

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/11-01/15**
Date: **10 February 2022**

ARTICLE 85 CHAMBER

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

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ***

Public

Decision on Mr Blé Goudé's request for compensation

Decision 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

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

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

The **ARTICLE 85 CHAMBER** ('Chamber') of the International Criminal Court ('Court'), seized of Mr Blé Goudé's request for compensation pursuant to Article 85 of the Rome Statute ('Statute'), issues the present decision.

I. Procedural history

1. On 15 January 2019, Trial Chamber I, by majority, acquitted Mr Blé Goudé of all charges brought against him in the context of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* case ('Acquittal Decision').¹ The written reasons for this oral decision were issued on 16 July 2019.² On 31 March 2021, the Appeals Chamber rejected the Prosecutor's appeal and confirmed, by majority, the Acquittal Decision.³
2. On 9 September 2021, Mr Blé Goudé ('Applicant'), through his counsel, filed a request for compensation pursuant to Article 85(3) of the Statute before the Presidency ('Request').⁴ On 14 September 2021, the Presidency constituted the present Chamber, designating it to consider the Request.⁵
3. Having been instructed to do so by the Chamber,⁶ the Registry filed a report on some issues relevant to the proceedings ('Registry Report') on 25 October 2021, providing an overview of the conditions imposed on the Applicant as a result of his continued stay

¹ Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript of hearing, 15 January 2019, ICC-02/11-01/15-T-232-ENG, p. 4, lines 14-18.

² Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Reasons for oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquiescement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, and on the Blé Goudé Defence no case to answer motion, 16 July 2019, ICC-02/11-01/15-1263, with the separate opinions of Judge Tarfusser as Annex A, ICC-02/11-01/15-1263-AnxA, ('Opinion of Judge Cuno Tarfusser') and Judge Henderson as Annex A and B, ICC-02/11-01/15-1263-AnxB-Red ('Reasons of Judge Geoffrey Henderson'), and the dissenting opinion of Judge Herrera Carbuccia as Annex C, ICC-02/11-01/15-1263-AnxC-Red ('Dissenting Opinion of Judge Herrera Carbuccia').

³ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, 31 March 2021, ICC-02/11-01/15-1400.

⁴ Mr Blé Goudé's Request for Compensation pursuant to Article 85(3) of the Rome Statute, ICC-02/11-01/15-1411-Conf-Exp. A public redacted version was filed the same day: ICC-02/11-01/15-1411-Red.

⁵ Presidency, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision constituting a chamber and referring a request arising under article 85 concerning 'Public Redacted Version of "Mr Blé Goudé's Request for Compensation pursuant to Article 85(3) of the Rome Statute"' (ICC-02/11-01/15-1411-Conf-Exp), 9 September 2021' dated 9 September 2021 (ICC-02/11-01/15-1411-Red), ICC-02/11-01/15-1413 ('Presidency Decision').

⁶ Order to provide information, 15 October 2021, ICC-02/11-01/15-1421-Conf.

on the territory of the host State, his living conditions following his release from the ICC Detention Centre, and arrangements made in relation to his livelihood.⁷

4. On 15 November 2021, the Office of the Prosecutor (‘Prosecution’) responded to the Request (‘Prosecution Observations’).⁸
5. On 16 December 2021, at the request of the Applicant,⁹ a hearing was held during which the Applicant’s counsel, the Prosecutor, and the Deputy Prosecutor made further submissions. The Applicant himself also addressed the Chamber during the hearing.¹⁰

II. Submissions

6. The Applicant submits that he is the ‘victim of a wrongful prosecution amounting to a grave and manifest miscarriage of justice’.¹¹ He avers that the Prosecution ‘did not exercise due diligence in investigating and prosecuting’ him, ‘from the inception of the case up and through the appeal’, resulting in his wrongful prosecution.¹² This alleged lack of due diligence was ‘a recurring phenomenon’ that ran throughout the entire proceedings against him.¹³
7. The Applicant ‘seeks to remedy’ the ‘complete disregard’ by the Prosecution of his ‘rights to liberty and right to the presumption of innocence’.¹⁴ He avers that while Trial Chamber I’s granting of the Defence’s no case to answer motion could be seen as having remedied the Prosecution’s weak evidence in this case, it did not remedy ‘the Prosecution’s lack of due diligence throughout the proceedings and general failure to investigate exonerating and incriminating circumstances equally under Article 54.’¹⁵

⁷ Registry’s Report pursuant to the Article 85 Chamber’s “Order to provide information” (ICC-02/11-01/15-1421-Conf), 14 October 2021, ICC-02/11-01/15-1423-Conf-Exp. A confidential redacted version, available to the Prosecution, was filed the same day: ICC-02/11-01/15-1423-Conf-Red.

⁸ Prosecution response to Charles Blé Goudé’s Request for Compensation pursuant to Article 85(3) of the Statute, ICC-02/11-01/15-1424-Conf-Exp. A public redacted version was filed on 17 November 2021: ICC-02/11-01/15-1424-Red.

⁹ Request, ICC-02/11-01/15-1411-Red, para. 58. On 24 November 2021, the Chamber scheduled this hearing: Scheduling order for a hearing on the compensation request, ICC-02/11-01/15-1425.

¹⁰ Transcript of hearing, 13 December 2021, ICC-02/11-01/15-T-242-CONF-ENG.

¹¹ Request, ICC-02/11-01/15-1411-Red, para. 2.

¹² Request, ICC-02/11-01/15-1411-Red, para. 11.

¹³ Request, ICC-02/11-01/15-1411-Red, para. 12.

¹⁴ Request, ICC-02/11-01/15-1411-Red, para. 22.

¹⁵ Request, ICC-02/11-01/15-1411-Red, para. 22.

The alleged lack of due diligence ‘resulted in the wrongful prosecution’ of the Applicant.¹⁶

8. According to the Applicant, the appeal that followed the acquittal was ‘frivolous’, because the Prosecution asked for a mistrial instead of a retrial. The Prosecution’s ‘inability or unwillingness [...] demonstrated that it was uncertain whether its evidence would be sufficient to convict [the Applicant] before another Trial Chamber’.¹⁷
9. As to the consequences of the alleged wrongful prosecution, and impact thereof on the claimant, the Applicant submits that it is ‘clear’ that the wrongful prosecution violated his rights and ‘had serious and long-lasting effects on his personal and professional life.’¹⁸ This harm ‘is irreversible and it is still uncertain how much time it will take for [the Applicant] and his family to heal from this experience and start anew.’¹⁹ The Applicant spent nearly five years in detention and since his acquittal continues to be ‘under strict conditions’ and ‘unable to leave’ The Hague. As a result, the Applicant has been unable to spend time with his family and contribute to the upbringing of his three children, be present for the loss of family members, and his ‘promising political career’ was stalled.²⁰
10. In the alternative, should the Chamber find that his initial detention was justifiable, the Applicant argues that following the 9 February 2018 order of Trial Chamber I inviting the Prosecutor to file ‘a trial brief illustrating her case and detailing the evidence in support of the charges’,²¹ the Prosecution refused to revise its narrative and drop the charges against the then accused. He submits that the Prosecution did not re-evaluate its case when filing the updated trial brief, and only in response to the no case to answer motions, filed by the defence teams for Mr Gbagbo and Mr Blé Goudé, indicated that it did not oppose the dismissal of charges related to two incidents.²² The Applicant argues that the foregoing in conjunction with the fact that during the subsequent appeal, the

¹⁶ Request, ICC-02/11-01/15-1411-Red, para. 11.

¹⁷ Request, ICC-02/11-01/15-1411-Red, para. 17.

¹⁸ Request, ICC-02/11-01/15-1411-Red, para. 29.

¹⁹ Request, ICC-02/11-01/15-1411-Red, para. 29.

²⁰ Request, ICC-02/11-01/15-1411-Red, paras 25-28.

²¹ See Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Order on the further conduct of the proceedings, 9 February 2018, ICC-02/11-01/15-1124.

²² Request, ICC-02/11-01/15-1411-Red, para. 30.

Prosecution ‘never definitively requested to retry’ the Applicant, lead to a grave and manifest miscarriage of justice.²³

11. The Applicant requests compensation for having been subjected to a total of 2,731 days of detention, ‘house arrest’, and restrictions while still being forced to remain in The Hague. Due to the ‘serious impact on his personal and professional life’ and taking into consideration the amount awarded for wrongful detention in the Host State, a total of € 819,300 is claimed.²⁴ In the alternative, if, as submitted by the Applicant, a miscarriage of justice took place ‘on 19 March 2018 when the Prosecution submitted its Trial Brief in which it did not re[-]evaluate its case against Mr Blé Goudé’, compensation for 1,273 days, totalling € 381,900 is claimed.²⁵
12. Although the Prosecution is not the respondent to the claim for compensation, given the manner in which the claim is phrased, namely as a wrongful prosecution, the Chamber considers it appropriate to set out the Prosecution’s observations on the Request in some detail.
13. The Prosecution submits that it met its statutory obligations when presenting its case against Mr Blé Goudé at both confirmation of charges stage and subsequently at trial. It further submits that it acted reasonably in exercising its broad discretion in presenting its case at the trial stage, and also acted reasonably during the appeal proceedings.²⁶ According to the Prosecution, the Applicant’s submissions ‘fail to represent the breadth and complexity of the judicial views on this case’. It submits that the Applicant only makes ‘sweeping and unspecified claims’ about the Prosecution’s alleged lack of due diligence.²⁷
14. The Prosecution avers that its investigation did not impermissibly prejudice the Applicant. It details the steps it took in investigating the post-election violence in Côte d’Ivoire, the number of witnesses it interviewed and documents it reviewed. According to the Prosecution, its case theory and the evidence used to support its narrative, did not impermissibly prejudice the Applicant.²⁸ It indicates that it collected and disclosed to

²³ Request, ICC-02/11-01/15-1411-Red, para. 21.

²⁴ Request, ICC-02/11-01/15-1411-Red, paras 51-53.

²⁵ Request, ICC-02/11-01/15-1411-Red, paras 54-55.

²⁶ Prosecution Observations, ICC-02/11-01/15-1424-Red, para. 14.

²⁷ Prosecution Observations, ICC-02/11-01/15-1424-Red, para. 9.

²⁸ Prosecution Observations, ICC-02/11-01/15-1424-Red, paras 25-29.

the defence team of the Applicant potentially exonerating information, allowing his defence to cross-examine the Prosecution's witnesses on those matters.²⁹ The Prosecution submits that, the Applicant is seeking to re-litigate challenges to the documentary evidence raised during the trial, while ignoring the Prosecution's steps to authenticate the documents and establish their chains of custody.³⁰ It submits that it obtained information relevant to the assessment of the reliability and credibility of documentary evidence, and challenges the Applicant's view on the Prosecution's use of anonymous hearsay.³¹

15. The Prosecution submits that its conduct at trial did not give rise to a grave and manifest miscarriage of justice. It stresses that its case theories are a matter of prosecutorial discretion,³² and that its decision not to withdraw charges against the Applicant other than the two Abobo incidents is supported by the fact that the dissenting judge of Trial Chamber I found there to be sufficient evidence for the other incidents. As such, the Applicant's submissions 'do not meet the article 85(3) standard.'³³

16. Furthermore, as to the appeal proceedings, the Prosecution contends that its application to conditionally release the accused was proper and unanimously ordered by the Appeals Chamber.³⁴ It also highlights that the Applicant 'fails to mention' that 'his conviction in absentia in Côte d'Ivoire was why the conditions were still necessary to allow him "to [...] actively participate in the [Court] [proceedings]".'³⁵ According to the Prosecution, the appeal against the Applicant's acquittal by the majority of Trial Chamber I was reasonable and did not violate his rights.³⁶

17. The Prosecution submits finally that since the Applicant has failed to establish conclusive facts showing a grave and manifest miscarriage of justice, his request for compensation must be dismissed.³⁷

²⁹ Prosecution Observations, ICC-02/11-01/15-1424-Red, paras 16-24.

³⁰ Prosecution Observations, ICC-02/11-01/15-1424-Red, para. 30.

³¹ Prosecution Observations, ICC-02/11-01/15-1424-Red, paras 31-36.

³² Prosecution Observations, ICC-02/11-01/15-1424-Red, para. 38.

³³ Prosecution Observations, ICC-02/11-01/15-1424-Red, para. 42.

³⁴ Prosecution Observations, ICC-02/11-01/15-1424-Red, paras 45-54.

³⁵ Prosecution Observations, ICC-02/11-01/15-1424-Red, para. 53.

³⁶ Prosecution Observations, ICC-02/11-01/15-1424-Red, paras 55-62.

³⁷ Prosecution Observations, ICC-02/11-01/15-1424-Red, paras 10 and 69.

III. Analysis

18. The present proceedings are not criminal proceedings. Indeed, as the Chamber noted earlier, they are neither part of the criminal trial against Mr Gbagbo and Mr Blé Goudé, nor a continuation thereof.³⁸ The criminal trial against the Applicant ended when the Appeals Chamber confirmed his acquittal by Trial Chamber I. The present proceedings for compensation have been initiated by the Applicant against the Court,³⁹ making the proceedings akin to a civil suit or administrative complaint. For this reason, the Chamber did not authorise the Office of Public Counsel for Victims to present the views and concerns of the victims who participated in the criminal proceedings against the Applicant.⁴⁰ As discussed below,⁴¹ the type of proceedings also affects the applicable standard of proof.
19. As a preliminary matter,⁴² the request for compensation is submitted pursuant to Article 85(3) of the Statute. On the basis of this provision, ‘[i]n exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason’.
20. Rule 173(2) of the Rules of Procedure and Evidence (‘Rules’) requires that any ‘request for compensation shall be submitted not later than six months from the date the person making the request was notified of the decision of the Court concerning: [...] [t]he existence of a grave and manifest miscarriage of justice under article 85, paragraph 3.’ A request for compensation pursuant to Article 85(3) of the Statute must thus be

³⁸ Decision on the OPCV request for victims to participate in the Article 85 proceedings, 11 October 2021, ICC-02/11-01/15-1420, para. 3.

³⁹ See also Trial Chamber II, *The Prosecutor v. Mathieu Ngudjolo Chui*, Decision on the request by Counsel for Mathieu Ngudjolo for one or more hearings to be held and for an order to ensure that Mathieu Ngudjolo attends the hearing or hearings, 30 October 2015, ICC-01/04-02/12-299-tENG.

⁴⁰ See Decision on the OPCV request for victims to participate in the Article 85 proceedings, 11 October 2021, ICC-02/11-01/15-1420.

⁴¹ See paras 32-34.

⁴² Notably, the Presidency referred the matter to the Chamber ‘without prejudice to any determination by the Chamber on the admissibility [...] of the Request’. Presidency Decision, ICC-02/11-01/15-1413, para. 5.

preceded by a ‘decision of the Court’ finding that a grave and manifest miscarriage of justice took place.⁴³

21. The Applicant does not submit, and the Chamber does not find, that the decision of Trial Chamber I to acquit the Applicant or the Appeals Chamber’s decision confirming the acquittal, in and of themselves, constitute a grave and manifest miscarriage of justice, or that either of those chambers explicitly found that a grave and manifest miscarriage of justice had taken place.
22. The Chamber notes that in the *Ngudjolo* case,⁴⁴ Trial Chamber II was similarly seized of a request for compensation that was filed ‘despite the absence of a “decision of the Court” mentioned in rule 173(2) of the Rules’,⁴⁵ i.e. a prior decision identifying a miscarriage of justice. Noting that ‘there is no provision in the applicable legal texts which states that a prior decision, concerning any of the situations listed in rule 173(2) of the Rules, should be issued by a chamber other than that seized of the request for compensation,’⁴⁶ Trial Chamber II entertained Mr Ngudjolo’s request for compensation in the interests of justice by first considering whether a grave and manifest miscarriage of justice had taken place, before turning, if applicable, to the question of compensation.⁴⁷
23. The Chamber agrees with this approach. As also suggested in the Request,⁴⁸ the Chamber will follow a ‘two-fold approach’. First, it will determine whether a grave and manifest miscarriage of justice occurred. If this is found to have been the case, the Chamber will, as a second step, consider whether it will exercise its discretion to award compensation.⁴⁹

⁴³ See also Trial Chamber II, *The Prosecutor v. Mathieu Ngudjolo*, Decision on the “*Requête en indemnisation en application des dispositions de l’article 85(1) et (3) du Statut de Rome*”, 16 December 2015, ICC-01/04-02/12-301-tENG (‘*Ngudjolo* Decision’), para. 13.

⁴⁴ See *The Prosecutor v. Mathieu Ngudjolo*, Note d’information à la Présidence, 4 March 2015, ICC-01/04-2/12-273; *The Prosecutor v. Mathieu Ngudjolo*, Defence request for instructions from the Chamber for the purposes of submitting its application for compensation on the basis of article 85, 9 April 2015, ICC-01/04-02/12-284-tENG; and *The Prosecutor v. Mathieu Ngudjolo*, Requête en indemnisation sur pied de l’article 85 (1) et (3) du Statut de Rome”, 14 August 2015, ICC-01/04-02/12-290.

⁴⁵ *Ngudjolo* Decision, ICC-01/04-02/12-301-tENG, para. 16.

⁴⁶ *Ngudjolo* Decision, ICC-01/04-02/12-301-tENG, para. 16.

⁴⁷ *Ngudjolo* Decision, ICC-01/04-02/12-301-tENG, para. 16.

⁴⁸ Request, ICC-02/11-01/15-1411-Red, para. 9.

⁴⁹ Pre-Trial Chamber II followed a similar approach when considering a request for compensation by Mr Bemba. It held that ‘[d]etermining that a grave and manifest miscarriage of justice within the meaning and for the purposes of article 85(3) of the Statute occurred must be regarded as a preliminary step *vis-à-vis* the power to exercise

Existence of a grave and manifest miscarriage of justice

24. The Chamber adopts the findings of Pre-Trial Chamber II that the wording, drafting history and provisions of international human rights law that Article 85 is based on, all make clear that the drafters of the Statute did not mean ‘to go so far as to vest an acquitted person with a right to benefit from compensation by mere virtue of the fact that the acquittal was preceded by time spent in custody, [...] however lengthy [this] might have been’.⁵⁰
25. As further noted by the aforementioned pre-trial chamber, Article 21(3) of the Statute requires that Article 85(3), pursuant to which this compensation claim is made, be interpreted in a manner ‘consistent with internationally recognised human rights’. However, that chamber’s review of international human rights instruments concluded⁵¹ that the limited ability to obtain compensation in the case of an acquittal or termination of proceedings, as reflected in Article 85(3), is in line with the current state of international human rights law. Therefore, Article 85(3) should not be interpreted as providing a *right* to compensation in all cases resulting in an acquittal.
26. Regarding Article 85(3), the Chamber notes that the term ‘grave and manifest miscarriage of justice’ is not defined in the Court’s legal framework. Having regard to the drafting history, international human rights instruments and case law, domestic procedures, as well as academic commentary,⁵² Trial Chamber II held that ‘a grave and manifest miscarriage of justice [...] is a certain and undeniable miscarriage of justice following, for example, an erroneous decision by a trial chamber or wrongful prosecution’.⁵³
27. Relying on Trial Chamber II’s example of a wrongful prosecution being a grave and manifest miscarriage of justice, and acknowledging that so far no definition of wrongful prosecution has been provided by the Court, the Applicant argues that the conditions for

discretion as to whether compensation should be awarded; as such, it should be considered as falling within the scope of the powers of the Chamber designated to address and determine the claim for compensation.’ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Mr Bemba’s claim for compensation and damages, 18 May 2020, ICC-01/05-01/08-3694 (‘Bemba Decision’), paras 21-22.

⁵⁰ Bemba Decision, ICC-01/05-01/08-3694, para. 44.

⁵¹ Bemba Decision, ICC-01/05-01/08-3694, paras 44-52.

⁵² Ngudjolo Decision, ICC-01/04-02/12-301-tENG, paras 41-44.

⁵³ Ngudjolo Decision, ICC-01/04-02/12-301-tENG, para. 45.

a wrongful prosecution are satisfied in the present case.⁵⁴ When pressed about the elements or definition of a wrongful prosecution,⁵⁵ it was submitted on behalf of the Applicant that the alleged wrongful prosecution in the present case is based on ‘[firstly], the systematic failure in investigation in accordance with the burden of proof; secondly, the tunnel vision, one-sided narrative acknowledged by the majority of the judges at appeal and first instance; and, thirdly, the Prosecution, against all odds [...] continued with this one-sided narrative.’⁵⁶

28. The Prosecution distinguishes in its submissions between malicious prosecution and wrongful prosecution. Based on the Black’s Law Dictionary definition, it submits that “[m]alicious prosecution” refers to judicial proceedings instituted for wrongful or improper motives, and without probable cause to sustain it’.⁵⁷ According to the Prosecution, wrongful prosecution is a broader concept than malicious prosecution and the former ‘could include examples of gross negligence in the administration of justice.’⁵⁸ However, in its view, the gross negligence would have to be such that the fundamental rights of the accused person are ‘demolished’.⁵⁹
29. The Chamber observes that any criminal case necessarily starts with charges brought by a prosecutor’s office against a suspect. As the prosecutor’s office sets out to prove these charges, an acquittal, regardless of its basis, means that the prosecution ‘failed’; even when, as sometimes happens in inquisitorial systems, the prosecutor, following the presentation of evidence and/or legal arguments, requests an acquittal from the bench. It follows that a ‘failed’ prosecution does not necessarily mean that the prosecution was ‘wrongful’, irrespective of whether the accused spent time in detention.
30. Indeed, as Trial Chamber II found, the miscarriage of justice, including a wrongful prosecution, must have given rise to ‘a clear violation of the applicant’s fundamental rights’ and ‘caused serious harm to the applicant’. Accordingly, ‘not every error committed in the course of the proceedings is automatically considered a “grave and manifest” miscarriage of justice’.⁶⁰ Importantly, as Pre-Trial Chamber II, which

⁵⁴ Transcript of 13 December 2021, page 10, lines 6-9; and page 46, lines 22-23.

⁵⁵ See the question by Judge Ugalde at lines 21-25, Transcript of 13 December 2021, page 45.

⁵⁶ Transcript of 13 December 2021, page 48, lines 10-13.

⁵⁷ Prosecution Observations, ICC-02/11-01/15-1424-Red, para. 10.

⁵⁸ Prosecution Observations, ICC-02/11-01/15-1424-Red, para. 13.

⁵⁹ Transcript of 13 December 2021, page 49, lines 20-25.

⁶⁰ *Ngudjolo* Decision, ICC-01/04-02/12-301-tENG, para. 45.

concurred with the aforementioned findings, noted that ‘the threshold set by article 85(3) is particularly high’.⁶¹ For it to be met, ‘the violation must be so serious and exceptional as to indicate that [...], “the proper administration of justice was compromised”’.⁶²

31. In the Chamber’s opinion a situation – all too common in trials – whereby the evidence, given and tested by cross-examination, falls short of that which might have been expected from the contents of witness statements, could not come within the category of ‘so serious and exceptional’. For the high threshold of Article 85(3) to be met, it must therefore be shown by the Applicant that the alleged wrongful prosecution amounted to a violation so serious and exceptional as to indicate that the proper administration of justice was compromised.⁶³

Burden of proof

32. Compensation proceedings are ‘another level of adjudication’ on the charges brought to an accused.⁶⁴ As noted above, these proceedings are not criminal in nature, but akin to civil or administrative proceedings at the domestic level. This raises the question of the appropriate standard of proof for the present proceedings.

33. Article 85(3) of the Statute requires that ‘conclusive facts’ support a finding by the Chamber on the alleged miscarriage of justice. Other than in paragraph 2 of the same provision, the phrase ‘conclusive facts’ is not used anywhere else in the Court’s legal framework, nor is it defined. Article 85(2) refers to a ‘fact’ that ‘shows conclusively’ that there has been a miscarriage of justice, using wording that is taken from Article 14(6) of the International Covenant on Civil and Political Rights.⁶⁵ The phrase ‘conclusive facts’ in Article 85(3) therefore appears to be an adaption of the wording of Article 85(2).⁶⁶

⁶¹ *Bemba* Decision, ICC-01/05-01/08-3694, para. 42, referring to the *Ngudjolo* Decision.

⁶² *Bemba* Decision, ICC-01/05-01/08-3694, para. 42, referring to the *Ngudjolo* Decision.

⁶³ See the words of Pre-Trial Chamber II, quoted in the previous paragraph.

⁶⁴ *Ngudjolo* Decision, ICC-01/04-02/12-301-tENG, para. 47.

⁶⁵ Article 3 of Protocol No. 7 to the European Convention on Human Rights uses the same wording.

⁶⁶ The Spanish version of the Statute also uses the similar wording for the phrases in the second and third paragraphs: ‘hechos [...] que demuestran concluyentemente’ and ‘hechos concluyentes’. The Chinese en Russian

34. As the drafters of the Statute have not provided a definition of what ‘conclusive facts’ entail,⁶⁷ the Chamber has to arrive at its own interpretation of what this phrase means. In the view of the Chamber, an applicant requesting compensation pursuant to Article 85(3) need not prove his or her claim to the standard of beyond reasonable doubt, but there must be concrete evidence on the basis of which the Chamber is satisfied that a grave and manifest miscarriage of justice took place, that is, evidence of a violation so serious and exceptional resulting in the proper administration of justice being compromised.
35. Having dealt with these preliminary legal questions, the Chamber now turns to the merits of the request for compensation. The Applicant’s arguments relate to the three stage of the case: i) the initial investigation and pre-trial stage; ii) the trial proceedings, including the instruction by Trial Chamber I to the Prosecution to file a trial brief; and iii) the period following the oral ruling on the acquittal, i.e. the appeals phase.⁶⁸ The Chamber will consider the Prosecution’s conduct for each of these stages in turn.

Investigation and pre-trial stage

36. The Applicant submits that Pre-Trial Chamber I issued the arrest warrant and confirmation decision against him ‘under the presumption that the Prosecution was acting in full respect of its mandate under Article 54(1)’. He argues that since the Prosecution failed to respect its mandate, the Pre-Trial Chamber’s decisions ‘in retrospect were not properly rendered.’⁶⁹ According to the Applicant, if the Prosecution had respected its truth seeking mandate, the case against him ‘would have never proceeded to trial or, at least, it would have to be terminated by the [Prosecution] at an

versions are similar in this regard. However, the French version of the Statute uses two slightly different phrases for the second and third paragraph, namely, ‘un fait [...] prouve’ and ‘de faits probants’, respectively.

⁶⁷ The litigation in the two previous compensation proceedings before the Court has shown, and academic commentary has noted that Article 85 is not the clearest provision (e.g., Salvatore Zappalà, ‘Compensation to an arrested or convicted person’, in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002), p. 1585; and Christopher Staker, ‘Article 85’, in Otto Triffterer (ed.), *The Rome Statute of the International Criminal Court: a Commentary* (2nd ed., C.H. Beck/Hart/Nomos 2016), p. 1502). The reference to ‘conclusive facts’ in paragraph 3 is an example of its ambiguous wording.

⁶⁸ The Applicant puts i) and ii) together for the alternative request, but he makes separate arguments in relation to the updated trial brief and the appeal stage.

⁶⁹ Request, ICC-02/11-01/15-1411-Red, para. 21.

earlier stage in the trial proceedings.⁷⁰ To substantiate his claim that the Prosecution ‘did not exercise due diligence in investigating and prosecuting [the Applicant]’s case’,⁷¹ the Applicant refers to findings by Judges Tarfusser and Henderson.

37. The Prosecution contends that the confirmation of charges procedure acts as a safeguard against claims of wrongful prosecution.⁷² The Chamber agrees that generally a decision to confirm the charges serves to certify that the Prosecution’s investigation brought out sufficient evidence to establish substantial grounds to believe that the person charged committed the alleged crimes. As all three judges of Pre-Trial Chamber I confirmed the charges against the Applicant,⁷³ the Prosecution cannot be said to have been irrational in its belief, at the time, that its case theory was correct.

38. As regards the findings of Judges Tarfusser and Henderson, the Applicant states that they ‘detail’⁷⁴ the alleged lack of due diligence. However, these findings were made by the two judges at the end of the presentation of the Prosecution’s evidence *at trial*. In the circumstances of Pre-Trial Chamber I having reviewed the evidence to the relevant standard and having confirmed the charges against him, it was incumbent on the Applicant to show actual wrongdoing or (gross) negligence on the side of the Prosecution, affecting the pre-trial chamber’s ability to evaluate the evidence brought before it and resulting in an incorrect decision. He has not done so and his complaint fails in so far as he claims that the alleged wrongful prosecution is evidenced by the investigation or pre-trial stage.

Trial stage

39. To substantiate the argument that the Prosecution allegedly failed to act with due diligence at the trial stage, the Applicant points to: i) the Prosecution’s failure to abide by its magistrate-like role in investigating alleged crimes under Article 54 of the

⁷⁰ Request, ICC-02/11-01/15-1411-Red, para. 35.

⁷¹ Request, ICC-02/11-01/15-1411-Red, para. 11.

⁷² Prosecution Observations, ICC-02/11-01/15-1424-Red, para. 8.

⁷³ Pre-Trial Chamber I, *The Prosecutor v. Charles Blé Goudé*, Decision on the confirmation of charges against Charles Blé Goudé, 12 December 2014, ICC-02/11-02/11-186. Judge Van den Wyngaert did append a partially dissenting opinion, but this related to alternative modes of liability, and not to the confirmation of the charges as such: Partly Dissenting Opinion of Judge Christine Van den Wyngaert, ICC-02/11-02/11-186-Anx.

⁷⁴ Request, ICC-02/11-01/15-1411-Red, paras 11 and 13.

Statute;⁷⁵ ii) to ‘significant shortcomings’ in the Prosecution’s collection of evidence (such as not establishing the authenticity of documents and significantly relying on hearsay);⁷⁶ iii) the Prosecution’s one-sided narrative;⁷⁷ and iv) the fact that despite Trial Chamber I having invited the Prosecution to file an updated trial brief in light of the evidence presented so far, the Prosecution ‘held steadfast to its narrative, intent on convicting Mr Blé Goudé at all costs’.⁷⁸

40. A careful analysis of the relevant proceedings however does not support the situation as portrayed by the Applicant. Notwithstanding the strong criticism of the Prosecution expressed in judicial decisions and opinions, at both the trial and the appeal stages, the Chamber notes that decisions were not unanimous and at each level a judge expressed support for the Prosecution’s view of the evidence. Notably, one of the judges of Trial Chamber I did not agree to acquit the Applicant at the half-way stage. In Judge Herrera Carbuccia’s view, ‘[o]n the basis of the evidence submitted into the record, the seriousness of the charges and the interests of the victims participating in these proceedings, the trial should have continued with the presentation of the Defence case.’⁷⁹ Although she analysed the evidence on the basis of the standard which, in her view, should be used when considering no case to answer motions (namely, of a ‘reasonable trial chamber’ taking the evidence at its highest), Judge Herrera Carbuccia held that

a reasonable Trial Chamber could conclude that Mr Blé Goudé is individually responsible, pursuant to article 25(3)(b) of the Statute, for inducing and soliciting the commission of the following crimes against humanity, as described in article 7 of the Statute, carried out in general during the post-election violence at roadblocks by the Jeunes Patriotes, and in particular during the March on RTI of 16 December 2010 and attacks in Yopougon commune, Abidjan, between 25 and 28 February 2011 and on 12 April 2011: (a) murder; (b) rape; (c) other inhumane acts; (d) attempted murder; and (e) persecution of unarmed civilians.⁸⁰

⁷⁵ Request, ICC-02/11-01/15-1411-Red, para. 11.

⁷⁶ Request, ICC-02/11-01/15-1411-Red, para. 14.

⁷⁷ Request, ICC-02/11-01/15-1411-Red, para. 15.

⁷⁸ Request, ICC-02/11-01/15-1411-Red, paras 15-16.

⁷⁹ Dissenting Opinion of Judge Herrera Carbuccia, para. 648.

⁸⁰ Dissenting Opinion of Judge Herrera Carbuccia, para. 646.

On appeal, Judge Ibáñez Carranza, also applying the reasonable trial chamber standard and taking the evidence at its highest, expressed a similar view.⁸¹

41. The Chamber notes that the findings of the majority of Trial Chamber I show that the Prosecution made errors, in particular in its inability to adapt sufficiently to changing realities during the trial, and address the difference between the evidence it sought to adduce and the testimonies actually given by its witnesses. There is no need to rehearse here the majority's findings, or its – at times – sharp criticism of the Prosecution. Nonetheless, as simply articulated by Judge Henderson on behalf of the majority:

It may well be that some of us may be of the view that they would have done things differently. However, this in no way impugns the integrity, good faith and commitment of the women and men who represented the Prosecutor in this case.⁸²

42. The Chamber has not been presented with any evidence of *male fides* by the Prosecution. Indeed, the Applicant submits that even after his acquittal by Trial Chamber I, he 'had to face an *indecisive* Prosecution, that after years of investigating a case and even presenting its evidence in full could not determine whether it wanted to retry [him].'⁸³ Indecisiveness by a prosecutor is, to say the least, unfortunate, but should not be characterised as either malicious or 'wrongful' prosecution. The internal review process appears to have been deficient, and the Prosecution may indeed, as submitted by the Applicant,⁸⁴ have suffered from 'tunnel vision'. However, 'shortcomings'⁸⁵ on the side of the Prosecution and poorly prosecuting a case, while undesirable - especially at the international level, with the type of interests which tend to be at stake - do not constitute a wrongful prosecution that amounted to a 'grave and manifest miscarriage of justice'.

43. The Applicant also submits that the Prosecution's 'unwillingness to re-evaluate its case' against him amounted to a violation of his right to expeditious proceedings as enshrined in Article 67(1)(c) of the Statute.⁸⁶ However, no such violation took place, because in

⁸¹ Dissenting Opinion of Judge Ibáñez Carranza to the Judgment on the appeal of the Prosecutor against the oral verdict of the Trial Chamber I of 15 January 2019 with written reasons issued on 16 July 2019, ICC-02/11-01/15-1400-Anx4-Red, para. 425.

⁸² Reasons for Judge Henderson, para. 9.

⁸³ Request, ICC-02/11-01/15-1411-Red, para. 34 (emphasis added).

⁸⁴ Transcript of 13 December 2021, page 47, lines 6-12.

⁸⁵ Opinion of Judge Tarfusser, para. 104.

⁸⁶ Request, ICC-02/11-01/15-1411-Red, para. 34.

response to the Prosecution's trial brief, which according to the Applicant showed the said 'unwillingness' to re-evaluate the Prosecution's case, Trial Chamber I allowed the defence teams to file no case to answer motions on behalf of then accused, Mr Gbagbo and Mr Blé Goudé.⁸⁷ Subsequently, once the majority of Trial Chamber I had concluded that the case should not proceed, it rendered an oral decision and ordered the release of the accused.

44. The Chamber considers that the Prosecution ought to have (properly) re-evaluated its case, not only following the confirmation proceedings, or in response to the order by Trial Chamber I to re-submit a trial brief, but also at any other stage during trial when the evidence, as presented, warranted a review of the case theory. Indeed, the Prosecution is under a duty to do such.

45. Nevertheless, as regards the present case, the Chamber does not find that the Prosecution's errors were so serious and exceptional that the proper administration of justice was compromised. The Applicant has not presented evidence to that effect, and has not shown in any other way that the Prosecution conduct during the trial stage amounted to a wrongful prosecution.

Appeal stage

46. The Applicant submits that as a result of the Prosecution requesting his ongoing detention following the acquittal, '[i]t is particularly egregious that the Prosecution would request release with conditions, and in the event such release could not be secured, detention of [the Applicant], while not knowing whether it wished to retry [him] or not.'⁸⁸ He further argues that in requesting a mistrial, the Prosecution led him 'to become essentially a stateless person where no receiving state would accommodate him.'⁸⁹

⁸⁷ See Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Second Order on the further conduct of the proceedings, 4 June 2018, ICC-02/11-01/15-1174.

⁸⁸ Request, ICC-02/11-01/15-1411-Red, para. 21.

⁸⁹ Request, ICC-02/11-01/15-1411-Red, para. 21.

47. The Prosecution submits, however, that the Applicant's 'claims are unsupported and misread the record.'⁹⁰ Following the acquittal by way of oral decision on 15 January 2019, the Prosecution's primary request to the Appeals Chamber was conditional release, rather than continued detention.⁹¹ The Chamber notes that the process was overseen by the Appeals Chamber, which reviewed the conditions several times, including *proprio motu* revoking four of the eight conditions imposed on the Applicant.⁹²
48. While the approach of the Prosecution during the appeal phase appears to show a similar indecisiveness, both as to its own reflection on the evidence and on the remedy sought on appeal, at least from the moment it received Trial Chamber I's written opinions, the Chamber does not find that appealing the decision of the majority of Trial Chamber I to acquit the accused, *per se*, was a violation of the Applicant's fundamental rights. The Prosecution was entitled to appeal the majority's acquittal of the Applicant, and the outcome of the appeal phase was the rendering of a final decision protective of the Applicant's rights. Therefore, the Prosecution's initiation of the appeal did not compromise the administration of justice and did not result in a miscarriage of justice.
49. The conditions the Applicant was subjected to after his acquittal, and remains restricted by, are an unfortunate consequence of his inability to return to Côte d'Ivoire, but should not be attributed to the Prosecution, or the Court as a whole. On the basis of the information before the Chamber,⁹³ it is clear that these circumstances are beyond the control of the Court. Moreover, the Chamber notes that the Registry has tried to alleviate the Applicant's situation to the best of its abilities, at a considerable cost to the Court,⁹⁴ including by facilitating visits from his family members.⁹⁵ The Registry is commended for its efforts in this regard.

⁹⁰ Prosecution Observations, ICC-02/11-01/15-1424-Red, para. 44.

⁹¹ Prosecution Observations, ICC-02/11-01/15-1424-Red, para. 45.

⁹² Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on counsel for Mr Gbagbo's request for reconsideration of the 'Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute' and on the review of the conditions on the release, 28 May 2020, ICC-02/11-01/15-1355-Red.

⁹³ See Registry Report, ICC-02/11-01/15-1423-Conf-Red.

⁹⁴ Registry Report, ICC-02/11-01/15-1423-Conf-Red, para. 6.

⁹⁵ Registry Report, ICC-02/11-01/15-1423-Conf-Red, para. 7.

Conclusion

50. The three stages during which the Prosecution allegedly failed to act with due diligence have each been considered in turn. The Chamber finds that the Prosecution's conduct at each individual stage does not amount to wrongful prosecution. Pertinently, this threshold is also not reached even where the Prosecution's conduct at all stages is considered as a whole. At each stage of the proceedings a chamber had oversight over the process and the actions of the Prosecution were scrutinised. The Applicant was charged with alleged crimes. However, as a result of the Prosecution's inability to convince the majority of Trial Chamber I, to the requisite criminal standard, that its allegations were correct, the Applicant was not convicted of the charges. The Applicant's defence team requested a half-time acquittal following the presentation of evidence by the Prosecution, after which both Trial Chamber I and the Appeals Chamber determined that he was to be acquitted. His fair trial rights were thus safeguarded during the criminal proceedings against, rather than impeded upon.⁹⁶

51. The Chamber has carefully considered the Prosecution's actions. At this instance, the Chamber finds that they do not amount, taken individually or as a whole, to a wrongful prosecution. The Chamber emphasises, however, that it is incumbent on the Prosecution to consider its approach to both the trial and appeal stages of a case with care. As noted already,⁹⁷ it should properly re-evaluate its case theory at every stage of an ongoing trial, and should not approach the appeal stage without a clear formulation of the remedy sought in such proceedings.

52. In the present instance, as the Chamber finds that the Prosecution's actions do not rise to the level of a wrongful prosecution, and no other form of a grave and manifest miscarriage of justice has been shown to have taken place, the Chamber does not need to move to the second part of the abovementioned 'two-fold approach'; namely, to consider whether it ought to use its discretion to compensate the Applicant. The Applicant's request is therefore dismissed.

⁹⁶ Compare *Bemba* Decision, ICC-01/05-01/08-3694, para. 42, finding that grave and manifest miscarriages of justice 'should be regarded as truly exceptional; as such, they share the feature of going beyond typical errors, whether of fact or of law, suitable to be addressed and remedied during appellate proceedings.'

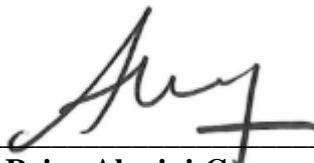
⁹⁷ See above at para 44.

53. Finally, the Chamber is aware that Applicant's present situation is undesirable and cannot continue indefinitely. It recalls that when he personally addressed the Chamber orally, the Applicant stressed that his main wish is for the Chamber to arrange for him to go back to Côte d'Ivoire.⁹⁸ The Registry has been communicating with the Ivorian authorities about the issuing of a passport for the Applicant. Noting that thus far no passport has been issued, the Chamber calls upon the Registrar to increase the Registry's efforts, and do everything in his power to assist the Applicant's swift return to Côte d'Ivoire. In the meantime, the Registrar should explore with the Host State whether all, or part of, the measures the Applicant is presently subjected to during his ongoing stay on the territory of the Host State can be lifted.

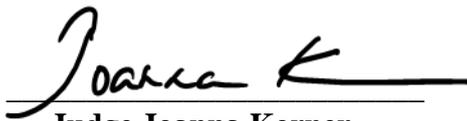
FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS Mr Blé Goudé's request for compensation pursuant to Article 85(3) of the Statute.

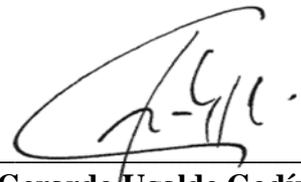
Done in both English and French, the English version being authoritative.



Judge Reine Alapini-Gansou
Presiding Judge



Judge Joanna Korner



Judge Sergio Gerardo Ugalde Godínez

10 February 2022

At The Hague, The Netherlands

⁹⁸ Transcript of hearing, 13 December 2021, ICC-02/11-01/15-T-242-CONF-ENG, p. 30, lines 22-25.