

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-02/11-01/15**  
Date: **17 November 2021**

**ARTICLE 85 CHAMBER**

**Before:** Judge Reine Alapini-Gansou, Presiding  
Judge Joanna Korner  
Judge Sergio Gerardo Ugalde Gordínez

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE**

**IN THE CASE OF**

***THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ***

**Public with public Annex A**

**Public redacted version of “Prosecution response to Charles Blé Goudé’s Request for Compensation pursuant to Article 85(3) of the Statute”, 15 November 2021, ICC-02/11-01/15-1424-Conf-Exp**

**Source: Office of the Prosecutor**

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

**The Office of the Prosecutor**  
Mr Karim A. A. Khan QC  
Mr James Stewart

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

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

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**REGISTRY**

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**Registrar**  
Mr Peter Lewis

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section Other**

## INTRODUCTION<sup>1</sup>

1. On 31 March 2021, the Appeals Chamber, by majority, rejected the Prosecution’s appeal against Trial Chamber I’s decision granting two no case to answer (NCTA) motions (also by majority).<sup>2</sup> The two dissenting Judges on appeal would have granted the Prosecution’s appeal and ordered a retrial, before a new Trial Chamber.<sup>3</sup> The acquittals of Mr Gbagbo and Mr Blé Goudé being final, the Appeals Chamber revoked all conditions previously imposed on their release.<sup>4</sup> On 9 September 2021, Mr Blé Goudé sought compensation under article 85(3) of the Statute, claiming that he was a victim of wrongful prosecution amounting to a grave and manifest miscarriage of justice.<sup>5</sup> He seeks €819,300 as compensation since 22 March 2014, when he was surrendered to the Court by the Côte d’Ivoire national authorities, or alternatively, €381,900 as compensation since 19 March 2018, when the Prosecution filed its Trial Brief.<sup>6</sup>

2. Given the significance of its mandate to the Court’s work, the Office of the Prosecutor continuously endeavours to improve the quality of its processes. Accordingly, it reflects—critically when needed—on all its cases whether ending in convictions, acquittals or non-confirmations of charges, to better discharge its mandate. The case against Mr Blé Goudé is no exception to this approach. That said, Mr Blé Goudé’s Request for a finding of wrongful prosecution and compensation must fail. His claims, both individually and cumulatively, fall manifestly short of the stringent requirements of article 85(3). None of the claims—focused mainly on the Prosecution’s purported lack of diligence in different phases of the criminal proceedings—establish conclusive facts amounting to a grave and manifest miscarriage of justice under article 85(3). Moreover, Mr Blé Goudé impermissibly repeats arguments previously ventilated before the Trial and Appeals Chambers.<sup>7</sup> Compensation proceedings are

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<sup>1</sup> [REDACTED].

<sup>2</sup> [NCTA AJ](#), para. 380 (notified on 1 April 2021); [Judge Eboe-Osuji Sep Op](#); [Judge Morrison Sep Op](#); [Judge Hofmański Sep Op](#); [Judge Ibáñez Dis Op](#); [Judge Bossa Dis Op](#). See [Reasons for 15 January 2019 Oral Decision](#), para. 28; [Judge Tarfusser Opinion](#); [Judge Henderson Reasons](#); [Judge Herrera Carbuccia Dis Op](#).

<sup>3</sup> [Judge Ibáñez Dis Op](#), paras. 419-422; [Judge Bossa Dis Op](#), paras. 41-44.

<sup>4</sup> [NCTA AJ](#), para. 381.

<sup>5</sup> [Request](#), para. 2.

<sup>6</sup> [Request](#), paras. 46-58.

<sup>7</sup> See e.g., [Request](#), paras. 13-14 (arguing that Prosecution evidence lacked probative value, authenticity and amounted to anonymous hearsay), 21 (arguing that the Prosecution’s request for conditional release, without knowing whether it wished to retry Mr Blé Goudé, was egregious), 17, 21 (arguing that the Prosecution appeal was frivolous since it did not bring factual errors and seek a retrial).

not an appropriate avenue to resurrect those submissions.<sup>8</sup> These arguments should be summarily rejected.

3. Mr Blé Goudé fails to show that he has suffered a grave and manifest miscarriage of justice—a burden he must discharge before seeking compensation.<sup>9</sup> Far from discharging his burden to meet article 85(3)'s high threshold, Mr Blé Goudé presents a series of often poorly substantiated arguments that must fail.

4. First, he challenges the Prosecution's investigation, arguing that the Prosecution had not properly discharged its mandate to investigate incriminating and exonerating circumstances equally under article 54(1)(a) and had presented a "one-sided" case narrative.<sup>10</sup> As demonstrated below, the Prosecution had met its statutory obligations when it presented its case at confirmation and trial, and acted reasonably in exercising its broad discretion in presenting its case at trial. In any event, article 85 proceedings do not generally serve as a forum to review or scrutinise the Prosecution's investigations, with the benefit of hindsight.<sup>11</sup> Moreover, he claims that the presumption of a proper investigation was displaced in the trial because the Prosecution's case was found to be "exceptionally weak."<sup>12</sup> Yet he unduly imposes on the Prosecution an 'obligation of result'. The Prosecution must investigate with integrity, but it is not obliged, nor can it be expected, to *ensure* a particular outcome in criminal proceedings.

5. Second, Mr Blé Goudé relies on purported shortcomings in the Prosecution's evidence, including on the authenticity of documents and the use of anonymous hearsay. But in doing so he impermissibly re-litigates trial issues.<sup>13</sup> The Prosecution took reasonable steps to authenticate documents, and did not rely impermissibly on anonymous hearsay. In any event, any deficiencies in the Prosecution's evidence were addressed during the trial, when the Trial Chamber by majority granted the Defence motions after finding the evidence was insufficient

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<sup>8</sup> [Ngudjolo Compensation Decision](#), para. 47 ("[article 85(3)] does not permit the Chamber to act as another level of adjudication or to re-assess the merits of the various decisions which have been adopted—or have not been adopted, as the case may be—by other Chambers in the course of the proceedings."); [Bemba Compensation Decision](#), para. 25 ("[...] compensation proceedings do not constitute an opportunity to reopen the debate on matters that have already been submitted and/or addressed by previous Chambers in the case.").

<sup>9</sup> Rule 173 (2), [RPE](#) requires the compensation request to be filed after a Court decision on the existence of a grave and manifest miscarriage of justice; [Ngudjolo Compensation Decision](#), paras. 12-16; [Bemba Compensation Decision](#), paras. 21-22; [Mangenda Compensation AD](#), para. 17 (on the two-step process for article 85(1)).

<sup>10</sup> [Request](#), paras. 11-12, 15-16, 20-22, 35.

<sup>11</sup> [Ngudjolo Compensation Decision](#), para. 30 ("[absent] inappropriate conduct, the [article 85] procedure is [inappropriate to review] the Prosecution's investigations"); [Bemba Compensation Decision](#), para. 32.

<sup>12</sup> [Request](#), para. 12.

<sup>13</sup> [Request](#), paras. 13-14.

and acquitted the two men, and when the Appeals Chamber by majority confirmed that result.<sup>14</sup> The Chambers' actions could therefore be said to have prevented any miscarriage of justice, rather than confirming the existence of one.<sup>15</sup>

6. Third, Mr Blé Goudé argues that, despite being aware of the weakness of its case, the Prosecution “held steadfast to its narrative” in its Trial Brief “intent on convicting [him] at all costs.”<sup>16</sup> This is incorrect. Nor is it reasonable or accurate to claim that the Prosecution should have withdrawn charges before the NCTA proceedings.<sup>17</sup>

7. Fourth, in arguing that the appeal proceedings gave rise to a grave and manifest miscarriage of justice, Mr Blé Goudé selectively (mis)interprets the record.<sup>18</sup> In faulting Prosecutor Fatou Bensouda for seeking conditions on his release during the appeal, he omits relevant circumstances. He also overlooks that the Appeals Chamber not only unanimously granted that application, but later reviewed its decision and found no error or injustice, and in any event, *proprio motu* reviewed and modified the conditions.<sup>19</sup> Likewise, he ignores his own stated position on conditional release.<sup>20</sup> His arguments that the Prosecution's appeal was frivolous<sup>21</sup> are legally and factually unsupported.

8. Accordingly, none of Mr Blé Goudé's allegations show conclusive facts of a grave and manifest miscarriage of justice qualifying as “scenarios of exceptional nature” under article 85(3).<sup>22</sup> The Prosecution's case was complex and based largely on circumstantial evidence.<sup>23</sup> But the Majority Judges at trial and on appeal, despite their criticisms, did not find there had been any miscarriage of justice, much less a grave and manifest one.<sup>24</sup> Significantly, Mr Blé

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<sup>14</sup> [Reasons for 15 January 2019 Oral Decision](#), para. 28; [NCTA AJ](#), para. 380.

<sup>15</sup> [Bemba Compensation Decision](#), paras. 28-29 (“[...] to the extent that this review was meaningfully carried out and resulted in the acquittal, this prevented any miscarriage of justice.”).

<sup>16</sup> [Request](#), paras. 15-16, 18, 20, 23, 30, 33-34.

<sup>17</sup> [Request](#), para. 18.

<sup>18</sup> [Request](#), paras. 17, 21-22.

<sup>19</sup> [Request](#), para. 21; see generally [Conditional Release AD](#); [Conditional Release Review AD](#).

<sup>20</sup> See below para. 46.

<sup>21</sup> [Request](#), paras. 17-18, 22.

<sup>22</sup> [Bemba Compensation Decision](#), paras. 33-34 (“[article 85(3) encompasses] scenarios of exceptional nature, [different from those typical of a trial with] specific opportunities of review. [It guarantees] against serious violations of [fair trial], including [possible compensation for] serious abuse of the judicial process.”)

<sup>23</sup> See [Confirmation Adjournment Decision](#), para. 41; [Judge Henderson Reasons](#), para. 5 (Preliminary Remarks).

<sup>24</sup> [Reasons for 15 January 2019 Oral Decision](#), para. 28; [Judge Henderson Reasons](#), paras. 1-10 (Preliminary Remarks), 52-91 (The Prosecutor's Case); [Judge Tarfusser Opinion](#), paras. 1-86, 89-116; See Nerlich, p. 2438 (mn. 25), as a matter of general principle (“[...] some caution is required because the reasons for acquittal [are] not necessarily written with the question of compensation and the threshold of article 85(3) in mind. Thus, even strong language in a judgement of acquittal does not necessarily mean that there was a ‘grave and manifest miscarriage of justice’”).

Goudé relies solely on certain remarks by Judges Henderson and Tarfusser, none of which amount to a finding under article 85(3). He also overlooks that the case against him attracted diverse judicial views at all stages of the proceedings, namely:

- At confirmation, all three Judges found the evidence was sufficient to establish substantial grounds to believe that he was individually criminally responsible under articles 25(3)(b) and (c) for murder, rape, other inhumane acts (or alternatively attempted murder) and persecution as crimes against humanity for three out of five charged incidents, namely events on 16-19 December 2010 relating to demonstrations at the *Radiodiffusion-Télévision Ivoirienne* (RTI) building, on 25-28 February 2011 in Yopougon, and on or around 12 April 2011 in Yopougon.<sup>25</sup> The confirmation of charges is itself a safeguard against claims of wrongful prosecution.<sup>26</sup>
- At trial, while Judges Henderson and Tarfusser found that the evidence against Mr Blé Goudé was insufficient, Judge Herrera Carbuccia dissented.<sup>27</sup> She “firmly disagree[d]” with their decision to terminate the trial and acquit the accused,<sup>28</sup> and found that a reasonable Trial Chamber could find that Mr Blé Goudé was individually criminally responsible under article 25(3)(b) for inducing and soliciting murder, rape, other inhumane acts, attempted murder and persecution as crimes against humanity with respect to the RTI march and both Yopougon incidents.<sup>29</sup>
- On appeal, while the three Judges in the majority dismissed the Prosecution’s appeal,<sup>30</sup> Judges Ibáñez and Bossa dissented.<sup>31</sup> Not only would they have granted the appeal based on

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<sup>25</sup> [Blé Goudé Confirmation Decision](#), paras. 182-194 (The Majority, Judges Fernández and Trendafilova, confirmed charges for two additional incidents, the 3 March 2011 attack on a women’s demonstration in Abobo and the 17 March 2011 shelling of Abobo market and surrounding area); [Blé Goudé Confirmation Judge Van den Wyngaert Dis Op](#), paras. 1, 12-14 (agreeing with the Majority on Mr Ble Goude’s liability under articles 25(3)(b) and (c) for three incidents but dissenting in relation to the two Abobo incidents and articles 25(3)(a) and (d) liability).

<sup>26</sup> [Ruto & Sang Confirmation Decision](#), para. 40 (“[an article 61(7) determination] is primarily to protect the suspect against wrongful prosecution”); [Mbarushimana Confirmation Decision](#), para. 41; [Bemba Confirmation Decision](#), para. 28; [Katanga Confirmation Decision](#), para. 63.

<sup>27</sup> [Reasons for 15 January 2019 Oral Decision](#), para. 28; [Judge Herrera Carbuccia Dis Op](#), paras. 1-19, 558-649 (accepting withdrawal of the 3 and 17 March incidents, but “firmly disagree[ing]” with the decision to acquit).

<sup>28</sup> [Judge Herrera Carbuccia Dis Op](#), para. 648.

<sup>29</sup> [Judge Herrera Carbuccia Dis Op](#), paras. 18-19 (finding that a reasonable Trial Chamber could conclude that through his acts and omissions Mr. Blé Goudé prompted the *Jeunes Patriotes* to commit crimes), paras. 643-646.

<sup>30</sup> [NCTA AJ](#), paras. 265-269, 340 (noting the Trial Chamber Majority Judges’ views on the weakness of the case); [Judge Eboe-Osuji Sep Op](#), para. 234 (fn. 239).

<sup>31</sup> [Judge Ibáñez Dis Op](#), paras. 1-22, 419-426; [Judge Bossa Dis Op](#), 1-5, 45-49.

the alleged errors of law and procedure, they would have ordered a new trial before a new trial chamber.<sup>32</sup>

9. The Prosecution fully accepts and defers to the final outcome in the criminal proceedings against Mr Blé Goudé (and respectfully acknowledges the various judicial findings and criticisms of aspects of its case). But Mr Blé Goudé’s submissions fail to represent the breadth and complexity of the judicial views on this case. In particular, he makes sweeping and unspecified claims about the Prosecution’s “lack of diligence.”<sup>33</sup> But this disregards that Judge Henderson—whose opinion reflects the Majority’s reasoning, and upon which he relies significantly—unequivocally stated that any criticism was offered with hindsight and was only limited to the Prosecutor’s case, and did not impugn “the integrity, good faith and commitment of the women and men who represented the Prosecutor in this case”.<sup>34</sup>

10. Finally, since Mr Blé Goudé has failed to establish conclusive facts showing a grave and manifest miscarriage of justice, his submissions asserting harm and claiming damages must be dismissed.<sup>35</sup> And, even if the Chamber found that the first step for article 85(3) is met, it still retains discretion not to award compensation. In this respect, Mr Blé Goudé’s submissions on damages are often unsubstantiated, incorrect and self-serving.<sup>36</sup>

11. The Prosecution respectfully requests the Chamber to dismiss Mr Blé Goudé’s Request.

## SUBMISSIONS

### I. THE SCOPE OF ARTICLE 85(3) OF THE STATUTE

12. Article 85(3) of the Statute operates in “exceptional circumstances” and requires a judicial finding—namely, “conclusive facts”—that a grave and manifest miscarriage of justice has occurred.<sup>37</sup> These exceptional circumstances are limited to cases of “certain and undeniable miscarriage of justice”, following, for instance, an erroneous decision or wrongful prosecution,<sup>38</sup> leading to “a clear violation of the applicant’s fundamental rights” and “serious

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<sup>32</sup> [Judge Ibáñez Dis Op](#), paras. 1-22, 419-426; [Judge Bossa Dis Op](#), 1-5, 45-49.

<sup>33</sup> [Request](#), paras. 1, 11-12, 18-22.

<sup>34</sup> [Judge Henderson Reasons](#), para. 9 (Preliminary Remarks).

<sup>35</sup> [Request](#), paras. 19-57.

<sup>36</sup> *See below* paras. 63-68.

<sup>37</sup> Article 85(3), [Statute](#); rule 173(2), [RPE](#); Bitti, p. 629.

<sup>38</sup> *See* [Ngudjolo Compensation Decision](#), para. 45 (fn. 79) (endorsing the Prosecution’s view on article 85(3) to cases of *mala fide* prosecutions, [Ngudjolo Compensation Hearing](#), 21:4-12); [Bemba Compensation Decision](#), para. 41; *See* Brady and Jennings, p. 304 (“[article 85(3)] exceeds current conventional and customary international law...[it] was seen to encapsulate the common law requirement for *malafides* [for] the Prosecutor, ...it will only be in exceptional circumstances that [compensation for release following acquittals will be awarded]”).

harm to the applicant”.<sup>39</sup> Of note, an acquittal of itself is not automatically grounds for compensation under article 85(3).<sup>40</sup> Moreover, not every flaw in the proceedings, or even violation of fair trial rights, amounts to a grave and manifest miscarriage of justice.<sup>41</sup> A violation must be “so serious and exceptional”, such that “the proper administration of justice was compromised.”<sup>42</sup>

13. The threshold in article 85(3) is particularly high, and is not limited to *malafides*.<sup>43</sup> “Malicious prosecution” refers to judicial proceedings instituted for wrongful or improper motives, and without probable cause to sustain it.<sup>44</sup> The phrase “wrongful prosecution”—that Chambers have used in the context of article 85(3)—is broader than malicious prosecution and could include examples of gross negligence in the administration of justice.<sup>45</sup>

14. As demonstrated below in response to each of Mr Blé Goudé’s four allegations, in this case the Prosecution had met its statutory obligations when it presented its case at confirmation and trial, acted reasonably in exercising its broad discretion in presenting its case at trial, and acted reasonably in the appeal proceedings. Mr Blé Goudé’s Request falls far short of the high threshold and exceptional nature of article 85(3), as reflected in the Court’s jurisprudence.

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<sup>39</sup> [Bemba Compensation Decision](#), para. 41; [Ngudjolo Compensation Decision](#), para. 41 (Black’s Law Dictionary: “miscarriage of justice” is “returning an unfair verdict based on the evidence presented as a legal justice failure”; *Oxford Dictionary*: a “grave and manifest miscarriage of justice” is a “failure of a court or judicial system to attain the ends of justice, especially one which results in the conviction of an innocent person”); [Granger v. United Kingdom](#), para. 26 (regarding an appeal against conviction, “miscarriage of justice” covers such matters as misdirections to the jury or wrong decisions on the admissibility of evidence, as well as breaches of natural justice).

<sup>40</sup> See Brady and Jennings, p. 303; Bitti, p. 623 (fn. 3), citing the report of the Working Group on Procedural Matters at the Rome Conference, noting “[t]here are delegations which believe that there should be an unfettered right to compensation where a person is acquitted or released prior to the end of trial. [article 85(3)] is intended to limit the right to compensation to cases of grave and manifest miscarriage of justice. Others (*sic*) delegations considered this text to be too restrictive”); See also [Rwamakuba Compensation Decision](#), paras. 21-31, (there is no right to compensation for an acquittal), upheld in [Rwamakuba Compensation AD](#), paras. 10, 15, 25; [Zigiranyirazo Compensation Decision](#), paras. 19-22 (“[t]he language of [article 85] is permissive rather than compulsory”), upheld in [Zigiranyirazo Compensation AD](#), paras. 7-8.

<sup>41</sup> [Bemba Compensation Decision](#), para. 42.

<sup>42</sup> [Bemba Compensation Decision](#), para. 42; [Ngudjolo Compensation Decision](#), paras. 41, 43 (*i.e.*, (i) conviction of an innocent person; (ii) wrong decisions on admissibility of evidence; (iii) demonstrated or substantiated suspicion of corruption; (iv) lack of judicial impartiality; and (v) other examples of gross negligence in the administration of justice); Nerlich, pp. 2436-2437 (mns. 22-24).

<sup>43</sup> [Ngudjolo Compensation Decision](#), para. 45 (using the phrase “wrongful prosecution”); [Bemba Compensation Decision](#), para. 42 (“[...] It seems beyond controversy that the provision is not limited to the notion of *malafides*, since this was explicitly excluded during article 85(3)’s drafting history.”); Brady and Jennings, pp. 303-304; Dreyse, pp. 2142-2144.

<sup>44</sup> Black’s Law Dictionary: malicious prosecution, the institution of a criminal or civil proceeding for an improper purpose and without probable cause.

<sup>45</sup> [Bemba Compensation Decision](#), para. 42 (“similarly grave instances” including “examples of gross negligence in the administration of justice to the detriment of the suspect or the accused”); [Ngudjolo Compensation Decision](#), paras. 41, 43; *E.g.*, [Law Commission of India Report](#), p. 78 (where police or prosecutorial misconducts (malicious or negligent) led to wrongful prosecution with a court making such a finding), cited in [Request](#), para. 36.



## II. ALLEGATION 1: THE PROSECUTION’S INVESTIGATION DID NOT GIVE RISE TO A GRAVE AND MANIFEST MISCARRIAGE OF JUSTICE

15. Mr Blé Goudé alleges that he was wrongfully prosecuted because the Prosecution failed to investigate incriminating and exonerating circumstances equally under article 54(1)(a), and pursued a “one-sided” or “pre-constructed” narrative.<sup>46</sup> In relying solely on Judges Henderson’s and Tarfusser’s views,<sup>47</sup> Mr Blé Goudé takes them out of context, and ignores relevant aspects of the Prosecution’s investigation in which it obtained and disclosed potentially exonerating and other information relevant to the Defence. He fails to demonstrate any inappropriate conduct by the Prosecution that would cause this Chamber to review the investigation.<sup>48</sup>

### II.A. The Prosecution’s duty under article 54(1)(a) of the Statute

16. Article 54(1)(a) requires the Prosecution to investigate incriminating and exonerating circumstances equally, and make reasonable efforts to obtain potentially exculpatory material not in its possession.<sup>49</sup> Whether the Prosecution has fulfilled this duty requires assessing if it acted in good faith, duly considering the broad scope of international investigations that collect, organise and evaluate significant amounts of evidence.<sup>50</sup> Additionally, the Prosecution has discretion in presenting its case, including in determining which witnesses to call at trial.<sup>51</sup> As demonstrated below, this Chamber can be satisfied that the Prosecution had met its article 54(1)(a) obligations when it presented the charges for confirmation, and at trial.

### II.B. The Prosecution investigation did not impermissibly prejudice Mr Blé Goudé

17. The Prosecution’s investigation in the *Côte d’Ivoire* situation commenced in 2011 shortly after Laurent Gbagbo was removed from power following the post-election violence there.<sup>52</sup> During this initial period, the Prosecution faced significant time and resource constraints in

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<sup>46</sup> [Request](#), paras. 11, 15, 23, 33.

<sup>47</sup> [Request](#), paras. 13-16.

<sup>48</sup> [Ngudjolo Compensation Decision](#), para. 30.

<sup>49</sup> [Lubanga Oral Disclosure AD](#), para. 36; [Ruto & Sang Further Investigation Decision](#), para. 32.

<sup>50</sup> Bergsmo *et al.*, p. 1384 (mn. 10) (“Decisive weight must be given to whether the Prosecutor has fulfilled his or her investigative obligations *in good faith* [and] the broad scope of investigations before international criminal tribunals, where significant amounts of evidence are collected, all of which needs to be organised and evaluated. In this process, it is possible to make errors in determining what is relevant and what is not. Something that may not appear remotely relevant at the commencement of a case might, later in the proceedings, indeed turn out to be highly relevant”). (Emphasis added.)

<sup>51</sup> [Ngudjolo TJ](#), para. 119 (“the discretion to call various witnesses rest[s] above all with the Office of the Prosecutor”).

<sup>52</sup> Laurent Gbagbo was removed from power in April 2011. The Pre-Trial Chamber authorised the investigation on 3 October 2011: [CIVI Article 15 Decision](#) (*corrigendum* issued 15 November 2011).

investigating the complex facts, with limited access to witnesses and documents. However, following these initial challenges, and between when the arrest warrants were issued for Mr Gbagbo (23 November 2011) and Mr Blé Goudé (21 December 2011), and the trial's commencement on 28 January 2016, the Prosecution collected a substantial body of evidence. For example, it interviewed and disclosed about 157 witness statements. It reviewed thousands of documents from government archives, including archives of the police, Defence and Interior Ministries, and documents found at the Presidential Palace and Presidential Residence. By the time the Prosecution concluded its case at trial, it had disclosed to Mr Blé Goudé at least 3,740 items of incriminating evidence (some of which also contained exonerating elements); 3,461 items material to defence preparation under Rule 77; and 97 potentially exonerating items (amounting to several hundreds of pages). The Prosecution's investigation methodologies further demonstrate the positive steps taken under article 54(1)(a).<sup>53</sup>

18. The Prosecution interviewed a range of witnesses to obtain evidence of the post-election violence from diverse vantage points. This included insider witnesses such as five senior generals in Mr Gbagbo's security forces during the violence, who also testified at trial;<sup>54</sup> 22 other insider witnesses of varying ranks under Mr Gbagbo's presidency who either testified at trial or whose evidence was admitted under rule 68(2)(b);<sup>55</sup> insider witnesses from the Ouattara government who also testified at trial;<sup>56</sup> and other insider witnesses whose statements were disclosed, but who were not called to testify at trial, including two members of the *Commando Invisible*, the Chief of Staff of the *Forces Nouvelles*, and a leader of a youth group affiliated to the *Jeunes Patriotes* and Mr Blé Goudé.<sup>57</sup> The Prosecution also interviewed numerous crime-base victims/witnesses; NGO workers; and journalists who were in Côte d'Ivoire at the relevant time, including one who extensively followed and interviewed Mr Blé Goudé in the relevant period and whose video-recordings the Prosecution obtained and submitted into evidence.<sup>58</sup>

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<sup>53</sup> E.g., the Prosecution's investigation reports on the review of documents specified that the reviews were for information that was incriminating, potentially exonerating, or otherwise relevant for the preparation of the defence: see e.g. CIV-OTP-0049-2986, at 2999; CIV-OTP-0051-0007, at 0012; CIV-OTP-0051-0029, at 0033; CIV-OTP-0051-0059, at 0067; CIV-OTP-0051-0166, at 0171; CIV-OTP-0073-0756, at 0761; CIV-OTP-0073-0806, at 0811-0812; CIV-OTP-0073-0840, at 0846-0847; CIV-OTP-0098-0005, at 0005.

<sup>54</sup> P-0009 (former Military Chief of Staff); P-0010 (former Head of the special unit "CECOS" (or Security Operations Command Centre)); P-0011 (former Head of the *Gendarmerie*); P-0046 (former Director-General of the National Police); P-0047 (former Head of the Army (ground forces)).

<sup>55</sup> P-0156, P-0164, P-0176, P-0226, P-0238, P-0239, P-0316, P-0321, P-0330, P-0347, P-0380, P-0381, P-0435, P-0440, P-0449, P-0483, P-0500, P-0501, P-0520, P-0560, P-0607 and P-0625.

<sup>56</sup> P-0048 and [REDACTED].

<sup>57</sup> P-0319; P-0486; P-0387; P-0324.

<sup>58</sup> [T-177-Eng](#) (P-0087).

19. In the evidence it collected, the Prosecution obtained potentially exonerating and other information relevant to the Defence and disclosed it to Mr Blé Goudé. This included information on the presence and strength of opposing armed elements operating in Abidjan during the post-election violence, described variously as the *Commando Invisible*, *Forces Nouvelles*, or simply “rebels” or “armed assailants”. For example, the Prosecution disclosed at least 22 witness statements; 66 documentary records of Côte d’Ivoire’s police, military, *Gendarmerie* and intelligence services; 4 items of video footage; and 46 UN and NGO reports—all providing specific information regarding the opposing armed elements, such as their positions, areas of activity and weapons at their disposal. Indeed, the Prosecution has noted that references to such information arose on hundreds of occasions in the evidence it disclosed.

20. When adjourning the confirmation proceedings against Mr Gbagbo on 3 June 2013, the Pre-Trial Chamber invited the Prosecution to, relevantly, provide further evidence or conduct further investigations regarding the positions, movements and activities of all armed groups opposed to the pro-Gbagbo forces—such as the *Commando Invisible* and *Forces Nouvelles*—during the post-election violence.<sup>59</sup> In response, on 13 January 2014, the Prosecution submitted two detailed investigation reports,<sup>60</sup> referring to, *inter alia*, 65 witness statements obtained between October 2011 and September 2013, and disclosed to Mr Blé Goudé.

21. At trial, in examination in chief, witnesses explained the role and impact of opposing armed elements operating in Abidjan during the charged period, and in particular their impact on the military command and decisions taken by the pro-Gbagbo forces.<sup>61</sup>

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<sup>59</sup> [Confirmation Adjournment Decision](#), para. 44(1).

<sup>60</sup> [Response to Pre-Trial Chamber’s Questions](#); [Response to Pre-Trial Chamber’s Questions – Annex 6](#); [Response to Pre-Trial Chamber’s Questions – Annex 7](#). These reports were accessible by Mr Blé Goudé from 11 March 2015 once the two cases were joined: [Joinder Decision](#), pp. 33-34.

<sup>61</sup> [REDACTED]; [T-193-Eng](#), 82:23-85:4 and [T-194-Eng](#), 66:12-67:18 (asking witness P-0009 (former Military Chief of Staff) about the declaration of Abobo as a war zone in light of the opposing armed elements and the military’s actions in response to the *Commando Invisible*); [T-138-Red2-Eng](#), 6:5-7:9 and [T-139-Red2-Eng](#), 87:17-88:18 (discussing with witness P-0010 (former general and head of the CECOS special unit) the possibility for a commander to intervene outside the chain of operational command in light of the clashes with the *Commando Invisible* and the considerations on declaring Abobo a war zone in light of the *Commando Invisible*’s presence there); [T-203-Eng](#), 36:1-14 (discussing with witness P-0047 (former Head of the Army ground forces) why he did not believe that Abobo should be declared a war zone); [T-68-Red2-Eng](#), 84:10-87:9 (questioning witness P-0330 (former *Gendarmerie* captain in charge of Camp Commando Abobo who defected to the opposing side after the 3 March 2011 attack on the women’s march) about the nature and frequency of attacks on security force convoys in Abobo and the convoys’ response).

22. The Prosecution, according to the principle of objectivity, also sought [REDACTED].<sup>62</sup> [REDACTED].<sup>63</sup> [REDACTED].<sup>64</sup>

23. The Prosecution thus took these important steps to discharge its obligations. Moreover, Mr Blé Goudé was demonstrably aware of the potentially exonerating evidence disclosed to him. He cross-examined Prosecution witnesses on those matters.<sup>65</sup> He also stated that he intended to call his own witnesses concerning the arrival of the *Commando Invisible* and its role in the violence.<sup>66</sup> Ultimately, 60 of the 82 witnesses who testified at trial gave evidence on the existence and role of the *Commando Invisible*, rebels or other armed groups.

24. In only citing to comments made by Judges Henderson and Tarfusser,<sup>67</sup> Mr Blé Goudé ignores that Judge Henderson, writing for the Majority, did not find that the Prosecution deliberately withheld important information in the case, and made no comments, much less findings, on the Prosecution's discharge of its duty under article 54(1).<sup>68</sup> Mr Blé Goudé fails to substantiate that the Prosecution violated its article 54(1) obligations. In these circumstances, no further review is necessary.<sup>69</sup>

### **II.C. The Prosecution's case theory did not impermissibly prejudice Mr Blé Goudé**

25. After investigating, Prosecutor Bensouda concluded that there was sufficient evidence to prosecute Mr Blé Goudé and presented her DCC.<sup>70</sup> The DCC referred to facts relevant to a possible Defence case.<sup>71</sup> Thus, the Prosecution's case theory or "narrative"—which Judge

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<sup>62</sup> [REDACTED].

<sup>63</sup> [REDACTED].

<sup>64</sup> [REDACTED].

<sup>65</sup> See e.g. [REDACTED] and [T-65-Red2-Eng](#), 2:13-4:4; [T-199-Eng](#), 50:24-10; [T-200-Red2-Eng](#), 19:13-22; [T-71-Red2-Eng](#), 75:7-78:16.

<sup>66</sup> [Blé Goudé Opening Statement](#), 24:20-25.

<sup>67</sup> [Request](#), para. 11 (fn. 16), citing [Judge Henderson Reasons](#), paras. 1, 2, 5, 9; [Judge Tarfusser Opinion](#), paras. 2-4.

<sup>68</sup> [Judge Henderson Reasons](#), para. 66.

<sup>69</sup> [Ngudjolo Compensation Decision](#), para. 30; [Bemba Compensation Decision](#), para. 25.

<sup>70</sup> [Ngudjolo Compensation Decision](#), para. 61 ("There may be sufficient evidence [...] to confirm the charges and send the case to trial, without there being sufficient evidence to establish the guilt of the accused person based on the more stringent standard of proof which is 'beyond all reasonable doubt'"). See also Bergsmo *et al.*, p. 1384 (mn. 9) ("[...]the Prosecutor will weigh the result of the investigation [according to] the 'sufficient basis' standard laid down in article 53 para. 2. At that stage, the sufficiency of the basis, and not whether the Prosecutor has determined the truth in the course of the investigation, will [determine] whether the Prosecutor will [prosecute]").

<sup>71</sup> See e.g. [Blé Goudé DCC](#), paras. 19, 37, 53 (historic presence of "rebel" forces/militias in Côte d'Ivoire which also committed crimes against civilians); 54, 232, 277 (Mr Blé Goudé's involvement in historic peace and reconciliation efforts and his calls for peace to youth during the post-election violence); 71 (military assistance provided by foreign States and the UN to Gbagbo's political opponent, Ouattara), 70 (role of the *Forces Nouvelles*); 109, 147-148, 161, 163-164 (armed attacks against security forces in Abobo neighbourhood); 222 (worsening security situation culminating in the "*Bataille d'Abidjan*" between pro-Gbagbo and pro-Ouattara forces).

Henderson acknowledged as internally coherent and *prima facie* plausible<sup>72</sup>—recognised the presence of opposing armed elements and other potentially exonerating information. But it opposed the Defence interpretations of the evidence that, in its view, sought to equate their level of criminality to that of the pro-Gbagbo forces, to justify its use of force against civilians.<sup>73</sup> Such differing interpretations of the same evidence are routine in adversarial criminal trials.

26. Mr Blé Goudé relies solely on certain comments by Judges Henderson and Tarfusser to support his claim that the Prosecution presented a one-sided “narrative” of events,<sup>74</sup> but disregards the other judicial views concurring with the Prosecution’s case theory at the pre-trial and trial stages.<sup>75</sup> Notably, the Pre-Trial Chamber confirmed the charges against Mr Blé Goudé after confirming the charges against Mr Gbagbo, receiving the Prosecution’s detailed investigation reports on the activities of all opposed armed groups,<sup>76</sup> and hearing the Blé Goudé Defence’s arguments on the role and significance of the opposing armed elements in Abidjan.<sup>77</sup>

27. Judge Herrera Carbuccia found that the Prosecution’s case theory reflected the exonerating evidence.<sup>78</sup> She recognised, as the Prosecution argued, that regardless of the presence of other armed groups that were active in the areas, the principles of distinction and proportionality still applied, and this presence did not undermine the crimes against humanity charges.<sup>79</sup> These differing judicial interpretations of the evidence undermine Mr Blé Goudé’s claim that the Prosecution presented its case wrongfully, or in any manner that caused a grave and manifest miscarriage of justice.

#### **II.D. The Prosecution’s use of evidence to support its narrative did not impermissibly prejudice Mr Blé Goudé**

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<sup>72</sup> [Judge Henderson Reasons](#), para. 66.

<sup>73</sup> See e.g. [Prosecution Final Confirmation Written Submissions](#), paras. 76-79 (responding to the Gbagbo Defence’s attempt to overstate the significance of the *Commando Invisible* in the 16 December 2010 charged incident). Mr Blé Goudé had access to these submissions from 11 March 2015: [Joinder Decision](#), pp. 33-34.

<sup>74</sup> See [Request](#), para. 15, citing [Judge Henderson Reasons](#), paras. 66, 79, 88; [Judge Tarfusser Opinion](#), paras. 5, 28, 104, 107. See below para. 39.

<sup>75</sup> See above para. 8.

<sup>76</sup> See above para. 20.

<sup>77</sup> [Confirmation Hearing Day 2](#), 49:7-50:20; [Confirmation Hearing Day 3](#), 42 :17-22; [Confirmation Hearing Day 4](#), 42:2-6, 43:24-44:4.

<sup>78</sup> [Judge Herrera Carbuccia Dis Op](#), para. 329 (“[T]he Prosecutor’s theory as regards actions in Abobo accepts that the *Commando Invisible* was present in Abobo and that Mr Gbagbo gave instructions to remove them from the area. Thus, the fact that the violence between the FDS and other armed groups may have amounted to armed conflict does not exclude the possibility that crimes against humanity were committed”).

<sup>79</sup> [Judge Herrera Carbuccia Dis Op](#), para. 330.

28. Mr Blé Goudé alleges that Judge Henderson accused the Prosecution of “cherry-pick[ing] the exhibits to support its narrative and ignor[ing] the rest”.<sup>80</sup> In exercising its discretion in presenting its evidence at trial,<sup>81</sup> the Prosecution presented—in light of Mr Blé Goudé’s right to an expeditious trial—its most relevant evidence to support its case, selected from the evidence that it had obtained according to article 54(1)(a) and disclosed to him. Mr Blé Goudé’s mere disagreement with the Prosecution’s exercise of this discretion falls manifestly short of the article 85(3) standard.

29. While Mr Blé Goudé does not cite to any finding of Judge Henderson, he presumably refers to the Judge’s statement to the same effect.<sup>82</sup> This highlighted the Prosecution’s reliance on receipts allegedly showing that the Gbagbo regime financed youth groups and militias.<sup>83</sup> Judge Henderson considered that the Prosecution should have presented the Chamber with evidence of the broader practice of payments by the Presidential administration so that the Chamber could assess how payments to the youth groups/militias compared to payments made to other persons/groups.<sup>84</sup> Judge Henderson was assessing whether the receipts could support the Prosecution’s allegations. He did not find that the Prosecution deliberately withheld information from the Chamber.<sup>85</sup> By contrast, Judge Herrera Carbucciona relied on these receipts to find that the evidence *supported* the allegation that pro-Gbagbo youth groups received financing from the State apparatus.<sup>86</sup> The Prosecution sought to rely on the receipts to corroborate witness testimony regarding payments made to pro-Gbagbo youth groups,<sup>87</sup> and was prevented in obtaining information from a witness at trial to authenticate the receipts.<sup>88</sup> Moreover, the Defence challenged the use of the receipts.<sup>89</sup> Mr Blé Goudé thus fails to demonstrate that the Prosecution’s investigation or its presentation of its case at trial gave rise to a grave and manifest miscarriage of justice. He fails to meet the article 85(3) standard.

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<sup>80</sup> [Request](#), para. 16.

<sup>81</sup> *See above* para. 16.

<sup>82</sup> [Judge Henderson Reasons](#), para. 81 (“[...] the Prosecutor should not cherry-pick those (parts of) exhibits that support her narrative and ignore the rest. Unfortunately, the Prosecutor has, on occasion, been selective in the evidence she collected”).

<sup>83</sup> *See* [Judge Henderson Reasons](#), paras. 81-82.

<sup>84</sup> [Judge Henderson Reasons](#), para. 82.

<sup>85</sup> *See* [Judge Henderson Reasons](#), para. 66 (“it would be unfair to suggest that the Prosecutor deliberately withheld important information”).

<sup>86</sup> [Judge Herrera Carbucciona Dis Op](#), paras. 287, 321, 594.

<sup>87</sup> *See e.g.* [T-27-Eng](#), 64:24-68:23 (attempting to question witness P-0625 regarding receipts for payments to certain groups by the presidential administration); [T-87-Red2-Eng](#), 47:8-51:17, 63:1-64:9 (witness P-0435 discusses the receipt of funds by the GPP group from the Gbagbo regime).

<sup>88</sup> [T-27-Eng](#), 64:24-68:23.

<sup>89</sup> *See e.g.* [Blé Goudé NCTA Motion](#), para. 251. *See* [Prosecution NCTA Response](#), paras. 1696-1698.

### III. ALLEGATION 2: THE PROSECUTION'S EVIDENTIARY APPROACH DID NOT LEAD TO A GRAVE AND MANIFEST MISCARRIAGE OF JUSTICE

30. Mr Blé Goudé alleges that the Prosecution failed to establish the authenticity of documents it collected in the investigation, thereby disregarding its mandate to seek the truth.<sup>90</sup> He further alleges that the Prosecution relied on “a prodigious scale” on anonymous hearsay, without providing the Chamber with adequate information on the reliability and credibility of the original source.<sup>91</sup> Mr Blé Goudé's claims should be rejected. He re-litigates his trial challenges to the documentary evidence,<sup>92</sup> contrary to the rationale of these proceedings,<sup>93</sup> and ignores the Prosecution's steps to authenticate and establish the chain of custody of documents. The Prosecution disclosed those steps to the Chamber and the Defence in its investigation reports. Moreover, it only sought to use the evidence characterised as anonymous hearsay to corroborate testimony in the case. Mr Blé Goudé fails to meet the article 85(3) standard.

#### III.A. The Prosecution obtained information relevant to the assessment of the reliability and credibility of documentary evidence

31. At trial the Prosecution submitted over 3,928 documentary and other non-oral items of evidence, and relied on the evidence of 96 witnesses.<sup>94</sup> The number of documents in this case is consistent with that in other cases in this Court.<sup>95</sup> The Prosecution took reasonable steps in the circumstances to authenticate these documents and to establish their chain of custody to assist the Chamber's assessment of them.<sup>96</sup>

32. For each of the archives that the Prosecution accessed in Abidjan, it provided the Chamber with detailed investigation reports with the authenticating information that it could reasonably obtain, to allow the Chamber to assess the documents' reliability and credibility.<sup>97</sup> Specifically,

<sup>90</sup> [Request](#), para. 14.

<sup>91</sup> [Request](#), para. 14.

<sup>92</sup> See e.g. [Blé Goudé NCTA Motion](#), paras. 183, 204, 386, 399.

<sup>93</sup> [Ngudjolo Compensation Decision](#), para. 30; [Bemba Compensation Decision](#), para. 25.

<sup>94</sup> 82 of whom testified in person, and 14 whose prior statements were submitted in accordance with Rule 68(2)(b); [Judge Henderson Reasons](#), para. 39.

<sup>95</sup> E.g., in *Ongwen*, the parties submitted 5,149 items of evidence and the Prosecution relied upon 116 witnesses.

<sup>96</sup> *Contra* [Request](#), para. 14.

<sup>97</sup> See e.g. CIV-OTP-0049-2986 (*Gendarmerie Nationale*); CIV-OTP-0023-0401 and CIV-OTP-0097-0219 (Presidential Palace); CIV-OTP-0024-0641 and CIV-OTP-0098-0005 (Presidential Residence); CIV-OTP-0051-0007 (*Direction Générale Adjointe chargée de la sécurité publique*); CIV-OTP-0051-0029 (Ministry of Defence archive held at the *Direction d'administration et de législation militaire*); CIV-OTP-0051-0059 (*Direction Générale de la Police Nationale*); CIV-OTP-0051-0166 (*État-Major Général des Forces Républicaines de Côte d'Ivoire*); CIV-OTP-0073-0756 (*Forces Terrestres – Akouédo Camp Ancien and Camp Nouveau*); CIV-OTP-0073-0806 (*Garde Républicaine*); CIV-OTP-0073-0840 (*Marine Nationale base at Locodjoro*); CIV-OTP-0083-1314 (*Pompes Funèbres Générales d'Afrique*).

the investigation reports set out: the steps taken to identify the locations of relevant documents, their descriptions and the conditions in which they were found;<sup>98</sup> the possible destruction and removal of documents during pillaging by the opposing forces;<sup>99</sup> the methodology for reviewing the documents, including the process to secure the originals, given that the Ivorian authorities only permitted the Prosecution to take photocopies on-site and would not allow it to remove originals from their locations;<sup>100</sup> the relevance criteria and other self-authenticating features such as details of the sender, the recipient and the transmission method, handwritten signatures, the use of a common format (*e.g.* official letterheads, stamps, reference numbers) and other contextual information such as whether the documents were stored with other documents of the same type;<sup>101</sup> and the identity of documents that appeared to be missing.<sup>102</sup> Investigators certified their reports<sup>103</sup> and were on the Prosecution's initial list of trial witnesses, but ultimately did not testify as their respective reports were submitted into the case record.<sup>104</sup>

33. The Prosecution took reasonable steps at trial to authenticate documents, especially given that witness testimony may elucidate a document's authenticity.<sup>105</sup> For example, the former Head of the Army confirmed the authenticity of a document on the recruitment of militia members into the armed forces.<sup>106</sup> The former Head of the Police viewed 125 official police documents and authenticated the vast majority of them.<sup>107</sup>

34. Judge Henderson's view that the authenticity of signatures could not be taken for granted appears to be based on one insider witness, P-0011, the former head of the *Gendarmerie*, disavowing his signature when the Prosecution asked him whether he recognised it on one

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<sup>98</sup> See *e.g.* CIV-OTP-0073-0806, at 0809.

<sup>99</sup> See *e.g.* CIV-OTP-0049-2986, at 2993-2994.

<sup>100</sup> See *e.g.* CIV-OTP-0049-2986, at 2998.

<sup>101</sup> See *e.g.* CIV-OTP-0051-0166, at 0171-0172.

<sup>102</sup> See *e.g.* CIV-OTP-0049-2986, at 3000.

<sup>103</sup> CIV-OTP-0097-0194; CIV-OTP-0097-0199; CIV-OTP-0097-0225; CIV-OTP-0098-0002; CIV-OTP-0098-0020; CIV-OTP-0098-0022; CIV-OTP-0098-0024; CIV-OTP-0098-0026; CIV-OTP-0098-0028; CIV-OTP-0098-0030; CIV-OTP-0098-0032.

<sup>104</sup> [Prosecution List of Witnesses June 2015](#), pp. 46-48.

<sup>105</sup> [Submission Regime AD](#), para. 52.

<sup>106</sup> [T-204-Red2-Eng](#), 36:22-39:13 (P-0047).

<sup>107</sup> See *e.g.* [T-125-Red2-Eng](#), 31:5-36:18; 45:15-25; 64:16-67:5 (P-0046).



specific document.<sup>108</sup> This one instance, however, can be contrasted with all the other occasions in which high level insider witnesses authenticated documents.<sup>109</sup>

35. Judge Henderson considered that documents provided by the Ivorian Government (who were Gbagbo's political opponents) required further authentication steps.<sup>110</sup> However, the Prosecution took reasonable steps to provide such information. As Judge Henderson acknowledged, the Prosecution could not be blamed for information no longer available or obtainable.<sup>111</sup> The Prosecution could not have ignored the documents it had obtained as they were *prima facie* relevant to the case, and it would have otherwise been criticised for failing to submit them for the Chamber's consideration. Moreover, international criminal trials typically feature documents obtained from former government archives following a period of violence or conflict and for which the documents' authors are not available to testify.<sup>112</sup>

### **III.B. The Prosecution used anonymous hearsay to corroborate allegations**

36. Mr Blé Goudé alleges that Judges Henderson and Tarfusser found the Prosecution had improperly relied on a "prodigious scale" of anonymous hearsay, both testimonial and documentary.<sup>113</sup> This, however, mischaracterises Judge Henderson's findings. Judge Henderson found that a considerable proportion of the Prosecution evidence was anonymous hearsay carrying no probative value.<sup>114</sup> However the Prosecution was not prohibited from relying on such evidence. The fact that an item of evidence may be based on anonymous hearsay does not necessarily deprive it of all evidentiary value.<sup>115</sup> Moreover, the Prosecution did not

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<sup>108</sup> [Judge Henderson Reasons](#), para. 33 (fn. 34), citing T-137 (P-0010), pp. 53-55. This reference appears to be erroneous as the cited testimony does not reflect this, and indeed P-0010 confirmed his own signature on a number of official documents in his testimony: [T-137-Conf-Eng](#), 11:13-22, 65:14-25; [REDACTED]. Rather, Judge Henderson may have intended to refer to insider witness P-0011 who disavowed his signature on a document shown to him: [T-131-Red3-Eng](#), 39:22-49:13.

<sup>109</sup> See e.g. P-0047 (former Head of the Army): [T-204-Red2-Eng](#), 36:22-39:21; P-0046 (former Director-General of the National Police): [T-125-Red2-Eng](#), 31:5-36:18; P-0010 (former General and head of the CECOS special unit): [T-137-Conf-Eng](#), 11:13-22, 65:14-25; [REDACTED]; P-0440 (Police Commissioner in Yopougon district, Abidjan at the relevant time): [T-157-Red2-Eng](#), 15:24-19:10; P-0560 (Police Commissioner in Adjamé district, Abidjan at the relevant time): [T-121-Eng](#), 4:24-7:16; [REDACTED].

<sup>110</sup> [Judge Henderson Reasons](#), para. 36.

<sup>111</sup> [Judge Henderson Reasons](#), para. 83 ("sometimes the necessary information will no longer be available or cannot be obtained by the Prosecutor. While this is unfortunate, this is not something for which the Prosecutor can be blamed").

<sup>112</sup> See e.g. [Mladić Bar Table Evidence Decision](#), paras. 11-12; [Brdanin TJ](#), paras. 31, 69 (fn. 128); [Kordić and Čerkez Zagreb Exhibits Decision](#), paras. 43-44; [Milutinović Documentary Evidence Decision](#), paras. 37-39; [Case 002/01 Documentary Evidence Decision](#), paras. 24-28; [Case 002/01 TJ](#), para. 266.

<sup>113</sup> [Request](#), para. 14.

<sup>114</sup> [Judge Henderson Reasons](#), para. 43.

<sup>115</sup> [Rule 68 AD](#), para. 106. See also [Judge Herrera Carbuccion Dis Op](#), para. 32 (finding that anonymous hearsay in testimonial evidence does not render it inadmissible or deprive it of all evidential value).

seek to rely on anonymous hearsay as the sole source of evidence in relation to material facts relating to the charges. It took reasonable steps to provide information regarding the identity of the source and information as to how the source came to know it,<sup>116</sup> or otherwise sought to use the evidence to corroborate other evidence.<sup>117</sup> The mere fact that Judges Henderson and Tarfusser were not satisfied that particular evidence was reliable or credible does not mean that the Prosecution had acted wrongfully, or in a manner giving rise to a grave and manifest miscarriage of justice. Mr Blé Goudé fails to meet the article 85(3) standard.

#### **IV. ALLEGATION 3: THE PROSECUTION’S CONDUCT AT TRIAL DID NOT GIVE RISE TO A GRAVE AND MANIFEST MISCARRIAGE OF JUSTICE**

37. Mr Blé Goudé alleges that, despite the indications of weakness in its case, the Prosecution “held steadfast to its narrative, intent on convicting Mr Blé Goudé at all costs.”<sup>118</sup> He argues (i) that the Prosecution “refused to take stock” of its case, shown by the Trial Brief filed in March 2018, which contained “exactly the same narrative” as the Pre-Trial Brief filed in July 2015; and (ii) that, despite the Trial Chamber’s suggestion to amend its narrative and withdraw charges, the Prosecution did not drop any charge in direct response to the Chamber’s order.<sup>119</sup> Mr Blé Goudé’s claim regarding the Trial Brief’s narrative must fail. He misreads the Prosecution submissions, and takes judicial findings out of their proper context. This allegation is also poorly substantiated.

38. As stated above,<sup>120</sup> a Prosecution case theory is ultimately a matter of prosecutorial discretion, and in this case the former Prosecutor exercised her discretion to proceed reasonably based on the evidence on the record. A failed Prosecution case—and by majority—does not, of itself, amount to a wrongful prosecution. Mr Blé Goudé merely disagrees with the exercise of the Prosecutor’s discretion.

39. In arguing that the Prosecution should have altered its case narrative in its Trial Brief but did not, Mr Blé Goudé makes several mistaken assumptions. He first incorrectly assumes that the initial case theory was flawed and needed adjustment, because the Prosecution did not investigate diligently.<sup>121</sup> This premise is unfounded because, as shown above, the Prosecution

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<sup>116</sup> *See above* paras. 32-35.

<sup>117</sup> *See above* para. 36.

<sup>118</sup> [Request](#), paras. 15-16, 18, 20, 23, 27, 30, 33-35.

<sup>119</sup> [Request](#), paras. 15-16, 18, 20, 23, 27, 30, 33-35.

<sup>120</sup> *See above* paras. 16, 25-29.

<sup>121</sup> [Request](#), paras. 12, 18.

took reasonable steps to investigate, including to discharge its article 54(1)(a) obligation.<sup>122</sup> Further, Mr Blé Goudé then assumes that the case theory in the Pre-Trial Brief did not reflect the Prosecution’s article 54 obligation.<sup>123</sup> But he overlooks that the case theory in the Pre-Trial Brief referred to potentially exonerating information arising from the investigation.<sup>124</sup> The Trial Brief, therefore, followed the same case theory.<sup>125</sup> Moreover, Mr Blé Goudé’s sole supporting explanation merely mirrors an excerpt from Judge Tarfusser’s separate opinion<sup>126</sup> that is not part of the Majority’s reasoning.<sup>127</sup> Judge Henderson’s reasons, representing the Majority, though in some respects critical of the Prosecution’s case theory, did not entirely accord with Judge Tarfusser’s views.<sup>128</sup> Judge Henderson found that the Prosecution narrative was “largely internally coherent and prima facie plausible”.<sup>129</sup> In fact, Judge Henderson expressly rejected the notion that the “[former] Prosecutor deliberately withheld important information,” although he had some “points of serious concern” on the case theory.<sup>130</sup>

40. Mr Blé Goudé also incorrectly states that the Trial Brief had “exactly the same narrative” as the Pre-Trial Brief.<sup>131</sup> The Trial Brief, reflecting developments at trial, included several aspects that the Pre-Trial Brief did not, and developed aspects of the case-theory.<sup>132</sup>

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<sup>122</sup> See above paras.16-24.

<sup>123</sup> [Request](#), para. 16.

<sup>124</sup> See e.g., [Pre-Trial Brief](#), paras. 116 (on 12 January 2011, given the prevailing insecurity in Abobo, the CEMA, Mangou asserted that armed attacks against the FDS were “akin to acts of war”, and the FDS considered itself to be in a position of self-defence), 184 (pro-Gbagbo youth obeyed Blé Goudé’s *mots d’ordre* to desist from violent action), 231 (Blé Goudé stated that “it is out of the question for young Ivorians to go and attack other young Ivorians”), 250 (On 24 February 2011, Gbagbo ordered the FDS to resist and do everything to reconquer Abobo and normalise the security situation. He decided not to declare it a war zone, but ordered the armed forces to retake certain positions), 275 (Blé Goudé spoke out against the use of violence on some occasions), 349 (On 23 March 2011, Blé Goudé stated that the FDS could not be responsible for the women’s death on 3 March 2011 because Abobo was in rebel hands at the time).

<sup>124</sup> [Request](#), para. 15.

<sup>125</sup> See generally [Trial Brief](#).

<sup>126</sup> [Request](#), para. 16, referring to [Judge Tarfusser Opinion](#), para. 104.

<sup>127</sup> [Judge Tarfusser Opinion](#), para. 1 (“[...] For the purposes of the Majority reasoning, I confirm that I subscribe to the factual and legal findings contained in the ‘Reasons of Judge Henderson’ (‘Reasons’)”).

<sup>128</sup> [Judge Henderson Reasons](#), paras. 52-77 (The Prosecutor’s case theory).

<sup>129</sup> [Judge Henderson Reasons](#), para. 66 (The Prosecutor’s case theory).

<sup>130</sup> [Judge Henderson Reasons](#), para. 66 (The Prosecutor’s case theory) (“[...] Although it would be unfair to suggest that the Prosecutor deliberately withheld important information, her narrative—wittingly or unwittingly—systematically omits or downplays significant elements of the political and military situation.”).

<sup>131</sup> [Request](#), para. 16.

<sup>132</sup> E.g., Compare [Trial Brief](#), paras. 414-420, 450-451 (security forces were attacked and suffered casualties) with [Pre-Trial Brief](#), paras. 288(xiii), 295-306 (which did not cover details of security forces dead and wounded). Also [Trial Brief](#), paras. 569-571 (detailing aspects of videos of the RTI national news, on Mr Blé Goudé’s public statements on 4 March 2011, including those beneficial to his defence).

41. Mr Blé Goudé’s submissions also quote judicial findings out of context.<sup>133</sup> The Majority Judges’ remarks criticising the Prosecution’s narrative were made in their reasons given *after* the acquittals in July 2019, not when they ordered the filing of the Trial Brief in February 2018.<sup>134</sup> Their decision ordering the Trial Brief was succinct. The Chamber was mindful of the Gbagbo Defence’s request for an amended pre-trial brief so it could appreciate and assess the Prosecution’s case—particularly, since a significant number of witnesses had been withdrawn—and given its obligations to ensure the fairness and expeditiousness of the trial.<sup>135</sup> It noted that its suggested methodology “would allow the Prosecutor to remedy some of the difficulties raised by the pre-trial brief [...] and, consequently, contribute to focus the debate on matters of substance”.<sup>136</sup> The “difficulties” that the Chamber identified with the Pre Trial brief appeared to relate to the structure, citations, and references to “evidence in bulk”.<sup>137</sup>

42. Mr Blé Goudé’s claim about the withdrawal of charges must also fail.<sup>138</sup> The Trial Chamber’s Order noted the procedural step under article 61(9) to withdraw charges as relevant to Prosecutor Bensouda’s assessment, should she choose to avail of it.<sup>139</sup> It equally noted that the Defence, based on the Trial Brief, could make written submissions on whether the trial should continue—<sup>140</sup> and the Defence availed themselves of this right. Accordingly, the Prosecution withdrew charges against Mr Blé Goudé, relating to the two Abobo incidents, following the Defence NCTA submissions on the matter and its own assessment. That stage—when the Chamber was deciding if the trial should continue, and if so, on what basis—was the most appropriate time for the Prosecution to consider whether it would withdraw charges. Moreover, it was reasonable to do so at that stage. Between February 2018 (when the Trial Brief was ordered) and September 2018 (when the Prosecution filed its NCTA response), the Prosecution was engaged in intense litigation before the Chamber. It filed an approximately 550-page Trial Brief, sought clarity on the NCTA legal standard and responded in over 1000 pages to an equivalent number of pages of NCTA motions from both Defence teams.<sup>141</sup> The

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<sup>133</sup> [Request](#), paras. 15-16.

<sup>134</sup> *Contra* [Request](#), paras. 15, 16.

<sup>135</sup> [Trial Brief Order](#), para. 10.

<sup>136</sup> [Trial Brief Order](#), para. 11.

<sup>137</sup> [Trial Brief Order](#), para. 11. Also referring to [Gbagbo Conduct of Proceedings Observations](#), para. 46 where the Gbagbo Defence identified that the Prosecution had not linked modes of responsibility with allegations.

<sup>138</sup> [Request](#), para. 18.

<sup>139</sup> [Trial Brief Order](#), para. 13 (“If the Prosecutor intends to withdraw any or all of the charges in accordance with article 61(9) of the Statute, she shall petition the Chamber as soon as possible.”).

<sup>140</sup> [Trial Brief Order](#), para. 14.

<sup>141</sup> *See e.g.*, [Prosecution NCTA Clarification Request](#); [NCTA Clarification Decision](#); [Trial Brief](#), [Blé Goudé NCTA Motion](#); [Gbagbo NCTA Motion](#); [Prosecution NCTA Response](#).

Prosecution did not consider that it needed to withdraw any other charges against Mr Blé Goudé. Judge Herrera Carbuccia agreed with this, when she found that three incidents were sufficiently supported and the trial should continue.<sup>142</sup> Mr Blé Goudé’s submissions do not meet the article 85(3) standard.

**V. ALLEGATION 4: THE APPEAL PROCEEDINGS DID NOT CAUSE A GRAVE AND MANIFEST MISCARRIAGE OF JUSTICE**

43. Mr Blé Goudé argues that “the Prosecution’s malfeasance continued into the appeal proceedings” because: (i) the former Prosecutor requested his conditional release (and if it could not be secured, his further detention) when she did not know, at the time, whether she wished to retry him; and (ii) the appeal against the NCTA/acquittal decision was frivolous in that it did not argue “substantive arguments related to alleged errors of fact or to the evidence itself,” or request a retrial as a remedy on appeal.<sup>143</sup> He claims that he was effectively made “stateless” during the appeal proceedings and until now, [REDACTED].<sup>144</sup>

44. Mr Blé Goudé’s submissions should be rejected. His claims are unsupported and misread the record. He fails to meet the standard in article 85(3) of the Statute.

**V.A. The application to conditionally release Mr Blé Goudé during the appeal proceedings was proper, and unanimously ordered by the Appeals Chamber**

*V.A.i. Procedural Background:*

45. Following its decision acquitting Mr Gbagbo and Mr Blé Goudé,<sup>145</sup> the Trial Chamber, by majority, ordered their immediate release, subject to any Prosecution request for their further detention.<sup>146</sup> The same day, the Prosecution asked the Chamber to impose conditions on their release.<sup>147</sup> The Prosecution considered that “exceptional circumstances” within article 81(3)(c)(i) existed to maintain their detention pending appeal,<sup>148</sup> but stated, nonetheless, that it would not oppose their release with appropriate conditions.<sup>149</sup> The Trial Chamber, by majority,

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<sup>142</sup> [Judge Herrera Carbuccia Dis Op](#), paras. 1-19, 558-649.

<sup>143</sup> [Request](#), paras. 17, 21-22.

<sup>144</sup> [Request](#), para. 21.

<sup>145</sup> [15 January 2019 Oral Acquittal Decision](#), 4:14-18; [15 January 2019 Judge Herrera Carbuccia Dis Op](#), para. 48.

<sup>146</sup> [15 January 2019 Oral Acquittal Decision](#), 4:19-5:1; [16 January 2019 Decision](#), 1:14-6:21.

<sup>147</sup> [Prosecution Conditional Release Request](#), paras. 1, 3.

<sup>148</sup> [Prosecution Conditional Release Request](#), para. 3 (arguing concrete risk of flight, seriousness of the charged offences, and probability that the Prosecution would succeed on appeal against the NCTA decision).

<sup>149</sup> [Prosecution Conditional Release Request](#), paras. 3, 15-18, 21-26 (release to a State Party other than Côte d’Ivoire, and other conditions to preserve the integrity of the proceedings).

rejected the application, finding no exceptional circumstances existed.<sup>150</sup> That day, the Prosecution filed a notice of appeal against the release decision, and sought suspensive effect.<sup>151</sup> The Appeals Chamber, by majority, granted suspensive effect.<sup>152</sup> On 1 February 2019, the Appeals Chamber heard submissions from the Prosecution, Mr Gbagbo, Mr Blé Goudé, the LRV and relevant States.<sup>153</sup> Mr Blé Goudé opposed conditional release as a matter of law but said he would abide by any conditions, if imposed.<sup>154</sup> The Appeals Chamber unanimously granted the Prosecution's appeal. It found that given the seriousness of the charges, the flight risk posed by Mr Gbagbo and Mr Blé Goudé and the Court's "continued jurisdictional interest" in them pending any appeals against their acquittals, conditions should be imposed on their release to mitigate their flight risk.<sup>155</sup> Key to this decision was the Appeals Chamber's determination that the Prosecutor's primary request was conditional release, and not continued detention.<sup>156</sup>

46. There were three distinct phases of Mr Blé Goudé's conditional release, with varying conditions imposed on him. However, he fails to acknowledge them.<sup>157</sup>

- Phase 1, 1 February 2019-28 May 2020: On 1 February 2019, the Appeals Chamber imposed eight conditions on Mr Gbagbo and Mr Blé Goudé's release.<sup>158</sup> These were "carefully

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<sup>150</sup> [16 January 2019 Decision](#), 1:14-6:21. Judge Herrera Carbuca considered that the accused should remain in detention pending appeal, since the Chamber had not issued its full reasons for the acquittals.

<sup>151</sup> [Prosecution Conditional Release Notice of Appeal](#), paras. 1-4; [Prosecution Conditional Release Appeal](#), paras. 1-8.

<sup>152</sup> [Suspensive Effect AD](#), paras. 19-23. Judges Morrison and Hofmański dissented: [Judges Morrison and Hofmański Suspensive Effect Dis Op](#), paras. 1-5 (dismissing the Prosecution's request *in limine*).

<sup>153</sup> See generally [First Release Hearing](#).

<sup>154</sup> [First Release Hearing](#), 31:25-35:25.

<sup>155</sup> [Conditional Release AD](#), paras. 53-60; [Conditional Release Review AD](#), para. 58 ("[...] this stems from...the Court's limited ability...to arrest a person...for the purposes of any proceedings").

<sup>156</sup> [Conditional Release AD](#), paras. 47, 53 ("It is important to stress that the primary request of the Prosecutor in this case is not continued detention. It is, rather, release with conditions [...]"); [Prosecution Conditional Release Notice of Appeal](#), para. 4.

<sup>157</sup> [Request](#), paras. 17, 21-22.

<sup>158</sup> [Conditional Release AD](#), paras. 60-61: (i) to sign an undertaking that they will abide by all instructions and orders from the Court, including to be present at the Court when ordered, and accepting that the proceedings before the Appeals Chamber may proceed in their absence, should they fail to appear before the Court when ordered to do so; (ii) to provide the address in the receiving State and contact information to the Court and the receiving State and request authorisation from the Court for any change of address; (iii) not to travel beyond the territorial limits of the municipality of the receiving State without the explicit or 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.

balanced with [Mr Blé Goudé’s] rights” and “proportionately tailored to mitigate [the flight risk] identified”.<sup>159</sup> A year later, on 6 February 2020, the Appeals Chamber heard an application by Mr Gbagbo to reconsider that decision, when Mr Blé Goudé also made submissions.<sup>160</sup> [REDACTED].<sup>161</sup> At the hearing and in his subsequently filed observations, he clarified that he had not asked for them to be lifted [REDACTED]<sup>162</sup> For that reason, he “[REDACTED].” This was responding to [REDACTED].<sup>163</sup> Significantly, by that stage, Mr Blé Goudé had on 30 December 2019 been convicted *in absentia* in Côte d’Ivoire for crimes in relation to the post-election violence, and accordingly sentenced to 20 years imprisonment.<sup>164</sup> On 28 May 2020, the Chamber unanimously dismissed Mr Gbagbo’s application, finding neither error nor injustice in conditionally releasing either Mr Gbagbo or Mr Blé Goudé.<sup>165</sup>

- Phase 2, 28 May 2020-31 March 2021: On 28 May 2020, the Appeals Chamber *proprio moto* reviewed the conditions of release, and revoked four of the eight conditions.<sup>166</sup> For Mr Blé Goudé, it maintained four conditions: two to ensure his presence at the Court if ordered and for his contact address; and two to ensure the integrity of the proceedings, by prohibiting contact with Prosecution witnesses or others interviewed, and by prohibiting public statements on the case.<sup>167</sup> In late June 2021, the Appeals Chamber held a three day hearing,<sup>168</sup> in which Mr Blé Goudé participated, and thereafter deliberated on the appeal.

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<sup>159</sup> [Conditional Release AD](#), paras. 54, 58-60.

<sup>160</sup> See [Second Release Hearing](#).

<sup>161</sup> [Blé Goudé First Modification Request](#), paras. 23-24 (asking to modify the conditions imposed); [Blé Goudé Second Modification Request](#), paras. 14-18 [REDACTED].

<sup>162</sup> Mr Blé Goudé’s presence was not required for the appeal proceedings. See [First Release Hearing](#), 55:10-20; [Blé Goudé April 2020 Observations](#), paras. 23-24.

<sup>163</sup> [Second Release Hearing](#), 30: 21-23 (“At this juncture for Mr Blé Goudé it is still important that the Court will impose measures which will safeguard his right to participate at the appeals proceedings without interference of the domestic authorities.”), 32:3-9 (arguing that “from a legal perspective” that the conditions should be lifted, but that even when they are lifted, the Court should ensure that Mr Blé Goudé is protected from external interference); [Prosecution Response to Modification Requests](#), para. 10 [REDACTED]; [Blé Goudé April 2020 Observations](#), paras. 23-24 [REDACTED]; [CIV Observations](#), paras. 13-45 (arguing that conditional release was proper and proportionate, opposing Mr Gbagbo’s request to reconsider); [Second Release Hearing](#), 99:20-23.

<sup>164</sup> [REDACTED]; [CIV Judgment](#).

<sup>165</sup> [Conditional Release Review AD](#), paras. 59-61. See also [2 September 2020 AD](#), paras. 4-8 (dismissing *in limine* Mr Gbagbo’s request to find a “denial of justice” because eight months had passed between his reconsideration request on conditional release and the Appeals Chamber’s decision); [18 June 2020 Presidency Decision](#), paras. 14-16 (dismissing Mr Gbagbo’s request on the purported failure to decide on his conditional release, for a lack of jurisdiction); [First Release Hearing](#), 9:12-10:17.

<sup>166</sup> [Conditional Release Review AD](#), paras. 62-67.

<sup>167</sup> [Conditional Release Review AD](#), para. 66, referring to conditions (i), (ii), (vi) and (vii) in the original [Conditional Release AD](#).

<sup>168</sup> [Appeals Hearing Scheduling Order](#), para. 21.

- Phase 3, 31 March 2021 to present: On 31 March 2021, the Appeals Chamber dismissed the Prosecution’s appeal, confirmed the acquittals and revoked all conditions of release.<sup>169</sup> There were no longer any Court proceedings against Mr Blé Goudé.

*V.A.ii. Submissions*

47. Mr Blé Goudé’s arguments fail to meet the article 85(3) threshold and should be rejected. He misstates the record and overlooks his own submissions on conditional release.

48. First, the Appeals Chamber decided on 1 February 2019 that “compelling reasons” existed to release Mr Blé Goudé conditionally, and on 28 May 2020, found no error or injustice in doing so.<sup>170</sup> Mr Blé Goudé’s attempt to re-litigate the validity of his conditional release during the appeal<sup>171</sup> should be summarily rejected.

49. Second, Mr Blé Goudé argues that the Prosecution’s application violated his rights by seeking to impose conditions on his release, and in their absence, to further detain him, without knowing whether it wished to retry him.<sup>172</sup> However he disregards critical aspects of the procedural context in which that application was made.

50. In particular, Mr Blé Goudé ignores the crucial fact that in January 2019 the Trial Chamber had not yet issued its written decision to acquit.<sup>173</sup> Moreover, the Trial Chamber (majority) had expressly stated that any appeal would run only from the date of the written reasons.<sup>174</sup> As the Prosecution observed—a point which Judge Herrera Carbuccion had also foreseen—without those written reasons explaining the basis of the acquittals, Prosecutor Bensouda could only form a provisional intent to appeal, based in part on the oral verdict itself and Judge Herrera Carbuccion’s dissenting opinions. However she could not determine the precise nature of any appeal at that stage—much less an exact remedy.<sup>175</sup> Likewise, at the first

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<sup>169</sup> [NCTA AJ](#), para. 381.

<sup>170</sup> [Conditional Release AD](#), para. 60; [Conditional Release Review AD](#), paras. 58-61.

<sup>171</sup> Compare [Request](#), para. 21 with [Second Release Hearing](#), 23:11-34:9.

<sup>172</sup> [Request](#), para. 21.

<sup>173</sup> The Written Reasons were not rendered until 16 July 2019.

<sup>174</sup> [15 January 2019 Oral Acquittal Decision](#), 4:10-11.

<sup>175</sup> [Prosecution Conditional Release Notice of Appeal](#), para. 26; [Prosecution Conditional Release Appeal](#), paras. 6, 40 (“[...]In the absence of a full and reasoned statement of reasons [...], the Prosecution has been unable to examine the Majority’s legal and factual reasoning and... has been significantly hampered in making fully informed arguments as to the probability of success on appeal.”), 41; [15 January 2019 Judge Herrera Carbuccion Dis Op](#), paras. 23, 31 (“[...] the parties will have no reasoning from the Majority of the Chamber (except for their lack of reasoning) to substantiate any appeal), 35 (“Without [the right to know the reasons for the judgment and the right to appeal], the Prosecutor’s obligation to act before the court...is hindered.”); [Second Release Hearing](#), 47: 6-24.



release hearing, and in view of the seriousness of the charges and the identified flight risk, the Prosecution sought conditions on Mr Blé Goudé's release to preserve the Prosecutor's statutory right to appeal including any potential remedy, should the appeal succeed.<sup>176</sup> The Prosecution's application, in these circumstances, was fully transparent and reasonable. Clearly the Appeals Chamber agreed since, even without precision on the exact nature of any appeal or remedy, it unanimously ordered Mr Blé Goudé's conditional release.<sup>177</sup> Further, in arguing that the Appeals Chamber had assumed that the Prosecution would specifically request a retrial when it granted conditional release purely based on the text of article 83(2), Mr Blé Goudé merely speculates.<sup>178</sup>

51. Prosecutor Bensouda's position on Mr Blé Goudé's conditional release was next expressed at the second release hearing in February 2020. Her position at that stage, that his conditions on release be maintained, was likewise reasonable and fully transparent. By this time, the written reasons had been rendered (in July 2019) and she had filed her appeal (in September/October 2019). In her appeal brief, and based on the errors identified, the former Prosecutor had asked for reversal of the acquittal, a declaration of mistrial, and for the case to be left with her for her further decision.<sup>179</sup> She also noted, in light of article 83(2)(b), that a new trial was a possible remedy by the Appeals Chamber.<sup>180</sup> In the second release hearing, the Prosecution was asked whether the requested remedy would affect the conditions imposed.<sup>181</sup> Prosecutor Bensouda's position was that if successful on appeal, she intended to retry the case. However, her final decision would depend upon several factors. These included the Appeals Judgment, the views of the Trial Chamber judges, the potential scope of any retrial, witness availability, and cooperation from Côte d'Ivoire.<sup>182</sup> By her approach, she was reasonably seeking to preserve the integrity of her appeal, including the potential remedy of retrial. In any event, when it *proprio motu* reviewed and significantly modified the conditions of release in

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<sup>176</sup> [First Release Hearing](#), 51:5-18, 54:23-57:7.

<sup>177</sup> [Conditional Release AD](#), para. 60; [Suspensive Effect AD](#), para. 17 (“The continued detention of an acquitted person... serves one principal purpose: to ensure that [...] the proceedings against the person may be continued without... a new arrest and surrender.”); [Second Release Hearing](#), 29: 22-23 (“[When your Honours] rendered the decision of 1 February 2019, you were not familiar with this relief the Prosecution is seeking for (*sic*).”).

<sup>178</sup> [Request](#), para. 21. *See also* [Second Release Hearing](#), 44:23-45:7, 48:14-50:12 (Judge Eboe-Osuji on continuation at half time as remedy, instead of retrial).

<sup>179</sup> [Prosecution Appeal Brief](#), para. 266.

<sup>180</sup> [Prosecution Appeal Brief](#), para. 266.

<sup>181</sup> [Second Release Hearing](#), 43:23-52:23; [Second Hearing Scheduling Order](#); [Second Hearing Conduct Order](#).

<sup>182</sup> [Second Release Hearing](#), 43:23-52:23; [Appeals Hearing Day 3](#), 28:3-33:3, 61:2-62:10; [Prosecution Further Submissions](#), paras. 47-67.

May 2020, the Appeals Chamber did not expressly refer to the former Prosecutor’s requested remedy.<sup>183</sup>

52. Third, Mr Blé Goudé also omits to mention that far from engaging in “malfeasance”,<sup>184</sup> the Prosecution took specific steps to safeguard his and Mr Gbagbo’s rights on appeal. Its primary request was conditional release, *not* detention. It also alerted the Chamber to Mr Blé Goudé’s rights,<sup>185</sup> and asked the Appeals Chamber “to expedite proceedings to fully protect [their] rights.”<sup>186</sup>

53. Finally, and crucially, Mr Blé Goudé fails to mention his own submitted position on his conditional release pending appeal. At the first release hearing, he contested conditions as a matter of law, but confirmed his willingness to abide by any conditions imposed. However, a year later, at the second release hearing, he stated that [REDACTED].<sup>187</sup> Significantly, Mr Blé Goudé expressly recognised that his conviction *in absentia* in Côte d’Ivoire was why the conditions were still necessary to allow him [REDACTED].<sup>188</sup> His selective interpretation of the facts should be rejected.

54. Therefore, Prosecutor Bensouda’s request for Mr Blé Goudé’s conditional release was reasonable, and properly ordered by the Appeals Chamber. Mr Blé Goudé’s submissions fall short of the standard in article 85(3).

**V.B. The appeal against Mr Blé Goudé’s acquittal was reasonable and did not violate his rights.**

55. The Prosecution appeal was neither “frivolous”, nor a violation of Mr Blé Goudé’s rights.<sup>189</sup> Rather, Prosecutor Bensouda reasonably exercised her statutory right to appeal his acquittal, and his criticisms of how she exercised her statutory right should be rejected.<sup>190</sup> Likewise, in his arguments claiming that the Prosecution was “uncertain” about retrial as a

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<sup>183</sup> [Conditional Release Review AD](#), paras. 62-67 (considering their undertaking to abide by Court orders, that they had complied with conditions so far, [REDACTED]).

<sup>184</sup> [Request](#), para. 17.

<sup>185</sup> [First Release Hearing](#), 6:2-15:14 (arguing for conditional release, not detention, as the reasonable, proportionate and less liberty-intrusive measure).

<sup>186</sup> [Prosecution Conditional Release Appeal](#), paras. 7-8.

<sup>187</sup> [Conditional Release AD](#), para. 36 (noting his argument that a chamber has no power to attach conditions to the release of an acquitted person); [REDACTED]. *See above* para. 46.

<sup>188</sup> [REDACTED].

<sup>189</sup> [Request](#), para. 17.

<sup>190</sup> [Request](#), paras. 17, 21-22.

remedy on appeal, Mr Blé Goudé misstates the record.<sup>191</sup> Since he has fully ventilated these arguments before the Appeals Chamber, they should not be further entertained.<sup>192</sup> Nonetheless, the former Prosecutor’s appeal was reasonably brought, and her stated position on the remedy reflected her careful approach, rather than equivocation.

56. Mr Blé Goudé fails to substantiate his claim that the Prosecution’s appeal was “frivolous”.<sup>193</sup> It was not—nor was it so found. The appeal raised two significant grounds: First, whether the Majority at trial had violated article 74(5), or alternatively erred in exercising their discretion (ground 1). And second, whether the Majority had erred by failing to properly articulate and consistently apply a clearly defined standard of proof and/or approach to assess the sufficiency of evidence (ground 2).<sup>194</sup> Further, for the Prosecution, these alleged errors were fundamental in that they led to Judges Henderson’s and Tarfusser’s flawed approach to the evidence and thereby ruptured the proceedings leading to the acquittals.<sup>195</sup>

57. It is highly relevant that the Appeals Chamber judgment was rendered by a majority of three to two. The majority of the Appeals Chamber engaged with the Prosecution’s arguments but did not agree with them. However, significantly, the two dissenting judges accepted the Prosecution’s appeal, and would have ordered a retrial. This of itself shows that the appeal was reasonable and not frivolous.<sup>196</sup> The reasonableness of Prosecutor Bensouda’s decision to appeal must also be considered in light of the unique procedural stage (NCTA) in which the appeal was brought and that the acquittal was not unanimous. Finally, despite the outcome on appeal, the Appeals Judgment (and its separate opinions) provides some clarity on certain important issues for the Court’s practice, such as the NCTA standard and other key issues.<sup>197</sup> Mr Blé Goudé mischaracterises the appeal, but its dismissal by a majority of three out of five Judges does not render it “frivolous”.<sup>198</sup>

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<sup>191</sup> [Request](#), paras. 17, 21-22.

<sup>192</sup> [Appeals Hearing Day 2](#), 20:20-30:18; [Appeals Hearing Day 3](#), 41:22-49:20; [Bemba Compensation Decision](#), para. 25 (“[...] compensation proceedings do not constitute an opportunity to reopen the debate on matters that have already been submitted and/or addressed by previous Chambers in the case.”).

<sup>193</sup> [Request](#), para. 17.

<sup>194</sup> [Prosecution Appeal Brief](#); [Prosecution Further Submissions](#); [Appeals Hearing Day 1](#), 10:18-22:7, 63:24-75:7.

<sup>195</sup> [Prosecution Appeal Brief](#), paras. 253-263; [Appeals Hearing Day 1](#), 17:5-22:7, 64:5-20, 72:5-75:7.

<sup>196</sup> [NCTA AJ](#), paras. 75-378; [Appeals Chamber Questions](#), paras. 1-20 (asking approximately 30 questions of the parties on the appeal); [Judge Ibáñez Dis Op](#), paras. 419-422; [Judge Bossa Dis Op](#), paras. 41-44.

<sup>197</sup> See generally [NCTA AJ](#) and separate opinions (on NCTA standard, article 74(5) requirements and best practices, evidentiary principles on corroboration, sexual violence, and appellate standard for factual appeals).

<sup>198</sup> E.g., Black’s Law Dictionary, frivolous, lacking a legal basis or legal merit, manifestly insufficient as a matter of law; [Strugar AJ](#), para. 34 (manifestly without merit); [Popović et al. Rule 115 AD](#), para. 8 (fn. 11) (redundant

58. Mr Blé Goudé also challenges the appeal because it did not raise “substantive arguments related to alleged errors of fact or to the evidence itself.”<sup>199</sup> However, the Prosecutor may appeal a final article 74 decision on errors of procedure, law or fact.<sup>200</sup> The Prosecutor is not confined to factual appeals. Requiring a factual appeal in every case runs counter to an appellant’s obligation to tailor the appeal to the alleged errors.<sup>201</sup> Moreover, contrary to Mr Blé Goudé’s submissions, although the grounds of appeal were framed as legal and/or procedural errors, and not errors of fact *per se*, the second ground on the standard of proof substantively challenged the Majority’s evidentiary assessments, as outlined in six discrete examples.<sup>202</sup> Nonetheless, in law, it was not required to do so.

59. Further, the Prosecution, as the appellant, was entitled to put forward for the Appeals Chamber’s consideration its arguments on the impact of the alleged errors on appeal, notwithstanding that three judges of the Appeals Chamber found that it did not demonstrate such impact on the decision.<sup>203</sup> The mere fact that three Judges in the majority dismissed the Prosecution’s argument does not, in itself, show that the appeal was frivolous or satisfy the high threshold in article 85(3). Indeed, that two Judges agreed with the Prosecutor’s appeal and its impact, and would have ordered a retrial, shows quite the opposite.<sup>204</sup>

60. Mr Blé Goudé also challenges the appeal because the former Prosecutor did not seek a retrial and was “uncertain” about her remedy on appeal. He submits that unlike at trial, where the Prosecution submitted that sufficient evidence existed to convict him, she did not formally request a retrial on appeal.<sup>205</sup>

61. On this point Mr Blé Goudé overlooks critical details. In her appeal brief Prosecutor Bensouda sought the remedy of reversal and mistrial, leaving the case in her hands for decision. However, she also acknowledged that a new trial or a retrial was a potential remedy, although

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motions); [Prlić et al. Rule 73\(D\) Decision](#), p. 4 (systematically calling into question decisions, using time and resources in a highly disproportionate manner); *contra* [Request](#), paras. 17, 27.

<sup>199</sup> [Request](#), para. 17 (arguing that despite its investigation or case presentation, the Prosecution did not bring errors of fact or challenge the evidence).

<sup>200</sup> Article 81, [Statute](#); Staker and Eckelmans, p. 1920 (mn. 8).

<sup>201</sup> *E.g.*, [NCTA AJ](#), paras. 73-74; [Lubanga AJ](#), para. 30.

<sup>202</sup> [Prosecution Appeal Brief](#), paras. 162-252.

<sup>203</sup> [NCTA AJ](#), para. 374; [Judge Eboe-Osuji Sep Op](#), para. 13; *Contra* [Request](#), paras. 22, 30.

<sup>204</sup> [Judge Ibáñez Dis Op](#), paras. 293 (“with the premature, oral and public announcement of the verdict, before completing the decision making process, the acquittals were materially affected”); 409 (“the lack of agreement [on standard of proof] materially affected the decision”); [Judge Bossa Dis Op](#), para. 40 (“the failure to define and agree on the standard of proof at the moment of entering the acquittals materially affected [them]”).

<sup>205</sup> [Request](#), para. 17.

she did not expressly seek it.<sup>206</sup> As set out above, at the second release hearing, Prosecutor Bensouda further clarified her position on the requested remedy.<sup>207</sup> She expressed her intention for retrial, but at the same time candidly recognised factors potentially affecting the feasibility of a retrial and requiring consideration in her final decision.<sup>208</sup> Significantly, the Prosecution recognised that any retrial would have a more limited scope,<sup>209</sup> and, conscious of the adverse impact an extended retrial might have, referred to measures which could mitigate such effects.<sup>210</sup> Far from considering it “wrongful”, Judge Ibáñez expressly found the Prosecution’s cautious approach not to be prejudicial, and endorsed aspects of it.<sup>211</sup> Finally, Mr Blé Goudé’s argument noting the difference in the Prosecutor’s position at trial and on appeal overlooks the different standards and considerations applicable at the NCTA stage and in deciding whether to retry an accused, and in particular the practical and operational challenges associated with a retrial.<sup>212</sup>

62. Prosecutor Bensouda transparently set out her position regarding retrial before the Appeals Chamber, and in the circumstances her approach was reasonable. Mr Blé Goudé’s submissions fail to show that the appeal was frivolous or caused a grave and manifest miscarriage of justice.

## **VI. THE CHAMBER SHOULD NOT AWARD COMPENSATION**

63. For the reasons above, Mr Blé Goudé has failed to demonstrate that he suffered a grave and manifest miscarriage of justice, much less, that he should be awarded compensation.<sup>213</sup> As such, his submissions on harm and damages should be rejected. Notwithstanding this, the Prosecution responds to certain aspects of his calculation of damages.

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<sup>206</sup> *See above* para. 51.

<sup>207</sup> [Second Release Hearing](#), 44:2-13 (“[...] the release conditions imposed... are still necessary. And the nature of the precise relief that we have sought in our appeal... does not alter this. Why? Because the Prosecutor remains committed to continuing proceedings in this case if she succeeds in her appeal... based on the Prosecutor’s instructions to us, we can also give your Honours further precision about the manner in which she intends to continue proceedings [.a new trial before a new Trial Chamber, or a retrial].”), 50:19-52:23; [Appeals Hearing Day 3](#), 28:3-33:3; [Prosecution Further Submissions](#), paras. 47-67.

<sup>208</sup> *See above* para 51.

<sup>209</sup> [Appeals Hearing Day 3](#), 61:2-62:10 (noting that the retrial would be no wider than the parameters of Judge Herrera Carbuccia’s findings).

<sup>210</sup> [Appeals Hearing Day 3](#), 31:21-33:1 (noting “the potential undue oppression of acquitted persons who will be facing a retrial”, the former Prosecutor’s “careful approach” to balancing competing considerations, and the “modest” nature of any retrial).

<sup>211</sup> [Judge Ibáñez Dis Op](#), paras. 421-422.

<sup>212</sup> *See above* para. 51.

<sup>213</sup> *Contra* [Request](#), paras. 31-38.

64. Mr Blé Goudé submits that the Dutch model for compensation provides a reasonable standard for assessing his claim,<sup>214</sup> and seeks the maximum daily award under that model (*i.e.* €300 per day) for the equivalent of time spent in detention.<sup>215</sup> This Chamber is not bound by the Dutch model, or any other domestic model for compensation in criminal prosecutions—much less so, since, in contrast to the Dutch system, article 85(3) does not grant compensation for acquittals.<sup>216</sup> However, even if the Dutch system is considered, Mr Blé Goudé’s submissions are incorrect in several aspects.

65. In calculating time spent in detention, Mr Blé Goudé includes the period since 1 February 2019 when he was on conditional release, and the period after his acquittal, arguing that [REDACTED],<sup>217</sup>[REDACTED].<sup>218</sup> However Mr Blé Goudé’s conditional release differed in significant respects [REDACTED].<sup>219</sup> In contrast to the ECtHR [REDACTED] cases he cites,<sup>220</sup> [REDACTED];<sup>221</sup> [REDACTED];<sup>222</sup> [REDACTED].<sup>223</sup> Moreover, the period from 31 March 2021, when the Appeals Chamber confirmed his acquittal, cannot be attributed to the Court as there were no longer proceedings against him.<sup>224</sup>

66. Significantly, as shown above, in early 2020, Mr Blé Goudé [REDACTED]. By that stage, he had been convicted *in absentia* in Côte d’Ivoire, and in February 2020 he expressly recognised that this conviction was why the conditions were necessary [REDACTED]. He [REDACTED] *even after* the Chamber significantly modified his conditions on 28 May 2020.<sup>225</sup> This in itself undermines his damages claim. Moreover, Mr Blé Goudé states that [REDACTED]<sup>226</sup>— [REDACTED].<sup>227</sup>

67. Mr Blé Goudé’s claims regarding [REDACTED], which he relies upon to justify the claim for maximum compensation,<sup>228</sup> merely repeats his previous unsubstantiated claim for

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<sup>214</sup> [Request](#), paras. 41-42.

<sup>215</sup> [Request](#), paras. 42, 53, 55.

<sup>216</sup> [Request](#), para. 42; *see above* paras. 12-13.

<sup>217</sup> [REDACTED].

<sup>218</sup> [Request](#), paras. 35, 46-55.

<sup>219</sup> *Contra* [Request](#), para. 49-51; *see also* paras. 21, 30, 48.

<sup>220</sup> *See* [Request](#), para. 50 (fn. 66). [REDACTED].

<sup>221</sup> [REDACTED].

<sup>222</sup> [REDACTED].

<sup>223</sup> [REDACTED].

<sup>224</sup> [Request](#), para. 51.

<sup>225</sup> *See above* paras. 46, 53.

<sup>226</sup> [Ngudjolo Compensation Hearing Decision](#), paras. 13-18 [REDACTED].

<sup>227</sup> [Response to Prosecution Compensation Proceedings Request](#), paras. 13, 15.

<sup>228</sup> [Request](#), para. 21.

which no finding was made.<sup>229</sup> In any event, Mr Blé Goudé was detained in Côte d'Ivoire pursuant to domestic criminal proceedings initiated against him there,<sup>230</sup> not pursuant to this Court's arrest warrant, and [REDACTED] cannot be attributed to the Court.

68. Finally, Mr Blé Goudé claims that he [REDACTED] was unable to receive the Covid-19 vaccine [REDACTED].<sup>231</sup> These difficulties cannot be attributed to the Court. [REDACTED].<sup>232</sup> [REDACTED].<sup>233</sup>

### CONCLUSION

69. For the reasons above, Mr Blé Goudé fails to show that he has suffered a grave and manifest miscarriage of justice—much less, that the exceptional circumstances required by article 85(3) exist. Moreover, none of Mr Blé Goudé's allegations, taken individually or cumulatively, amount to conclusive facts showing that there has been a grave and manifest miscarriage of justice in his case. The Prosecution therefore respectfully requests this Chamber to dismiss Mr Blé Goudé's Request for compensation.




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Karim A. A. Khan QC, Prosecutor

Dated this 17<sup>th</sup> day of November 2021

At The Hague, The Netherlands

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<sup>229</sup> [REDACTED].

<sup>230</sup> [CIV Observations on Arrest and Surrender](#), paras. 6-9.

<sup>231</sup> [REDACTED].

<sup>232</sup> [REDACTED].

<sup>233</sup> [REDACTED].