴ - ultimately less than nine months ago³⁵ - that those risks are concrete in relation to Mr Gbagbo, recognising that *“in light of all the information received, and the record of this case [...] if [he] is released, with or without conditions, in the Netherlands or in any other State, there is a positive risk of flight and interference with the case”*.³⁶

24. In addition, the Chamber’s findings on the existence of a network of supporters and the availability of financial means which could facilitate the absconding from the Court’s jurisdiction, was also confirmed by the Appeals Chamber on two occasions.³⁷ It is submitted that this same network has sufficient

³³ See the “Response to the Prosecution’s Request for Suspensive Effect of its Appeal under article 81(3)(c)(ii) of the Statute”, *supra* note 11, paras. 18-24.

³⁴ See the “Tenth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute” (Trial Chamber I), No. [ICC-02/11-01/15-328](#), 11 November 2015; the “Public redacted version of Ninth Decision on Detention, on the review of Mr Laurent Gbagbo’s detention pursuant to article 60(3) of the Statute” (Trial Chamber I), No. [ICC-02/11-01/15-127-Red](#), 8 July 2015; and the “Eighth Decision on Detention, on the review of Mr Laurent Gbagbo’s detention pursuant to article 60(3) of the Statute” (Trial Chamber I), No. [ICC-02/11-01/11-808](#), 11 March 2015, paras. 24-30, 35 and 39. See also the “Seventh decision on the review of Mr Laurent Gbagbo’s detention pursuant to article 60(3) of the Statute” (Trial Chamber I), No. [ICC-02/11-01/11-718-Red](#), 11 November 2014, paras. 43, 60 and 65; the “Sixth decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (Pre-Trial Chamber I, Single Judge), No. [ICC-02/11-01/11-668](#), 11 July 2014, para. 42; the “Fifth Decision on Review of Detention” (Pre-Trial Chamber I), No. [ICC-02/11-01/11-633](#), 12 March 2014, para. 34; the “Fourth Decision on Review of Detention” (Pre-Trial Chamber I), No. [ICC-02/11-01/11-558](#), 11 November 2013, paras. 43, 46 and 52; the “Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (Pre-Trial Chamber I), No. [ICC-02/11-01/11-454](#), 11 July 2013, paras. 37, 44 and 50; the “Public redacted version of the Second decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (Pre-Trial Chamber I, Single Judge), No. [ICC-02/11-01/11-417-Red](#), 12 March 2013, paras. 30, 39 and 40-41; and the “Decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (Pre-Trial Chamber I, Single Judge), No. [ICC-02/11-01/11-291](#), 12 November 2012, para. 61.

³⁵ See the “Decision on Mr Gbagbo’s Request for Interim Release” (Trial Chamber I), No. [ICC-02/11-01/15-1156-Red](#), 20 April 2018, para. 39.

³⁶ See the “Decision on Mr Gbagbo’s Detention” (Trial Chamber I), No. [ICC-02/11-01/15-1038-Red](#), 26 September 2017, para. 63.

³⁷ See the “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled ‘Decision on Mr Gbagbo’s Detention’” (Appeals Chamber), No. [ICC-02/11-01/15-992-Red](#), 19 July 2017, paras 22-28 and 35-36. See also the “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled ‘Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute’” (Appeals Chamber), No. [ICC-02/11-01/15-208](#), 8 September 2015, para. 46.

resources today to enable both Defendants to abscond. The issuance of a decision on their acquittal, pending two appeals, does not mitigate these findings because said ruling is not final and Mr Gbagbo and Mr Blé Goudé continue to pose concrete flight risks. In these circumstances, should the appeal against the Decision on acquittal succeed, there exists a real danger that they may not appear at trial when summoned by this Court, frustrating the entire purpose of the proceedings against them. In this regard, the Legal Representative recalls that it is of paramount importance for the Victims that the presence of the Defendants is assured should the appeal be successful and the proceedings eventually continue.

25. Moreover, the Legal Representative stresses that the risk of flight of both Defendants is very much related to the main concerns of the Victims participating in the case. Several Victims have recently received threats in the aftermath of the Decision on acquittal and have been attacked in the streets by pro-Gbagbo supporters.³⁸ In this regard, the Chamber has already noted that the fact that Mr Gbagbo “*knows the identity of witnesses and victims is a genuine risk*”.³⁹

26. If released, the Defendants will be able to freely communicate and access social media, there will be no control on the flow of information within the identified network. Accordingly, there is a real risk that if Mr Gbagbo and Mr Blé Goudé are released, supporters may indeed threaten witnesses and victims who have already testified and attempt to compromise the integrity of the proceedings. In the same vein, shall the Decision on acquittal be reversed on appeal, there exists a real risk that individuals, part of the same network, also attempt to discontinue the proceedings

³⁸ The Legal Representative recalls her submissions in the Response to the Prosecution’s Request for suspensive effect, which in the relevant part reads as follows: “*Following the acquittal, Victims seriously fear exacerbation of the already volatile situation in Côte d’Ivoire. Tensions are still latent in certain areas of Abidjan and the Defendants’ release may rekindle said tensions. In the circumstances, some of the participating Victims have already fled their place of residence due to the uncertainty of the situation*”. See the “Response to the Prosecution’s Request for Suspensive Effect of its Appeal under article 81(3)(c)(ii) of the Statute”, *supra* note 11, para. 24

³⁹ See the “Decision on Mr Gbagbo’s Detention” (Trial Chamber I), *supra* note 36, para. 64.

by exerting pressure and coercive actions on witnesses and victims.⁴⁰ It is noteworthy to recall that Mr Gbagbo's network of supporters was very active during the trial and deliberately and knowingly, on various occasions, circumvented court orders aimed at protecting witnesses.⁴¹

27. The Majority failed to properly assess this additional factor when examining the overall risks of flight and the related consequences that might contribute to the *exceptionality* of the circumstances for the purposes of article 81(3)(c)(i) of the Statute.

28. Similarly, the Legal Representative posits that the Majority further erred in law by stating that Victims' safety concerns cannot "*influence the Chamber's decision, which is limited by the standards contained in the Rome Statute*".⁴² Nothing in the letter of article 81(3)(c)(i) of the Statute prevented the Chamber to consider factors related to the security situation surrounding the release of the Defendants, and to assess how those can affect the circumstances justifying the continued detention or a release with specific conditions. The assertion by the Majority is particularly striking in light of the Court statutory responsibility under article 68(1) of the Statute to ensure the safety and the well-being of Victims and of any person involved in the proceedings.⁴³ The Legal Representative recalls that out of the 729 Victims participating at trial, only a few dual status individuals have enjoyed protective measures while testifying.⁴⁴

⁴⁰ *Idem*.

⁴¹ See the "Decision on Mr Gbagbo's Detention" (Trial Chamber I), No. [ICC-02/11-01/15-846](#), 10 March 2017, para. 15. See also the transcripts of the hearing held on 10 May 2016, No. [ICC-02/11-01/15-T-36-Red-ENG WT](#), page 11, line 24 *et seq.*

⁴² See the Impugned Decision, *supra* note 2, page 5, line 24 to page 6, line 1.

⁴³ See, *inter alia*, the "Decision on victims' participation in trial proceedings" (Trial Chamber VI), No. [ICC-01/04-02/06-449](#), 6 February 2015, para. 29. See also the "Decision Establishing Principles on the Victims' Application Process" (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/15-205](#), 4 March 2015, para. 35.

⁴⁴ See in particular, dual status individuals a/20012/12; a/20090/12; a/20092/12; a/20002/13; a/10157/14; a/10179/14 and a/25130/15. The other dual status individuals testified publicly, see a/20008/12; a/20009/12; a/20016/12; a/20019/12; a/20021/12; a/20082/12; a/20063/13; a/20067/13; a/10261/14 and a/25211/15.

This factor should also have been taken into account by reason of the still volatile security situation in certain areas of Abidjan.

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. The Legal Representative concurs with the arguments advanced by the Prosecution⁴⁵ and submits that the Majority erred in the exercise of its discretion with regard to the assessment of the seriousness of the charges.

30. The Majority committed a clear error by considering that it had previously established “*that there is insufficient evidence to conclude that crimes against humanity attributable to the accused were committed in Ivory Coast*”⁴⁶ in order to assess the seriousness of the crimes charged. This element is irrelevant in order to evaluate the existence of the exceptional circumstances under article 81(3)(c)(i) of the Statute, as it is the exact reason why the acquittals were pronounced⁴⁷ and why the determination under article 81(3)(c)(i) of the Statute has become necessary. Considering this element at this point would deprive article 81(3)(c)(i) of the Statute of its object and purpose and would render this provision ineffective.

31. The Legal Representative also agrees with the Prosecution that the Majority failed to ponder relevant considerations in its assessment of the seriousness of the crimes charged,⁴⁸ especially as the Chamber recognised said seriousness in previous

⁴⁵ See the Appeal Brief, *supra* note 14, paras. 29-33.

⁴⁶ See the Impugned Decision, *supra* note 2, page 2, lines 15-17.

⁴⁷ See the Decision on acquittal, *supra* note 4, page 2, line 25 to page 4, line 19.

⁴⁸ See the Appeal Brief, *supra* note 14, para. 31.

decisions.⁴⁹ The Majority should also have considered the own admission by the Defence of Mr Blé Goudé as to the “*undoubtedly*” seriousness of the crimes charged.⁵⁰

32. Had the Majority properly considered the seriousness of the charges, this factor would have clearly militate in favour of maintaining the Defendants in detention pending appeal on their acquittal, especially in light of the totality of the relevant facts and factors that had to be considered by the Chamber in its determination.

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

33. The Legal Representative fully supports the Prosecution’s arguments with regard to the numerous errors committed by the Majority in its assessment of the probability of success on appeal.⁵¹

34. Firstly, and as detailed by the Prosecution,⁵² the Majority committed an error of law in the exercise of its discretion by applying an incorrect legal standard when assessing the probability of success on appeal. The Majority indeed erroneously considered its own assessment of the strength of the evidence presented to date at trial,⁵³ and erroneously considered that the criteria of the “*probability of success on*

⁴⁹ See the “Decision on Mr Gbagbo’s Detention” (Trial Chamber I), No. [ICC-02/11-01/15-846](#), 10 March 2017, para. 17.

⁵⁰ See the transcripts of the hearing held on 16 January 2019, No. [ICC-02/11-01/15-T-233-CONF-ENG](#) [ET](#), page 17, lines 15-18.

⁵¹ See the Appeal Brief, *supra* note 14, paras. 34-46.

⁵² *Idem*, paras. 34-37.

⁵³ See the Impugned Decision, *supra* note 2, page 4, lines 3-5, page 5, lines 11-13.

appeal” found in article 81(3)(c)(i) of the Statute required that there is a “*high probability that the Appeals Chamber would overturn the acquittal*”.⁵⁴

35. Secondly, the Majority, in the Impugned Decision, erroneously relied on the fact that the possibility that the Appeals Chamber agrees with Judge Herrera Carbuccion’s Dissenting Opinion is “*entirely speculative*”.⁵⁵ The result of an appeal will always be uncertain until a decision on such appeal is rendered and therefore the Legal Representative argues that it is wholly inappropriate to consider this element in the assessment of article 81(3)(c)(i) of the Statute. However, the existence of a Dissenting Opinion is a relevant factor militating in favour and not against a chance to succeed on appeal.

36. Thirdly, the Legal Representative concurs with the Prosecution with regard to the error committed by the Majority in its assessment of the Dissenting Opinion.⁵⁶ The Legal Representative also submits that the critics formulated by the Majority against the Dissenting Opinion, as to the legal standard allegedly applied in the Decision on acquittal, should have been considered by the Majority in the Impugned Decision as an objective factor militating for maintaining the Defendants in detention pending appeal. The Majority further exacerbated the disagreement in the Impugned Decision⁵⁷ and this fact should have been pondered when assessing the probability of success on appeal.

37. The Legal Representative also agrees with the Prosecution’s arguments that the novelty of the Majority’s approach and the issuing of the Decision on acquittal with reasons to follow should have been considered as a relevant factor in the

⁵⁴ *Idem*, page 4, lines 7-10.

⁵⁵ See the Impugned Decision, *supra* note 2, page 5, lines 14-16.

⁵⁶ See the Appeal Brief, *supra* note 14, paras. 39-41.

⁵⁷ See the Impugned Decision, *supra* note 2, page 4, line 11 to page 5, line 13.

assessment of the probability of success on appeal.⁵⁸ However, the Legal Representative submits that the Chamber also erred by failing to recognise this novelty and the rendering of the Decision on acquittal with reasons to follow, as exceptional circumstances by themselves,⁵⁹ as previously argued.⁶⁰ The Chamber abused its discretion by simply stating that it was “*unpersuaded*” that these elements were exceptional circumstances,⁶¹ without providing any reasoning as to why these elements could not be considered as such or contribute to create exceptional circumstances in the terms of article 81(3)(c)(i) of the Statute.

38. Consequently, the Legal Representative contends that the Chamber committed multiple serious errors in its assessment of the probability of success on appeal and that these errors materially affect the Impugned Decision.

2. Victims’ preliminary views about conditional release

39. The Legal Representative notes the Prosecution’s position suggesting the Appeals Chambers to consider using its powers, under articles 81(3)(c) and 83(1) of the Statute - read in conjunction with article 64(6)(f) of the Statute - to release the Defendants subject to conditions.⁶²

40. In this regard, the Legal Representative reiterates that exceptional circumstances exist in the present case justifying the continued detention of both Defendants pending the appeal against the Decision on acquittal.

⁵⁸ See the Appeal Brief, *supra* note 14, paras. 44-45.

⁵⁹ See the Impugned Decision, *supra* note 2, page 5, lines 18-23.

⁶⁰ See the transcripts of the hearing held on 16 January 2019, No. [ICC-02/11-01/15-T-233-CONF-ENG](#) [ET](#), page 2, line 21 to page 3, line 2 and page 3, lines 15-19. See also *supra*, paras. 18-20.

⁶¹ See the Impugned Decision, *supra* note 2, page 5, lines 18-23.

⁶² See the Appeal Brief, *supra* note 14, para. 50 c.

41. Should the Appeals Chamber consider that these circumstances do not justify maintaining the Defendants in detention, the Legal Representative argues that the release of Mr Gbagbo and Mr Blé Goudé should only be ordered if strict conditions - adequate to substantially diminish the risks for the well-being and safety of the Victims - are applied.⁶³

42. The Legal Representative further notes the Appeals Chamber's Order instructing the Registry to seek the views of the Host State and of relevant States on the potential release of the Defendants. Therefore, she reserves her right to eventually develop further arguments on conditional release at the hearing to be held on 1st February 2019.

IV. CONCLUSION

43. As developed in the Appeal Brief⁶⁴ and in the present Submissions,⁶⁵ the Majority incorrectly applied the standard of "*exceptional circumstances*" under article 81(3)(c)(i) of the Statute; took into account irrelevant factors and failed to take into account relevant factors on each of the criteria that needed to be considered to issue a decision under said provision. In so doing, the Majority also failed to properly explain why additional circumstances could not be considered exceptional in the meaning of article 81(3)(c)(i) of the Statute.

44. The Legal Representative therefore argues that the identified errors materially affected the Impugned Decision. Had the Chamber applied the correct legal standard and properly considered the relevant facts and factors, it would have concluded that

⁶³ See the transcripts of the hearing held on 16 January 2019, No. [ICC-02/11-01/15-T-233-CONF-ENG](#) [ET](#), page 4, lines 3-10.

⁶⁴ See the Appeal Brief, *supra* note 14, paras. 16-46.

⁶⁵ See *supra*, paras. 14-37.

the continued detention of both Defendants is needed pending the appeal against the Decision on acquittal.

45. As far as the procedure is concerned, the Legal Representative agrees with the Prosecution that it is more desirable, in light of the current stage and the expeditiousness of the proceedings, as well as of the concurring duties of the Chamber with regard to the rendering of the reasoning of the Decision on acquittal,⁶⁶ that the Appeals Chamber substitutes its discretion for that of the Trial Chamber.

46. In this regard, as early as in February of last year, the Legal Representative expressed the Victims' serious concerns in relation to the lack of expeditiousness in the conduct of the trial, following the Chamber's decision to trigger the so-called "no case to answer" procedure.⁶⁷ The events that have followed have demonstrated that the Victims' concerns were justified.⁶⁸ The current state of uncertainty is highly prejudicial to the Victims' substantive rights to truth and access to justice,⁶⁹ and is contrary to the due diligence required from the Judges in performing properly and expeditiously all judicial duties and in delivering their decisions without undue delay.⁷⁰ Consequently, the Legal Representative concurs with the Prosecution's request for a timeframe to be given to the Chamber for the rendering of the reasoning supporting the Decision on acquittal.

⁶⁶ See the Appeal Brief, *supra* note 14, para. 7.

⁶⁷ See, *inter alia*, the "Views and concerns of victims in relation to the 'Order on the further conduct of the proceedings' (ICC-02/11-01/15-1124)", No. [ICC-02/11-01/15-1131](#), 16 February 2018, paras. 10-15.

⁶⁸ See the Dissenting Opinion, *supra* note 3, para. 43.

⁶⁹ In this regard, the Legal Representative recalls the recent ruling of Pre-Trial Chamber I in the Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia: "[I]t is [...] necessary for the victims to be informed promptly as to whether or not they will be in a position to exercise their rights before this Court, a matter which depends entirely on the Prosecutor's decision of whether to open an investigation. Extended preliminary examinations affect the rights of victims and maintain them in a state of uncertainty which is prejudicial". This principle should apply *mutatis mutandis* to the present case. See the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'" (Pre-Trial Chamber I), No. [ICC-01/13-68](#), 15 November 2018, para. 120.

⁷⁰ See article 7 (Diligence) of the Code of Judicial Ethics, [ICC-BD/02-01-05](#), International Criminal Court, 9 March 2015.

V. RELIEF SOUGHT

47. For the foregoing reasons, the Legal Representative respectfully requests the Appeals Chamber

- To grant the Prosecution's Appeal under article 81(3)(c)(ii) of the Statute and reverse the Impugned Decision ruling that exceptional circumstances in the meaning of article 81(3)(c)(i) exist to maintain Mr Gbagbo and Blé Goudé in detention pending the appeal on the Decision on acquittal.



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Dated this 29th day of January 2019

At The Hague, The Netherlands