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No. ICC-02/11-01/15 OA 14

Date: 28 May 2020

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 Redacted

**Decision on counsel for Mr Gbagbo's request for reconsideration of the
'Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber
I pursuant to article 81(3)(c)(i) of the Statute' and on the review of the conditions
on the release of Mr Gbagbo and Mr Blé Goudé**

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

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

Counsel for Mr Laurent Gbagbo
Mr Emmanuel Altit
Ms Agathe Bahi Baroan

The Office of Public Counsel for Victims
Ms Paolina Massidda

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

States Representatives

The Kingdom of Belgium



The Republic of Côte d'Ivoire

REGISTRY

Registrar
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

Noting its ‘Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute’ of 1 February 2019, ICC-02/11-01/15-1251-Conf,

Having before it the ‘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’ of 7 October 2019, ICC-02/11-01/15-1272-Conf,

After deliberation,

Renders unanimously the following

DECISION

1. Counsel for Mr Gbagbo’s request for reconsideration (ICC-02/11-01/15-1272-Conf) is dismissed.
2. Pursuant to operative paragraph 4 of the Appeals Chamber’s Judgment of 1 February 2019 (ICC-02/11-01/15-1251-Conf), the conditions of release of Mr Gbagbo and Mr Blé Goudé are reviewed as set out in paragraph 66 below.

I. INTRODUCTION

1. Counsel for Mr Gbagbo requests that the Appeals Chamber reconsider its Judgment of 1 February 2019, which imposed conditions upon the release of Mr Gbagbo and Mr Blé Goudé. Counsel for Mr Gbagbo asks that the Appeals Chamber order Mr Gbagbo’s immediate and unconditional release. In submitting that the Appeals Chamber has the power to reconsider its prior decisions, counsel for Mr Gbagbo relies upon jurisprudence from both the Court and the International Criminal

Tribunal for the former Yugoslavia,¹ and argues that the tests for the reconsideration of decisions espoused in that jurisprudence are met in the circumstances of this case.

II. PROCEDURAL HISTORY

2. On 15 January 2019, Trial Chamber I (the ‘Trial Chamber’) issued, by majority, Judge Olga Herrera Carbuccion dissenting, an oral decision acquitting Mr Gbagbo and Mr Blé Goudé of all charges against them and indicating that full reasons would be filed as soon as possible.²

3. The next day, on 16 January 2019, the Trial Chamber rendered, by majority, Judge Olga Herrera Carbuccion dissenting, an oral decision, pursuant to article 81(3)(c)(i) of the Statute, in which it rejected a request by the Prosecutor to find that there were exceptional circumstances to maintain the detention of Mr Gbagbo and Mr Blé Goudé, and release them subject to conditions, unless no State willing and able to enforce such conditions could be found.³

4. On 1 February 2019, following an appeal by the Prosecutor against that oral decision, the Appeals Chamber delivered its judgment on the matter (‘Judgment’), in which it amended the oral decision and imposed a number of conditions on the release of Mr Gbagbo and Mr Blé Goudé.⁴

5. On 28 February 2019, the Appeals Chamber issued, in respect of Mr Gbagbo, a decision varying one of the conditions set out in the Judgment.⁵

6. On 7 October 2019, counsel for Mr Gbagbo requested that the Appeals Chamber reconsider the Judgment and order Mr Gbagbo’s immediate release without conditions (‘Mr Gbagbo’s Request’).⁶

¹ At the hearing held on 6 February 2020, counsel for Mr Charles Blé Goudé also submitted that the Appeals Chamber had the power to reconsider its prior decisions by referring to the jurisprudence from the Court and *ad hoc* tribunals.

² [Transcript of 15 January 2019](#), ICC-02/11-01/15-T-232- ENG, p. 1, line 15, to p. 5, line 7.

³ [Transcript of 16 January 2019](#), ICC-02/11-01/15-T-234- ENG, p. 1, line 14 to p. 6, line 21.

⁴ [Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to article 81\(3\)\(c\)\(i\) of the Statute](#), 1 February 2019, ICC-02/11-01/15-1251-Conf (public redacted version registered on the same day, ICC-02/11-01/15-1251-Red; a second public redacted version was registered on 21 February 2019, ICC-02/11-01/15-1251-Red2). *See*, in particular, para. 60.

⁵ [Decision varying a condition in the ‘Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to article 81\(3\)\(c\)\(i\) of the Statute’](#), 28 February 2019, ICC-02/11-01/15-1254-Conf (public redacted version registered on the same day, ICC-02/11-01/15-1254-Red) (‘Decision varying a condition in the Judgment’).

7. On 16 and 17 October 2019, the victims participating in the proceedings (the ‘Victims’) and the Prosecutor filed their respective responses to Mr Gbagbo’s Request, both seeking its dismissal.⁷

8. On 10 December 2019, counsel for Mr Blé Goudé requested that the Appeals Chamber modify certain conditions (‘Mr Blé Goudé’s First Request’).⁸ On 20 December 2019, by email sent by a legal officer of the Appeals Division, the Appeals Chamber referred this request to the Registrar, considering the latter best placed to deal with it and consult with [REDACTED] given that the conditions in question did not stem directly from the Judgment.⁹ The Registrar was requested to report to the Appeals Chamber, having considered the matter.

9. On 20 December 2019, the Appeals Chamber issued an order scheduling a hearing on 6 (potentially extending to 7) February 2020 to hear submissions and observations on Mr Gbagbo’s Request.¹⁰ In the same order, it granted leave, following a request under rule 103 of the Rules of Procedure and Evidence (‘Rules’), to the Republic of Côte d’Ivoire (‘Côte d’Ivoire’) to file observations.

10. On 21 January 2020, Côte d’Ivoire filed its observations on Mr Gbagbo’s Request, seeking its dismissal.¹¹

⁶ [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-Conf (public redacted version registered on 8 October 2019, ICC-02/11-01/15-1272-Red).

⁷ [CLR V Consolidated Response to Defence’s Request No. ICC-02/11-01/15-1272-Conf, No. ICC-02/11-01/15-1273 and No. ICC-02/11-01/15-1275-Conf](#), 16 October 2019, ICC-02/11-01/15-1278-Conf (public redacted version registered on 28 October 2019, ICC-02/11-01/15-1278-Red) (the ‘Victims’ Response’); [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, ICC-02/11-01/15-1280-Conf (public redacted version registered on 18 October 2019, ICC-02/11-01/15-1280-Red) (the ‘Prosecutor’s Response’).

⁸ Blé Goudé’s Defence Request to modify the conditions of his release, 10 December 2019, ICC-02/11-01/15-1293-Conf-Exp (Defence and Registrar only). A confidential redacted version was filed on 3 February 2020, ICC-02/11-01/15-1293-Conf-Red.

⁹ Email sent by a legal officer of the Appeals Division to the Registry, 20 December 2019, at 18:55.

¹⁰ [Order scheduling a hearing before the Appeals Chamber and permitting participation in judicial proceedings pursuant to rule 103 of the Rules of Procedure and Evidence](#), 20 December 2019 (corrected version was registered on 30 January 2020, ICC-02/11-01/15-1296-Corr).

¹¹ [Observations de la République de Côte d’Ivoire sur la "Requête de la Défense afin d’obtenir que la Chambre d’appel restitue à Laurent Gbagbo, acquitté de toutes les charges portées contre lui,](#)

11. On 29 January 2020, the Appeals Chamber issued a decision on the conduct of the hearing, setting out questions which could guide the parties and participants at the hearing, and inviting Mr Gbagbo, Mr Blé Goudé, the Prosecutor, the Victims, and Côte d'Ivoire to participate in the hearing.¹²

12. On 31 January 2020, counsel for Mr Blé Goudé filed a second request to modify certain conditions of Mr Blé Goudé's release ('Mr Blé Goudé's Second Request').¹³

13. On 5 February 2020, the Registry filed observations in relation to Mr Blé Goudé's Second Request.¹⁴

14. On 6 February 2020, the Appeals Chamber held a hearing during which the parties and participants made submissions and observations on the issues arising from Mr Gbagbo's Request.¹⁵

15. On 7 February 2020, the Prosecutor and the Victims filed responses to Mr Blé Goudé's requests.¹⁶

16. On 14 February 2020, by email sent by a legal officer of the Appeals Division,¹⁷ the Appeals Chamber instructed the Registry to begin consultations with the Kingdom of Belgium ('Belgium') and [REDACTED] as to the possible ramifications of the Appeals Chamber's decision lifting the conditions in the Judgment, with the exception of the condition in its paragraph 60(i).¹⁸

[l'intégralité de ses droits humains fondamentaux", 7 octobre 2019, ICC-02/11-01/15-1272](#)", 21 January 2020, ICC-02/11-01/15-1298 ('Côte d'Ivoire's Observations').

¹² [Decision on the conduct of the hearing before the Appeals Chamber](#), 29 January 2020, ICC-02/11-01/15-1299.

¹³ Blé Goudé's Defence Second Request to modify the conditions of his release, 31 January 2020, ICC-02/11-01/15-1302-Conf-Exp (Defence and Registrar only). A confidential redacted version was filed on the same day.

¹⁴ Registry's Observations on the "Blé Goudé Defence Second Request to modify the conditions of his release" (ICC-02/11-01/15-1302-Conf-Exp), 5 February 2020, ICC-02/11-01/15-1305-Conf-Exp (Defence and Registrar only). A confidential redacted version was filed on 7 February 2020, ICC-02/11-01/15-1305-Conf-Red.

¹⁵ Transcript of hearing, 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG.

¹⁶ Prosecution Response to Charles Blé Goudé's Request to Modify Conditions of his Release, 7 February 2020, ICC-02/11-01/15-1308-Conf; CLRV Consolidated Response to the First and Second Request by the Defence of Mr Blé Goudé to modify the conditions of his release (ICC-02/11-01/15-1293-Conf-Red and ICC-02/11-01/15-1302-Conf-Red), 7 February 2020, ICC-02/11-01/15-1307-Conf.

¹⁷ Email sent by a legal officer of the Appeals Division to the Registry, 14 February 2020, at 18:07.

¹⁸ See [Judgment](#), para. 60.

17. On 11 and 30 March 2020, the Registry transmitted to the Appeals Chamber, on an *ex parte* basis, the observations of Belgium and [REDACTED] respectively.¹⁹

18. On 2 April 2020, counsel for Mr Gbagbo requested the Appeals Chamber to render a decision on Mr Gbagbo's Request as soon as practicable.²⁰

19. On 6 April 2020, the Appeals Chamber directed the Registry to reclassify as confidential the observations of Belgium and [REDACTED] and invited counsel for Mr Gbagbo and Mr Blé Goudé to file observations thereon within ten days notification thereof.²¹

20. On 28 April 2020, counsel for Mr Gbagbo and Mr Blé Goudé filed their respective observations.²²

III. RELEVANT PARTS OF THE JUDGMENT

21. The Appeals Chamber held that continued detention, pending appeal, of an acquitted individual 'is an extraordinary measure which should not be undertaken lightly and the Statute has imposed a rigorous test of "exceptional circumstances" to justify such continued detention'.²³ The Appeals Chamber reviewed human rights jurisprudence and decisions from the International Criminal Tribunal for Rwanda on

¹⁹ Transmission of the Observations of the Kingdom of Belgium, 11 March 2019, ICC-02/11-01/15-1316-Conf-Exp (notified on 12 March 2020; Registry only), with two confidential and *ex parte* annexes, ICC-02/11-01/15-1316-Conf-Exp-AnxI and ICC-02/11-01/15-1316-Conf-Exp-AnxII (the 'Observations of Belgium') (reclassified as confidential on 15 April 2020, ICC-02/11-01/15-1316-Conf); [REDACTED]

[Requête afin que la Chambre d'appel se prononce au plus vite sur la demande de la Défense visant à ce que Laurent Gbagbo, acquitté, recouvre « l'intégralité de ses droits humains fondamentaux », déposée le 7 octobre 2019 \(ICC-02/11-01/15-1272\)](#), 2 April 2020, ICC-02/11-01/15-1322-Conf (public redacted version was filed on the same day, ICC-02/11-01/15-1322-Red).

²¹ Order on the reclassification of certain documents and setting deadlines for filing of observations, 6 April 2020, ICC-02/11-01/15-1325-Conf.

²² Observations formulées par la Défense à la suite du dépôt par les Autorités Belges d'observations « concernant la modification éventuelle des conditions de libération de M. Laurent Gbagbo » (ICC-02/11-01/15-1316-Conf-AnxII), notifiées le 15 avril 2020, 28 April 2020, ICC-02/11-01/15-1336-Conf ('Mr Gbagbo's Observations'); [REDACTED]

[Judgment](#), para. 50.

the issue, and concluded that continued detention, in the case of an acquittal, ‘can only be the last resort’.²⁴

22. The Appeals Chamber noted, however, that ‘the primary request of the Prosecutor in this case [was] not continued detention. It [was], rather, release with conditions’.²⁵ In this regard, the Appeals Chamber found that, while the power to impose conditions on the release of an acquitted person is not expressly provided for in the Statute, it is ‘incidental to the Trial Chamber’s power under article 81(3)(c) of the Statute’ and ‘extends to the Appeals Chamber by virtue of article 83(1) of the Statute’.²⁶ The Appeals Chamber further noted that the power to impose conditions on the release of an acquitted person pending appeal also stemmed from a construction of rule 149 of the Rules, read together 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’.²⁷

23. With respect to the circumstances in which a chamber may impose conditions pending appeal on an acquitted individual, the Appeals Chamber held that, although the criteria of ‘exceptional circumstances’ was inapplicable (this being the threshold for continued detention following acquittal), ‘there must be compelling reasons for imposing conditions on the released person’, that ‘consideration should be given to whether there appears to be a flight risk that could be mitigated by conditions’ and that ‘[a]ny such conditions must be carefully balanced with the rights of the acquitted person and must be proportionately tailored to mitigate the risks identified’.²⁸

24. In applying the ‘compelling reasons’ standard, the Appeals Chamber found, as argued by the Prosecutor,²⁹ that there was ‘a sufficient factual indication that Mr Gbagbo and Mr Blé Goudé might abscond if released unconditionally’.³⁰ The Appeals Chamber concluded that the risk of flight could be mitigated by imposing conditions

²⁴ [Judgment](#), paras 50-52.

²⁵ [Judgment](#), para. 53.

²⁶ [Judgment](#), para. 53.

²⁷ [Judgment](#), para. 53.

²⁸ [Judgment](#), para. 54.

²⁹ [Judgment](#), paras 58-59.

³⁰ [Judgment](#), para. 60.

on release and that ‘there [were] compelling reasons to exercise its powers under the Statute to impose conditions on Mr Gbagbo and Mr Blé Goudé’.³¹

25. In light of the foregoing, the Appeals Chamber imposed the following conditions on Mr Gbagbo and Mr Blé Goudé at paragraph 60 of the Judgment:

- (i) To sign an undertaking that they will abide by all instructions and orders from the Court, including to be present at the Court when ordered, and accepting that the proceedings before the Appeals Chamber may proceed in their absence, should they fail to appear before the Court when ordered to do so;
- (ii) To provide the address in the receiving State and contact information to the Court and the receiving State and request authorisation from the Court for any change of address;
- (iii) Not to travel beyond the territorial limits of the municipality³² of the receiving State without the explicit and prior authorisation of the Court;
- (iv) To surrender all identity documents, particularly their passports, to the Registry;
- (v) To report weekly to the law enforcement authorities of the receiving State or the Registry;
- (vi) Not to contact, either directly or through any other party, any Prosecution witness in this case, or any interviewed person in the ongoing investigation in the Côte d’Ivoire as disclosed, except through counsel authorised to represent them before this Court and in accordance with the applicable protocols;
- (vii) Not to make any public statements, directly or through any other person, about the case or be in contact with the public or speak to the press concerning the case; and
- (viii) To abide by any additional reasonable conditions imposed by the State of release.³³

IV. SUBMISSIONS BY THE PARTIES AND PARTICIPANTS

A. Mr Gbagbo’s Request

26. In Mr Gbagbo’s Request, counsel for Mr Gbagbo first highlights that the liberty of an acquitted person is absolute.³⁴ In his view, the right to liberty can only be exceptionally restricted under particular conditions strictly prescribed by law and only where absolutely necessary.³⁵ By reference to jurisprudence of the European Court of

³¹ [Judgment](#), para. 60.

³² Pursuant to its [Decision varying a condition in the Judgment](#), condition (iii) which proscribes ‘travel beyond the territorial limits of the *municipality*’, was varied by the Appeals Chamber in respect of Mr Gbagbo to proscribe ‘travel beyond the limits of the *region*’, without the explicit and prior authorisation of the Court (emphasis added).

³³ [Judgment](#), para. 60.

³⁴ [Mr Gbagbo’s Request](#), paras 21.

³⁵ [Mr Gbagbo’s Request](#), para. 19.

Human Rights, he submits that there is no circumstance that can justify the imposition of conditions restricting the liberty of an acquitted person.³⁶

27. In relation to the legal framework for reconsideration, counsel for Mr Gbagbo submits that the Court may reconsider its earlier decision by reference to the decision of Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo* and the jurisprudence of the International Criminal Tribunal for the former Yugoslavia, which held, respectively, that ‘a court can depart from earlier decisions that would usually [be] binding if they are manifestly unsound and their consequences are manifestly unsatisfactory’³⁷ and that ‘the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice’.³⁸

28. In support of the request for reconsideration, counsel for Mr Gbagbo first submits that the Judgment provides no clear explanation as to the legal basis that would permit the creation of a new legal framework, namely conditional release of an acquitted person.³⁹ He contends that the Appeals Chamber does not explain how the provisions in the Statute and the Rules support its new legal framework,⁴⁰ and also asserts that the Appeals Chamber fails to identify the incidental powers invoked in support of its reasoning, what their legal bases are, and in what manner they are relevant to the issues on appeal.⁴¹ Counsel for Mr Gbagbo further contends that the Appeals Chamber fails to identify the legal basis for the compelling reasons test and also does not explain the difference with the exceptional circumstances test stipulated in article 81(3)(c)(i) of the Statute.⁴² He asserts that this notion of compelling reasons is not provided for in the Statute or the Rules and therefore it seems that it derives from an arbitrary decision of the Appeals Chamber.⁴³

³⁶ [Mr Gbagbo’s Request](#), paras 22-24.

³⁷ See Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para. 18.

³⁸ [Mr Gbagbo’s Request](#), paras 25-27.

³⁹ [Mr Gbagbo’s Request](#), para. 31.

⁴⁰ [Mr Gbagbo’s Request](#), paras 36-41.

⁴¹ [Mr Gbagbo’s Request](#), para. 42.

⁴² [Mr Gbagbo’s Request](#), paras 45-46.

⁴³ [Mr Gbagbo’s Request](#), para. 45.

29. Secondly, counsel for Mr Gbagbo submits that, by relying on previous decisions on release to supporting its conclusion on the risk of absconding, the Appeals Chamber ignores a radical change in circumstances: Mr Gbagbo's acquittal.⁴⁴ Counsel for Mr Gbagbo further contends that the Appeals Chamber fails to identify the concrete factual circumstances amounting to compelling reasons that warrant the restriction of freedom.⁴⁵

30. Thirdly, counsel for Mr Gbagbo submits that article 81(3)(c) of the Statute is incompatible with internationally recognised human rights because it allows for the possibility of restricting the liberty of an acquitted person, contrary to the legal framework provided in other international legal instruments.⁴⁶

31. Finally, counsel for Mr Gbagbo argues that the Judgment limited Mr Gbagbo's liberty and rendered it impossible for him to exercise some of his fundamental rights; therefore warranting reconsideration.⁴⁷ Counsel for Mr Gbagbo further contends that the passage of time is an essential element in the evaluation of the extent and consequences of the violation to Mr Gbagbo's rights.⁴⁸ He submits that if the Appeals Chamber does not reconsider the Judgment, the Court will be responsible for the sustained violation of Mr Gbagbo's rights.⁴⁹

32. During the hearing, counsel for Mr Gbagbo submitted that, even if the Appeals Chamber were to decide that the Judgment was well founded, a review of conditions must be conducted.⁵⁰ In this regard, he argued that the Prosecutor's appeal brief ('Appeal Brief'), filed after the Judgment, constituted a new development and new fact because following the appeal the violations of Mr Gbagbo's rights were worsening with the advancement of time.⁵¹ Counsel for Mr Gbagbo further submitted that there was no concrete or new information in the Prosecutor's Response that

⁴⁴ [Mr Gbagbo's Request](#), para. 50.

⁴⁵ [Mr Gbagbo's Request](#), paras 52-53.

⁴⁶ [Mr Gbagbo's Request](#), para. 56.

⁴⁷ [Mr Gbagbo's Request](#), paras 60-61.

⁴⁸ [Mr Gbagbo's Request](#), paras 73-74.

⁴⁹ [Mr Gbagbo's Request](#), para. 74.

⁵⁰ Transcript of 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 17, lines 10-13.

⁵¹ Transcript of 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 17, line 24 to p. 18, line 1.

justified further restrictions on Mr Gbagbo's freedom, and thus all conditions imposed on Mr Gbagbo should be lifted.⁵²

B. Submissions on behalf of Mr Blé Goudé

33. Counsel for Mr Blé Goudé did not file a written response to Mr Gbagbo's Request.

34. During the hearing, counsel for Mr Blé Goudé, stressed that he would address the questions raised by the Appeals Chamber 'from a purely theoretical perspective, particularly in light of the fact that the Court's statutory framework provides little to no guidance as to the circumstances for reconsideration of appellate decisions'.⁵³

35. He submitted that the Appeals Chamber could reconsider its own decisions, in accordance with rule 158 of the Rules, to prevent an injustice.⁵⁴ He further submitted that reconsideration might be granted in exceptional circumstances⁵⁵ and that the Prosecutor's oral submissions at the hearing as to her requested remedy in the appeal, namely a mistrial with the prospect of a retrial, created undue delay and uncertainty as to the future course of proceedings.⁵⁶ This uncertainty, along with issues of double jeopardy and the conditions for a mistrial not being met, all constituted exceptional circumstances warranting reconsideration, and obviated the necessity of maintaining the conditions.⁵⁷

36. Counsel for Mr Blé Goudé stated that, if the Appeals Chamber was considering the lifting of the conditions imposed on Mr Blé Goudé, it was still important that the Court impose measures to safeguard his right to participate in the appeals proceedings without interference from the domestic authorities in Côte d'Ivoire.⁵⁸

C. The Prosecutor's Response

37. In her response, the Prosecutor first argues that resorting to the exceptional measure of reconsideration is 'unnecessary and inappropriate' because the Judgment

⁵² Transcript of 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 18, lines 2-8.

⁵³ Transcript of 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 19, line 24 to p. 20, line 2.

⁵⁴ Transcript of 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 21, lines 12-14.

⁵⁵ Transcript of 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 21, lines 15-16.

⁵⁶ Transcript of 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p81, line 16 to p.82 line 25.

⁵⁷ Transcript of 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 83, line 1 to p. 85, line 18.

⁵⁸ Transcript of 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 30, lines 11-16.

expressly provides for the Appeals Chamber to review and vary the conditions of release in the future.⁵⁹ She further argues that article 60(3) of the Statute and rule 119(2) of the Rules allow the Appeals Chamber to review the exercise of its power to impose conditions of release.⁶⁰

38. With regard to the review of the conditions, the Prosecutor argues that, even if the Appeals Chamber were minded to review the Judgment, it should find that there are no circumstances justifying review of the conditions imposed.⁶¹ She submits that while article 60(3) of the Statute provides the appropriate standard for reviewing conditional release,⁶² the only new development identified by counsel for Mr Gbagbo is the filing of the her Notice of Appeal and the Appeals Chamber had already considered in the Judgment that she intended to appeal the acquittal.⁶³ She therefore contends that counsel for Mr Gbagbo does not demonstrate changed circumstances requiring Mr Gbagbo's unconditional release.⁶⁴

39. With regard to Mr Gbagbo's flight risk, the Prosecutor argues that the filing of the Notice of Appeal constitutes no change in the factual circumstances underlying the Appeals Chamber's finding on his flight risk if released unconditionally, and thus the conditions must continue to be imposed to mitigate the flight risk.⁶⁵

40. The Prosecutor submits that counsel for Mr Gbagbo repeats submissions already made before the Appeals Chamber in relation to the legal and factual basis for conditional release.⁶⁶ The Prosecutor also argues that counsel for Mr Gbagbo indicated that Mr Gbagbo was willing to accept conditions imposed by the Appeals Chamber, which were 'carefully balanced with Mr Gbagbo's rights and proportionately tailored to mitigate the risks it identified'.⁶⁷

⁵⁹ [Prosecutor's Response](#), paras 8, 12.

⁶⁰ [Prosecutor's Response](#), paras 9-12.

⁶¹ [Prosecutor's Response](#), paras 15-16.

⁶² [Prosecutor's Response](#), para. 16.

⁶³ [Prosecutor's Response](#), para. 18.

⁶⁴ [Prosecutor's Response](#), paras 17-19. At the hearing, the Prosecutor submitted that her request for mistrial in the event of successful appeal, as stated in her Appeal Brief, did not alter her view that the conditions were still necessary, *see* para. 41 below.

⁶⁵ [Prosecutor's Response](#), para. 20.

⁶⁶ [Prosecutor's Response](#), para. 23.

⁶⁷ [Prosecutor's Response](#), para. 24.

41. During the hearing, the Prosecutor submitted that, in the event of a successful appeal, she intended to seek a continuance of the proceedings in the form of a new trial before a new trial chamber.⁶⁸ The Prosecutor further submitted that although, in her Appeal Brief, she did not expressly state her intention to pursue a new trial before a new trial chamber, she did ask for the Appeals Chamber to declare a mistrial and return the case to her for further decision, including that on a possible retrial.⁶⁹ She indicated that the remedy she was seeking involved two steps: firstly, she requests that the Appeals Chamber declare a mistrial and to quash or negate the acquittals, and secondly, she requests that the Appeals Chamber return the case to her so that she may ascertain the form of the subsequent proceedings.⁷⁰ The Prosecutor thus submitted that her request for a mistrial in the event of a successful appeal did not alter her view that the conditions are still necessary, as she intended to continue proceedings in this case.⁷¹

D. Submissions by the Victims

42. The Victims first contend that Mr Gbagbo's Request should be dismissed *in limine* due to the lateness of the filing and the fact that counsel for Mr Gbagbo has provided no reasons justifying its lateness.⁷²

43. On the merits, the Victims argue that counsel for Mr Gbagbo fails to assert a clear error in the Appeals Chamber's reasoning in the Judgment, and that his arguments constitute 'a mere disagreement' with the Judgment.⁷³ In this respect, the Victims submit that provisions in relation to pre-trial and trial proceedings 'apply *mutatis mutandis* to proceedings in the Appeals Chamber' and it 'properly exercised its power within the established Court's legal framework'.⁷⁴ The Victims further submit that Mr Gbagbo's acquittal was 'clearly a pre-existing circumstance' considered by the Appeals Chamber in the Judgment.⁷⁵

⁶⁸ Transcript of hearing, 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 44, lines 6-11.

⁶⁹ Transcript of hearing, 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 46, lines 16-23; *see also* Appeal Brief, para. 266.

⁷⁰ Transcript of hearing, 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 48, lines 8-12.

⁷¹ Transcript of hearing, 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 44, lines 2-7.

⁷² [Victims' Response](#), paras 19-22, 26.

⁷³ [Victims' Response](#), paras 28-30.

⁷⁴ [Victims' Response](#), para. 30.

⁷⁵ [Victims' Response](#), para. 31.

44. With regard to flight risk, the Victims argue that the Appeals Chamber only had to determine that ‘the Prosecutor’s factual and legal arguments were well founded to justify either a continued detention or the less strict remedy’ of conditional release.⁷⁶ In this regard, the Victims submit that the Appeals Chamber was correct in imposing conditions of release.⁷⁷

45. As to counsel for Mr Gbagbo’s arguments on international human rights, the Victims argue, by reference to the jurisprudence of the European Court of Human Rights, that as long as the detention of an acquitted person is based on ‘a specific statutory provision or judicial decision’, it does not constitute a violation of article 5 of the European Convention of Human Rights and the general principle of the rule of law.⁷⁸ The Victims further argue that a Chamber can impose conditions limiting freedom pursuant to rule 119(5) of the Rules, which has never been interpreted as being in violation of fundamental human rights.⁷⁹

46. During the hearing, the Victims submitted that they remained concerned about the possibility of the commission of further crimes and attempts to compromise the integrity of the proceedings if Mr Gbagbo were released unconditionally because this might galvanise his supporters into retaliation against the Victims.⁸⁰ They also expressed concern that releasing Mr Gbagbo unconditionally would allow him to return to Côte d’Ivoire and seek political power to actively obstruct the appeals proceedings before the Court.⁸¹

E. Côte d’Ivoire’s Observations

47. In its observations, Côte d’Ivoire submits that while unconditional release should be contemplated only where Mr Gbagbo offers firm guarantees to appear in future proceedings, this is not the case because his behaviour cannot be predicted and, as the Judgment held, he has incentives to abscond.⁸² It submits that the absconding of Mr Gbagbo would have grave implications for the authority of the Court, the

⁷⁶ [Victims’ Response](#), para. 34.

⁷⁷ [Victims’ Response](#), paras 34-35.

⁷⁸ [Victims’ Response](#), para. 36.

⁷⁹ [Victims’ Response](#), para. 37.

⁸⁰ Transcript of hearing, 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 60, lines 18-25.

⁸¹ Transcript of hearing, 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 62, lines 11-17.

⁸² [Côte d’Ivoire’s Observations](#), para. 29.

administration of justice, the rights of Victims, the Côte d'Ivoire and, hence, for international public policy.⁸³

48. Côte d'Ivoire also stresses that while it has a duty to protect the victims and witnesses on its territory, Mr Gbagbo's unconditional release would have grave implications for their right to acknowledge the harm done to them and to seek reparation.⁸⁴

49. Côte d'Ivoire further submits that although counsel for Mr Gbagbo argues that the conditions set out in the Judgment deny Mr Gbagbo his civil and political rights, none of them deny his fundamental human rights.⁸⁵ It states that the conditions satisfy the standards applied by all legal systems in democratic societies in relation to persons subject to criminal proceedings and given conditional release.⁸⁶

50. Côte d'Ivoire concluded its observations by stating that the Judgment is fair, balanced and proportionate, as it imposed the restrictions on Mr Gbagbo's liberty to guarantee his appearance in court and the security for all.⁸⁷

51. During the hearing, Côte d'Ivoire reiterated that it supported the ruling in the Judgment.⁸⁸

F.

[REDACTED]

52. [REDACTED]

⁸³ [Côte d'Ivoire's Observations](#), para. 31.

⁸⁴ [Côte d'Ivoire's Observations](#), paras 34-36.

⁸⁵ [Côte d'Ivoire's Observations](#), paras 38-39.

⁸⁶ [Côte d'Ivoire's Observations](#), para. 40.

⁸⁷ [Côte d'Ivoire's Observations](#), para. 45.

⁸⁸ Transcript of hearing, 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 70, lines 22-23.

⁸⁹ [REDACTED]

[Redacted]

53. [Redacted]

54. [Redacted]

90 [Redacted]

91 [Redacted]

92 [Redacted]

93 [Redacted]

94 [Redacted]

95 [Redacted]

96 [Redacted]

97 [Redacted]

[REDACTED]

55. [REDACTED]

V. MERITS

56. Counsel for Mr Gbagbo submits that reconsideration of a decision may be appropriate if a clear error of reasoning has been shown or if it is necessary to do so in order to prevent an injustice.¹⁰³ He submits that both limbs of the test are satisfied in the instant case, in that: (i) the Judgment is clearly erroneous as there is no legal basis to allow for the conditional release of an acquitted person, and (ii) reconsideration of the Judgment is warranted to prevent injustice as it violated Mr Gbagbo's

98 [REDACTED]
99 [REDACTED]
100 [REDACTED]
101 [REDACTED]
102 [REDACTED]

¹⁰³ Transcript of hearing, 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 13, lines 12-14. In [Mr Gbagbo's Request](#), counsel for Mr Gbagbo cites two cases mentioned above in paragraph 27. At the hearing, he referred to what is stated in this paragraph of this decision.

fundamental rights, and the passage of time has further exacerbated the violation of his rights.¹⁰⁴

57. Without prejudice to the question of whether, and under which circumstances, the Appeals Chamber would reconsider judgments that have been issued pursuant to rule 158(1) of the Rules, the Appeals Chamber finds that counsel for Mr Gbagbo has, in any event, not shown that the Appeals Chamber erred in issuing the Judgment and, as a consequence, has not shown that the threshold for reconsideration he has put forward has been met.

58. With regard to counsel for Mr Gbagbo's first argument, the Appeals Chamber is not persuaded that the Judgment contains a clear error of reasoning. In determining that it had the power to impose conditions on the release of an acquitted person, the Appeals Chamber set out its analysis of the relevant provisions of the Statute and Rules. It also properly took account of 'the Court's continued jurisdictional interest in the acquitted person pending the appeal against the acquittal', which could justify imposing conditions if a risk of flight were found to exist.¹⁰⁵ The Appeals Chamber notes that this stems from, as has been recognised in the past, the Court's limited ability, contrary to that of national courts, to arrest a person and to bring him or her before it for the purposes of any proceedings.¹⁰⁶

59. The Appeals Chamber considers that counsel for Mr Gbagbo fails to point to any clear error in the Judgment, but rather merely disagrees with the Appeals Chamber's ruling by contending that it did not provide any clear explanation of the legal basis for granting the conditional release of an acquitted person.¹⁰⁷ As to counsel for Mr Gbagbo's two additional points in this argument, the lack of a factual basis for imposing conditions and the incompatibility of article 81(3)(c) of the Statute with human rights jurisprudence, the Appeals Chamber considers that he merely reiterates

¹⁰⁴ [Mr Gbagbo's Request](#), paras 60-74; Transcript of hearing, 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p.13, line 25 to p.14, line 8.

¹⁰⁵ [Judgment](#), para. 53.

¹⁰⁶ See Transcript of hearing, 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 9, lines 9-17.

¹⁰⁷ [Mr Gbagbo's Request](#), paras 30-47.

arguments that had already been made before, and were considered by, the Appeals Chamber prior to it rendering the Judgment.¹⁰⁸

60. With regard to counsel for Mr Gbagbo's second argument, the Appeals Chamber is also unpersuaded that reconsideration of the Judgment is warranted to prevent an injustice. Although the Appeals Chamber agrees with counsel for Mr Gbagbo that the conditions set out in paragraph 60 of the Judgment imposed certain restrictions on Mr Gbagbo's rights, those conditions were imposed because they served a legitimate aim, as the Judgment had identified, namely, to mitigate the flight risk. As referred to in the Judgment, 'there must be compelling reasons for imposing conditions on a released person' and '[a]ny [...] conditions must be carefully balanced with the rights of the acquitted person and must be proportionately tailored to mitigate the risks identified'.¹⁰⁹ In this regard, the Appeals Chamber notes that the conditions imposed were considered proportionate to mitigate that risk, and counsel for Mr Gbagbo has not succeeded in showing otherwise or in showing that the flight risk did not exist. This is not to say, however, that such conditions can never be reviewed. In this regard, both persons were provided with a mechanism to address issues related to their conditions, as operative paragraph 4 of the Judgment allowed for a review of the conditions either at the request of a party or on the Appeals Chamber's own motion.

61. In light of the foregoing, the Appeals Chamber considers that counsel for Mr Gbagbo has demonstrated, based on the standard he puts forward, neither a clear error of reasoning, nor that there are particular circumstances justifying reconsideration of the Judgment.

62. Notwithstanding the above, the Appeals Chamber, pursuant to the aforementioned operative paragraph 4, will now review the conditions imposed on both Mr Gbagbo and Mr Blé Goudé. In conducting the review, the Appeals Chamber will consider whether the reasons for the imposition of the conditions continue to exist and, if so, whether alternative or less stringent conditions may be imposed to achieve the same objective, or whether the interests of justice require revocation or modification of the conditions for any other appreciable reason. What is important is

¹⁰⁸ [Judgment](#), paras 48-59.

¹⁰⁹ [Judgment](#), para. 54.

that the Appeals Chamber ensures that the conditions imposed do not place unnecessary or excessive restrictions on the rights of an acquitted individual.

63. Turning to the case at hand, the Appeals Chamber notes that the Judgment required both Mr Gbagbo and Mr Blé Goudé to sign an undertaking that they, *inter alia*, would abide by all instructions and orders from the Court.¹¹⁰ Both persons have cooperated and complied with the conditions hitherto in place and there is no suggestion that either has made any attempt to enter or flee to any unauthorised State or territory.

64. [REDACTED]

65. In light of these circumstances, the Appeals Chamber finds that the continuing imposition of certain conditions set out in paragraph 60 of the Judgment is unnecessary.

66. The Appeals Chamber considers that it is appropriate to revoke conditions (iii),¹¹³ (iv), (v) and (viii) of paragraph 60 of the Judgment as set out herein at paragraph 25. Conditions (i), (ii), (vi) and (vii) of paragraph 60 of the Judgment are maintained.

67. In the view of the Appeals Chamber, these remaining conditions suffice in the circumstances of this case.

¹¹⁰ [Judgment](#), para. 60(i).

¹¹¹ [REDACTED]

¹¹³ As varied in respect of Mr Gbagbo by the [Decision varying a condition in the Judgment](#).

68. Further to condition (i),¹¹⁴ Mr Gbagbo and Mr Blé Goudé shall comply with all orders of this Court. It is necessary to clarify that such orders include any order to appear for any trial that results from the appeal now pending. Should they wilfully fail to reappear before the Court for any future proceedings in this case, such proceedings could in principle continue without their physical presence, subject to what is said below at paragraph 71. It may be mentioned in this regard that what distinguishes this case from others in which a suspect or accused person may have failed to appear before the Court, is that the threshold erected in article 60 of the Statute has been crossed. This is in the sense that any suspect or accused (or in this case, acquitted person) who has physically appeared before the Court pursuant to article 60, has crossed the threshold of the Court's effective exercise of jurisdiction. In that regard, it is equally important to underscore that anyone who crosses that threshold would have done so by any of the following means: he or she was physically surrendered to the Court, appeared voluntarily or appeared pursuant to a summons to appear.

69. In making the foregoing pronouncements, the Appeals Chamber is fully mindful of article 63(1) of the Statute which provides: 'The accused shall be present during the trial'. It is the view of the Appeals Chamber that the proper aim of the provision is to deny legality to the trial of a person who wants to be present at his or her trial and participate in good faith, but was unable to attend due to no fault of his or her own. There is a perversion of that legitimate aim, if article 63(1) of the Statute is pleaded in aid of an accused person who wants to prevent his or her own trial by deliberate absence in circumstances of contumacy, following an initial appearance pursuant to article 60 of the Statute.

70. The continuance of proceedings without the physical presence of the accused in cases of wilful absence is prohibited neither by the Statute properly understood, nor by general principles of law. As long as the right to a fair trial is scrupulously respected, particularly by ensuring proper representation of counsel, such proceedings are permissible in the realms of both international and domestic law. At the international level, the Appeals Chamber of the International Criminal Tribunal for

¹¹⁴ [Judgment](#), paragraph 60(i) imposes the condition: 'To sign an undertaking that they will abide by all instructions and orders from the Court, including to be present at the Court when ordered, and accepting that the proceedings before the Appeals Chamber may proceed in their absence, should they fail to appear before the Court when ordered to do so'.

Rwanda has held that it is not impermissible to proceed with a trial in the absence of an accused who knowingly refuses to be present at this trial.¹¹⁵ Similarly, both the United Nations Human Rights Committee¹¹⁶ and the European Court of Human Rights¹¹⁷ have also held that there is no blanket prohibition of trials in the absence of persons who, having been informed of the proceedings sufficiently in advance, decline to exercise their right to be present, waive their right, or abscond, provided careful measures are taken to ensure that the trial in question was fair – including by way of proper representation by counsel. At the national level, both the common law systems¹¹⁸ and continental European legal systems alike permit the trial of persons who wilfully abscond from their trial in circumstances of contumacy.

71. The Appeals Chamber does not, by this decision, impose upon any future trial chamber an obligation to continue proceedings in the wilful absence of Mr Gbagbo or Mr Blé Goudé. Nor is the desirability of doing so, in the actual circumstances of the question, hereby determined. It shall be for any future trial bench to make those determinations, in light of all the particular circumstances before it. Moreover, the occurrence of such a scenario is contingent on the outcome of the appeal in this case, the merits of which form no part of the present decision.

72. Turning to the question of receiving States, the Appeals Chamber notes that whilst Belgium is the receiving State for Mr Gbagbo, [REDACTED]

¹¹⁵ ICTR, Appeals Chamber, *Nahimana et al. v. The Prosecutor*, Judgement, 28 November 2007, ICTR-99-52-A, paras 96-109. In that case, the ICTR Appeals Chamber, at paragraph 116, found an implied waiver on the part of the appellant in that he ‘freely, explicitly and unequivocally expressed his waiver of the right to be present during his trial hearings, after he had been duly informed by the Trial Chamber of the place and date of the trial, of the charges laid against him, of his right to be present at those hearings, and that his presence was required’.

¹¹⁶ See *Mbenge v Zaire*, UN Human Rights Committee, Communication No 16/1977, 25 March 1983, para 14.1.

¹¹⁷ ECtHR, *Sejdovic v. Italy*, 1 March 2006, Application No 56581/00, paras 82-83, 86-88; ECtHR, *Dembukov v. Bulgaria*, 28 February 2008, Application No 68020/01, para. 45; ECtHR, *Lena Atanasova v. Bulgaria*, 26 January 2017, Application No 52009/07, para 52.

¹¹⁸ See United Kingdom, House of Lords, *R v. Jones*, 20 February 2002, [2002] UKHL 5, [2003] 1 AC 1, in which the UK House of Lords determined that the court had the power to proceed with a trial where the defendant had deliberately absconded prior to the commencement of proceedings. From the perspective of New Zealand, for instance, the Law Commission of New Zealand has observed as follows: ‘Since at least the mid-1980s. New Zealand courts have been willing to exercise their discretion to commence or continue a trial in an accused’s absence. In that sense, while the House of Lords’ decision in *Jones* provided the courts with additional and useful guidance, it did not lead to a significant change in the approach the courts were already beginning to take’: Law Commission of New Zealand, ‘Discussion Document: Proceeding in the Absence of the Defendant’ (May 2009), para 28.

