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**International
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Date: **29 January 2019**

THE APPEALS CHAMBER

Before:

**Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa**

SITUATION IN COTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE

Public

With Public Annex 1

**Defence Response to the “Prosecution’s Document in Support of Appeal pursuant to
Article 81(3)(c)(ii) of the Statute” (ICC-02/11-01/15-1245 OA14)**

Source: Defence of Mr Charles Blé Goudé

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

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I. Introduction

1. The Defence for Mr Charles Blé Goudé (“the Defence”) files the present response to the “*Prosecution’s Document in Support of Appeal pursuant to Article 81(3)(c)(ii) of the Statute*”, dated 23 January 2019 (“Prosecution’s Appeal”),¹ on which it will elaborate during the 1 February 2019 hearing. For the reasons developed below, the Defence submits that Trial Chamber I (“the Trial Chamber”) did not err in its decision to dismiss the request of the Office of the Prosecutor (“Prosecution”) to maintain Mr Charles Blé Goudé in detention pending appeal pursuant to Article 81(3)(c)(i) of the Rome Statute (“Statute”) (“the Impugned Decision”).²

II. Procedural History

2. On 15 January 2019, the Trial Chamber acquitted Mr Laurent Gbagbo and Mr Charles Blé Goudé from all charges and ordered their immediate release.³ On the same day, the Prosecution filed its “*Urgent Prosecution’s request pursuant to article 81(3)(c)(i) of the Statute*” (“Request”), submitting that there are exceptional circumstances for maintaining both acquitted persons in detention pending appeal while requesting the Chamber to impose certain conditions on their release.⁴ On 16 January 2019, the Chamber dismissed the Prosecution’s request.⁵
3. Later on 16 January 2019, the Prosecution challenged the Impugned Decision before the Appeals Chamber. The Prosecution also requested the Appeals Chamber to suspend Mr Charles Blé Goudé’s release, relying on articles 82(3) of the Statute and rule 156(5) of the Rules of Procedure and Evidence (“RPE”).⁶ The Defence responded to the Prosecution’s request for suspensive effect on 17 January 2019.⁷ On 18 January

¹ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, “Prosecution’s Document in Support of Appeal pursuant to Article 81(3)(c)(ii) of the Statute”, 23 January 2019, ICC-02/11-01/15-1245 OA14.

² *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber I, Transcript of 16 January 2019, ICC-02/11-01/15-T-234-ENG ET WT.

³ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber I, Transcript of 15 January 2019, ICC-02/11-01/15-T-232-ENG ET WT.

⁴ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber I, “Urgent Prosecution’s request pursuant to article 81(3)(c)(i) of the Statute”, 15 January 2019, ICC-02/11-01/15-1235, para. 31.

⁵ Impugned Decision, p. 6, lns 9-14.

⁶ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, “Prosecution’s Appeal pursuant to article 81(3)(c)(ii) of the Statute and urgent request for suspensive effect”, 16 January 2019, ICC-02/11-01/15-1236 OA14, paras 1-2.

⁷ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, “Defence Response to the Prosecution’s urgent request for suspensive effect”, 17 January 2019, ICC-02/11-01/15-1238 OA14.

2019, the Appeals Chamber, by Majority, Judges Morrison and Hofmański dissenting, granted the Prosecution’s urgent request for suspensive effect.⁸ As per the Appeals Chamber’s order, the Defence hereby responds to the Prosecution’s Appeal filed on 23 January 2019 (“the Response”).

III. Submissions

(a) Response to the first ground of appeal

(i) The Trial Chamber did not incorrectly apply the standard of “exceptional circumstances” under article 81(3)(c)(i)

4. First, the Defence disagrees with the Prosecution’s allegation that the standard used in decisions addressing the question of suspensive effect of an appeal under article 81(3)(c)(i) equally applies to decisions on the merits of that appeal.⁹ The plain text of article 81(3)(c)(i) requires the demonstration of exceptional circumstances which is a much higher standard than showing particularly strong reasons to temporarily freeze the decision of immediate release. Also, while both decisions address the question of the continued detention of an acquitted person pending appeal, the nature and the consequences of those decisions are very different. The decision on a request for suspensive effect resolves a procedural matter for which the judges should not address the substance of the underlying issue. On the contrary, the decision under article 81(3)(c)(i) assesses the merits of the matter. Second, the potential time spent in detention as a result of the decision ordering suspensive effect is likely to be a few weeks while that duration would be uncertain and indefinite as a result of a decision on the merits of the appeal, especially in the present case, which is very complex, with a large amount of evidence to be assessed. Therefore, the outcome at stake for the acquitted person is also not comparable and supports the requirement of a different standard.
5. Turning now to the core of the Prosecution’s submissions, the Statute provides for several potential interpretations of the interaction between the factors of article 81(3)(c)(i).

⁸ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, “Decision on the Prosecutor’s request for suspensive effect of her appeal under article 81(3)(c)(ii) of the Statute and directions on the conduct of the appeal proceedings”, 18 January 2019, ICC-02/11-01/15-1243 OA14.

⁹ Prosecution’s Appeal, para. 10.

6. It could be concluded that the factor of exceptional circumstances is separate from the three factors of flight risk, seriousness of the charges and probability of the appeal. Under this interpretation, which is the Defence's, the factor of exceptional circumstances would be assessed separately from the subsequent factors. The Defence notes that its interpretation is supported by the plain text of article 81(3)(c)(i), which provides that the acquitted person may be maintained in detention “[u]nder exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal [...]”. If the text of this article is compared for instance with article 57(3)(e) of the Statute, which begins by “[w]here a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned”, it is clear that the term “and” distinguishes two separate conditions which could in no event be interpreted as being subsumed by one another. Under this interpretation, which the Defence supports, the Prosecution has failed to even address the factor of exceptional circumstances but incorrectly limited herself to the assessment of the three subsequent factors. Therefore, one fundamental prong of article 81(3)(c)(i) has not been met and the Prosecution's request ought to be dismissed for lack of substantiation.
7. An alternative interpretation of the aforementioned provision is that of the Prosecution, which considers that the concrete flight risk, the seriousness of the offence charged and the probability of success on appeal are sub-factors of the exceptional circumstances factor and that the Chamber must determine whether cumulatively, these three factors reach the threshold of exceptionality.¹⁰ The Prosecution also seems to believe that proving these three individual factors would suffice to automatically demonstrate exceptional circumstances.¹¹ The Prosecution fails to substantiate why her interpretation is necessarily the correct one. Notwithstanding the fact that this interpretation is not obvious from the plain reading of the article, she does not adduce one single supporting article, case law, or analogy to support her theory. Furthermore, the Prosecution contradicts herself on various instances. First, the Prosecution has always, since the beginning of these discussions

¹⁰ Prosecution's Appeal, para. 11.

¹¹ Prosecution's Appeal, paras 15, 47.

on article 81(3)(c)(i) of the Statute, reviewed each of the factors in isolation.¹² Second, in its initial request, the Prosecution referred to the probability of the success of the appeal as “[t]he third exceptional circumstance under article 81(3)(c)(i)”,¹³ thereby first, suggesting that each of those three factors are exceptional in nature and second, defeating its own argument that it is the combination of those three factors which could potentially make the circumstances exceptional as opposed to each factor reviewed individually. Again, a few lines below, the Prosecution reiterates this idea in stating that “an exceptional circumstance affecting the upcoming appeal is established by the absence of a full and reasoned statement of the Trial Chamber’s finding [...]”.¹⁴

8. Finally, the legal conclusion that there are exceptional circumstances justifying the continued detention of Mr Charles Blé Goudé would be even more difficult to achieve under the Prosecution’s interpretation. First, three non-exceptional factors rarely make, even taken together, an exceptional circumstance, especially since as pointed out by the Prosecution the three factors in question relate to each other.¹⁵ In the same vein, the cumulative assessment of the three factors in question would not assist in reaching the exceptional circumstances standard as, if the Prosecution is correct in alleging that the seriousness of the charges and the probability of the appeal relate back to the concrete flight risk, by having a direct impact on it,¹⁶ the exceptionality standard would not be reached as soon as the concrete risk of flight has been ruled out, since the other two criteria, while potentially met, would not individually reach the threshold of exceptionality to justify continued detention, and would therefore not change the fact that the concrete risk of flight does not exist. The present Appeals Chamber emphasized itself that “[t]he continued detention of an acquitted person pursuant to article 81(3)(c)(i) serves one principal purpose: to ensure that, in case of a successful appeal by the Prosecutor against the acquittal, the proceedings against the person may be continued without the need for a new arrest and surrender”.¹⁷ The Prosecution does not challenge the fact that the Trial Chamber, to determine that there

¹² See Request, Prosecution’s Appeal.

¹³ Request, para. 20 c.

¹⁴ Request, top of p. 15.

¹⁵ Prosecution’s Appeal, para. 14.

¹⁶ Prosecution’s Appeal, para. 14.

¹⁷ “Decision on the Prosecutor’s request for suspensive effect of her appeal under article 81(3)(c)(ii) of the Statute and directions on the conduct of the appeal proceedings”, ICC-02/11-01/15-1243, para. 17.

were exceptional circumstances justifying detention, must rule that a concrete risk of flight exists, which it did not. On the contrary, the Trial Chamber concluded that the Prosecution had not demonstrated any concrete risk of flight.¹⁸ Therefore, if the Prosecution had followed its own interpretation, it would have been obliged to conclude that the Trial Chamber did not err.

9. Another interpretation could be that given by the Prosecution to the approach taken by the Trial Chamber in the Impugned Decision. In the Prosecution's view, the Trial Chamber "*required that each factor considered in the overall assessment individually reach the threshold of "exceptionality"*".¹⁹ First, this allegation is incorrect. While the Trial Chamber has used the term "exceptional", always in a specific context, in relation to the seriousness of the charges and the probability of the appeal, this notion has not been used once in relation to the concrete risk of flight. Second, the Prosecution misconstrued the Trial Chamber's approach and the wording of the Impugned Decision. It can certainly not be ruled out that the Chamber did approach the factors cumulatively. In all logics, a Trial Chamber which would ultimately approach the aforementioned factors cumulatively and balance their weight together would still have to first analyse them individually. As elaborated above, the Prosecution herself reviewed each criterion one by one. The fact that the Trial Chamber may have analysed certain factors individually and determined that the factor in question did not, in and of itself, make the acquittal exceptional,²⁰ does not necessarily indicate that the Trial Chamber failed to weigh all factors together prior to making its decision. It could actually suggest that it did. The Trial Chamber could have considered that while in itself, the factor in question did not constitute an extraordinary circumstance, there was a possibility that all factors taken together would. In the *Ngudjolo* case, Trial Chamber II did not act differently from the Trial Chamber in assessing each factor in isolation prior to concluding that "*there are no exceptional circumstances in this particular case*".²¹

10. In any event, the Defence submits that it is not necessary in the context of the present appeals to determine which of the last two approaches is correct. In the Defence's

¹⁸ Impugned Decision, p. 3, ln. 25 to p. 4, ln. 1.

¹⁹ Prosecution's Appeal, para. 12.

²⁰ See Prosecution's Appeal, para. 13.

²¹ *The Prosecutor v. Mathieu Ngudjolo Chui*, Transcript of 18 December 2012, ICC-01/04-02/12-T-3-ENG ET WT, p. 5, lns 17-19.

view, regardless of which interpretation is followed, the issue is whether the Trial Chamber considered all the relevant factors and made no error in the balancing exercise of these factors in arriving at its decision. Observing that it did, the Defence submits that the Trial Chamber would have in either scenario found that the standard of exceptional circumstances was not met. In other words, assuming *arguendo* that (i) the Prosecution's interpretation is the only correct interpretation, (ii) the Trial Chamber failed to apply it when it should have, it is incorrect to allege that would the Trial Chamber have adopted the Prosecution's approach, it "*would have found the standard of "exceptional circumstances" was met and concluded that that the Accused be detained, or conditionally released, pending appeal*".²² First, contrary to the Prosecution's suggestion, proving the three individual factors will not suffice to automatically demonstrate exceptional circumstances.²³ More importantly, the Trial Chamber would have still ruled that there was no concrete risk of flight, which would have defeated the purpose of ordering continued detention. Consequently, such error, if any, would not have affected the Impugned Decision.

11. In light of the foregoing, the Defence submits that the Prosecution failed to demonstrate that the Trial Chamber committed an error of law by incorrectly applying the standard of "exceptional circumstances" under article 81(3)(c)(i) of the Statute and that that error would have affected the Impugned Decision.

(ii) The Trial Chamber did not incorrectly apply the standard of "exceptional circumstances" under internationally recognised human rights principles

12. Article 81(3)(c)(i) provides a narrow exception to the general rule of immediate release upon acquittal and only a strict interpretation of Article 81(3)(c)(i) is compatible with internationally recognized human rights.
13. The Rome Statute and the Rules of Procedure and Evidence do not define the terms "exceptional circumstances" of Article 81(3)(c)(i). However, it is clear, from both a textual and contextual interpretation of this provision, that the exception to immediate release carved out in Article 81(3)(c)(i) is itself truly "exceptional" under international law: it is neither readily reconcilable with the Rome Statute, nor with international recognized human rights to which the Court is bound.

²² Prosecution's Appeal, para. 48.

²³ Prosecution's Appeal, para. 47.

14. The Court, like other international organizations, is bound by general recognized human rights norms.²⁴ According to Article 21(3) of the Statute, internationally recognized human rights norms take precedence over any conflicting rule of the ICC legal regime. The Appeals Chamber has emphasized the imperative nature of human rights in every aspect of the exercise of the Court's jurisdiction:

37. (...) Article 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. *Human rights underpin the Statute; every aspect of it including the exercise of jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights.*²⁵

15. The fundamental right to liberty of an acquitted person is axiomatic²⁶ and inherently interwoven with the fundamental procedural rights of the accused, as manifested in the Statute.²⁷ They serve to protect individuals from unlawful or arbitrary detention.

16. The law and long-standing practice of international courts and tribunals further support a strict interpretation of Article 81(2)(c)(i). For instance, Rule 99(B) of the ICTY/ICTR Rules of Procedure and Evidence – analogous to Article 81(3)(c)(i) – stipulate that the Trial Chamber may, upon request by the Prosecution, issue an order for the continued detention of a person pending a determination of the appeal. However, practice before these Tribunals reveals that Rule 99(B) has never been applied to order the detention in custody of an acquitted person.²⁸

17. Moreover, although it is submitted that a textual interpretation of Article 81(3)(c), warrants a strict interpretation of this provision, the drafting history of the Statute may

²⁴ See ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, I.C.J. Reports 1980, at pp. 89–90, para. 37.

²⁵ [emphasis added] *Prosecutor v. Lubanga*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 37.

²⁶ See *Prosecutor v. Bemba*, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled “Decision on application for interim release”, 16 December 2008, ICC-01/05-01/08-323, para. 28; *Prosecutor v. Katanga*, Judgment on Katanga's Appeal on Regulation 55 Implementation, Appeals Chambers, 26 March 2013, ICC-01/04-01/07-3363, para. 86; *Prosecutor v. Lubanga*, Separate Opinion of Judge Pikis in the Judgment on Lubanga's Interim Release Appeal, 13 February 2017, Appeals Chamber, ICC-01/04-01/06-824, para. 16.

²⁷ Rome Statute, Art. 85, 58(1) and 60(2).

²⁸ Before the ICTY, it appears that every acquitted person was immediately release without conditions pending appeal. Before the ICTR, immediate release with conditions was imposed in only three cases, which are distinguishable from the instant case: *Prosecutor v. Bagilishema*, Decision on Prosecutor's Request Pursuant to article 99(B), Trial Chamber, 8 June 2011, ICTR 95-1 A, para. 2; *Prosecutor v. Ntaguerura et al.*, Decision on Prosecutor's request pursuant to article 99(B), 26 February 2004, ICTR-99-46; *Military I, Decision on prosecutor's motion to impose Conditions on Kabiligi's Liberty*, 31 December 2008, ICTR-98-41.

provide additional interpretative guidance. The drafting history reveals that the initial drafters did not envisage the possibility of post-acquittal detention, except in situations where an acquitted person was facing other criminal charges, to the extent that this would not breach the principle of *non bis in idem*, in order to secure their transfer.²⁹ Later drafts included the possibility for the Trial Chamber to order the detention of an acquitted person pending appeal, namely, by issuing an arrest warrant,³⁰ indicating the drafter's intention of requiring a renewed legal basis for detaining a person post-acquittal. The need for a legal basis to order detention was echoed by Judges Morrison and Hofmański in their dissenting opinion, albeit in the context of the Prosecution's request for suspensive relief.³¹

18. Furthermore, a review of the relevant legal framework of a significant number of domestic jurisdictions reveals that post-acquittal detention is simply not envisaged.³² The domestic courts' case law cited by the Prosecution in its Appeal Brief are irrelevant, as they concern situations of bail or post-conviction detention,³³ whereas the post-acquittal regime of those same jurisdictions would have been more appropriate and would have challenged the Prosecution's stance.

19. The right to immediate release of an acquitted person has also been recognized by regional human rights bodies such as the European Court of Human Rights ("ECtHR") and the Inter-American Court of Human Rights.³⁴ For instance, in the ECtHR case of *Labita v. Italy*, the ECtHR unanimously concluded that the applicant's detention for twelve hours post-acquittal represented unlawful detention, breaching Article 5(1) ECHR and Article 2 of Protocol No. 4. The ECtHR reiterated that only a

²⁹ 1994 ILC Draft Statute for an International Criminal Court with commentaries 1994 Yearbook of the International Law Commission, 1994, vol. II, Part Two, Art. 45, 48.

³⁰ Report of the Inter-Sessional Meeting from 19 to 30 January in Zutphen, The Netherlands: Preparatory Committee on the Establishment of an International Criminal Court (A/AC-249/1998/L-13), Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), A/51/22[VOL-I](SUPP).

³¹ Dissenting Opinion of Judge Morrison and Judge Hofmański, 18 January 2019, ICC-02/11-01/15-1243-Anx.

³² For instance, Article 355 of the Criminal Code of Procedure of Côte d'Ivoire provides: "Si l'accusé est absous ou acquitté, il est mis immédiatement en liberté s'il n'est retenu pour autre cause".

³³ Prosecution's Appeal, para. 36.

³⁴ From the Inter-American Court of Human Rights, See *Loayza-Tomayo v. Peru*, Judgment of September 17, 1997; *Cantoral-Benavides v. Peru*, Judgment of August 18, 2000. The jurisprudence of regional human rights bodies has been relied on by the Appeals Chamber of the Court in interpreting and applying the Statute, See for instance *Prosecutor v. Katanga*, Judgment on the Appeal of Mr Germain Katanga against the Decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the regulations of the Court and severing the charges against the accused persons", Appeals Chamber, 27 March 2013, ICC-01/04-01/07-3363.

narrow interpretation of the exceptions to the right to liberty of Article 5(1) was consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty.³⁵

20. Therefore, in light of the Court's obligation to interpret and apply the Statute consistently with internationally recognized human rights, the criteria of Article 81(3)(c)(i) must be interpreted narrowly and may only apply in extreme cases.

(b) Response to the second ground of appeal

21. The Defence submits that the Trial Chamber did not err in the exercise of its discretion when assessing there is no concrete risk of flight by Mr Charles Blé Goudé.

22. The Defence disagrees with the Prosecution's statement that "*the Appeals Chamber already found that "particularly strong reasons" justify the suspensive effect of this appeal and therefore that the Accused should be detained pending the appeal*".³⁶ The Appeals Chamber in that decision, while acknowledging the requirement of the existence of particularly strong reasons to justify suspensive effect, did not make an in-depth assessment as to whether these reasons existed in the present case but instead focused on the potential consequences that the implementation of the decision under appeal may have in case of a successful appeal. This position is supported by the use by the Appeals Chamber of the verb "preclude".³⁷ The Appeals Chamber merely noted the Prosecution's submissions that there was a concrete flight risk but did not at this stage assess whether her arguments were justified.³⁸ Therefore, the way the Prosecution jumps to conclusion is incorrect.

23. Since the beginning of the discussions on the release of Mr Charles Blé Goudé, the Prosecution has been relying on abstract and unsubstantiated hypotheses to consider that there is a risk of flight justifying the conditional release or continued detention of Mr Charles Blé Goudé.³⁹ Yet, while the Prosecution ought to have demonstrated more than ever, now that Mr Charles Blé Goudé's innocence has been recognized, that the

³⁵ ECHR, *Labita v. Italy*, 6 April 2000, Application no. 26772/95, para. 197.

³⁶ Prosecution's Appeal, para. 16.

³⁷ Appeals Chamber, "Decision on the Prosecutor's request for suspensive effect of her appeal under article 81(3)(c)(ii) of the Statute and directions on the conduct of the appeal proceedings", 18 January 2019, ICC-02/11-01/15-1243 OA14, para. 22.

³⁸ *Ibid.*

³⁹ Transcript of 13 December 2018, ICC-02/11- 01/15-T-231-CONF-ENG ET, p. 8, ln 23 to p. 11, ln 11; Request; Prosecution's Appeal.

very concrete possibility of a flight risk is based on objective facts, none of these circumstances are either concrete or objective, let alone exceptional, and would justify the continued detention of an acquitted person.

24. The Trial Chamber's statement that it had no information as to where Mr Charles Blé Goudé wished to go if immediately released is not irrelevant. First, the Prosecution is incorrect in stating that Mr Charles Blé Goudé would be free to go to whichever State he wishes. Pursuant to rule 185(1) of the Rules, it is the Registry's responsibility to "*make such arrangements as it considers appropriate for the transfer of the person, taking into account the views of the person*" to a State agreeing to receiving him or her. Therefore, it is clear from this provision that the released person cannot go to a country willing to receive him without the Court accepting to make arrangements in this sense. Second, the risk of flight must be concrete. Thus, the absence of any information as to the state the acquitted person would wish to be hosted makes the allegations of a risk of flight in the hypothetical scenario that Mr Charles Blé Goudé would choose a non-cooperating state or Ivory Coast to host him, purely speculative, and thus unfounded.⁴⁰

25. The Defence will not repeat why it agrees with the Trial Chamber's interpretation of Mr Alassane Ouattara's statements.⁴¹ Furthermore, Mr Ouattara's comment about the now operational Ivorian justice having started "judging everyone without exception" can only be interpreted as a reference to the pro-Ouattara side being also investigated and judged, not to Messrs Gbagbo and Blé Goudé.⁴² In any case, in the extraordinary event that Côte d'Ivoire would consider necessary to arrest and "judge" Mr Charles Blé Goudé, which the Prosecution has failed to objectively demonstrate, it could never be concluded that he is absconding. Therefore, the Trial Chamber did not err in refraining from explicitly giving weight to this hypothesis, which does not even fall into the category of flight risk and is not based on any objective facts. Regardless, the crucial point is that Mr Ouattara's statements or even the alleged decisions taken by

⁴⁰ In the *Ngudjolo* case, Trial Chamber II, in its decision on immediate release, also reflected on the absence of information on this matter in observing that "*at this particular juncture, the Chamber does not know where the accused person plans to travel once the various formalities are over and he is released*". See *Prosecutor v. Mathieu Ngudjolo Chui*, Trial Chamber II, Transcript of 18 December 2012, ICC-01/04-02/12-T-3-ENG ET WT, p. 4, lns 23-25.

⁴¹ See *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, "Defence Response to the Prosecution's urgent request for suspensive effect", 17 January 2019, ICC-02/11-01/15-1238 OA14., para. 16.

⁴² Prosecution's Appeal, para. 20.

the government of Côte d'Ivoire with respect to Ms Simone Gbagbo's case is not relevant in assessing whether Mr Charles Blé Goudé would constitute a concrete flight risk.⁴³

26. Turning now to the only relevant question in the present discussions, the Prosecution failed to demonstrate Mr Charles Blé Goudé's incentive to abscond. The Prosecution refers to past decisions of the Trial Chamber which would have found that Mr Gbagbo had an incentive to abscond.⁴⁴ However, the past assessment of the Trial Chamber as to whether Mr Gbagbo constituted a risk of flight for the purpose of interim release is no longer relevant. The same Trial Chamber has decided that the former accused were innocent and should be released immediately. Moreover, the Trial Chamber never made such a similar determination about Mr Charles Blé Goudé, who never requested interim release once during the trial proceedings, except in the very final stage where he was specifically invited to do so by the Trial Chamber.⁴⁵ The Prosecution fails to substantiate how the aforementioned moot findings equally apply to Mr Charles Blé Goudé,⁴⁶ unless the Prosecution can predict what the Trial Chamber would have decided had Mr Charles Blé Goudé requested interim release prior to his acquittal.

27. Throughout the proceedings, Mr Charles Blé Goudé has showed full commitment to the trial proceedings and to challenge the charges brought against him by the Prosecution. During the course of the pre-trial and trial stages, Mr Charles Blé Goudé has expressed his right to address the Judges every time he had an occasion to do so. He made oral statements during the Initial Appearance Hearing,⁴⁷ the Confirmation Hearing⁴⁸ and the Opening Statement.⁴⁹ Ultimately, on 22 November 2018, the Chamber, by Majority, rejected his request to make a final oral statement.⁵⁰ Mr Charles Blé Goudé's repeated will to directly address the Judges is a concrete expression of his full cooperation with the Court. Annex 1 to the present Response gives an overview of Charles Blé Goudé's statements in that regard.

⁴³ Prosecution's appeal, para. 26. The Defence will further elaborate during the coming oral hearing why the Prosecution's arguments in relation to Ghana and the alleged false passports are not adequately substantiated.

⁴⁴ Prosecution's Appeal, paras 4, 23.

⁴⁵ See Prosecution's Appeal, para. 4.

⁴⁶ Prosecution's Appeal, paras 4, 23.

⁴⁷ ICC-02/11-02/11-T-3-CONF-FRA ET, pp. 7-10.

⁴⁸ ICC-02/11-02/11-T-8-CONF-FRA ET, pp. 45-68.

⁴⁹ ICC-02/11-01/15-T-12-CONF-FRA ET, pp. 73-92.

⁵⁰ ICC-02/11-01/15-T-230-ENG ET, pp. 19-23.

28. Mr Charles Blé Goudé's incentive to cooperate and appear in court has been reinforced since the Chamber has ruled in favour of a full acquittal. The Defence's arguments have been heard, the Chamber observed that the Prosecution's evidence was "exceptionally weak",⁵¹ and ordered his immediate release. It would therefore be illogical to attempt to abscond at this stage. If the decision in the *Bemba and al.* case is read *a contrario*,⁵² Mr Charles Blé Goudé's knowledge of his acquittal militates in favour of releasing him immediately, as the probability of flight risk is no longer apposite.⁵³

29. Contrary to the Prosecution's allegations,⁵⁴ the Trial Chamber did not err by inappropriately giving weight to Mr Charles Blé Goudé's signed commitment to appear before the Court at any requested time as guaranteed by his lead counsel.⁵⁵ Moreover, the Prosecution did not demonstrate the existence of a network.⁵⁶

30. Thus, in light of the foregoing, it is unreasonable to conclude that the Trial Chamber erred in the exercise of its discretion when assessing whether there is a concrete risk of flight.

(c) Response to the third ground of appeal

31. The seriousness of the offence charged is one of the criteria to be taken into consideration by a Trial Chamber when assessing a Prosecution's request to maintain an acquitted person in detention.

32. Echoing the *lex specialis* status of article 81(3)(c)(i) of the Statute, which the Appeals Chamber emphasized,⁵⁷ Judge Van Den Wyngaert, in *Ngudjolo*, gave guidance as to

⁵¹ Impugned Decision, p. 4, ln. 5.

⁵² *The Prosecutor v. Jean-Pierre Bemba Gombo and al.*, "Decision on Mr Bemba's Application for Release", 12 June 2018, ICC-01/05-01/13-2291, para. 21.

⁵³ See the Defence's full submissions on this point in "Defence Response to the Prosecution's urgent request for suspensive effect", 17 January 2019, ICC-02/11-01/15-1238 OA14, para. 23.

⁵⁴ Prosecution's Appeal, para. 24.

⁵⁵ Impugned Decision, ICC-02/11-01/15-T-234-ENG ET WT, p. 3, lns 15-20. See also ICC-02/11-01/15-T-233-ENG RT, p. 35, ln. 14 to p. 36, ln 14. The Defence notes that in the *Ngudjolo* case, Trial Chamber II had also given proper weight to these assurances. See Transcript of 18 December 2012, ICC-01/04-02/12-T-3-ENG ET WT, p. 5, lns 2-7.

⁵⁶ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, "Defence Response to the Prosecution's urgent request for suspensive effect", 17 January 2019, ICC-02/11-01/15-1238 OA14, paras 18-20.

⁵⁷ ICC-02/11-01/15 OA14, para. 17.

how the criterion of the seriousness of the offence charged should be appreciated, asking to the Prosecution the following:

"You did not develop, notably, the gravity of the crime and, once again, **what is special about this?** In view of the fact that, for each individual accused before our Court, the facts or events mean that this that there is a serious offence at hand. So what should motivate us to accept your request?"⁵⁸

33. The continued detention of an acquitted person is indeed an exceptional restriction to this person's fundamental right to liberty, not only because this person shall be presumed innocent, but most importantly because this person has been declared not guilty of the charges and, hence, acquitted. Therefore, the criterion of the seriousness of the offence charged should only be appreciated specially, in that it must present a level of specialty so high that it justifies that the acquitted person be maintained in detention.

34. In the Impugned Decision, the Majority made a special assessment of the seriousness of the charges in the particular context of article 81(3)(c)(i) of the Statute, recalling that:

"although the charges are clearly serious in nature, this in itself is not an extraordinary circumstance that could warrant detaining acquitted persons."⁵⁹

35. By doing so, the Majority has properly addressed the apparent paradox of the criterion of seriousness of the charges: the International Criminal Court has been instituted to rule on very serious charges involved, by nature, by allegations of crimes against humanity. However, a grammatical application of article 81(3)(c)(i) of the Statute would lead to the systemic continued detention of acquitted persons, which would be an unfair restriction to the fundamental right to liberty of the person. Therefore, only charges of an extraordinary gravity could justify the continued detention of an acquitted person. It is thus instrumental to determine whether or not, in the instant case, the charges for which the acquittal has been pronounced were of an exceptional or extraordinary or special gravity.

36. Therefore, and contrary to the Prosecution's assertion, the Majority, by noting that it dismissed the charges against the Acquitted, has correctly set the relevant framework

⁵⁸ ICC-01/04-02/12-T-2-ENG ET pp. 7-8, lns 24-2, emphasis added.

⁵⁹ ICC-02/11-01/15-T-234-ENG ET, p. 2, lns 8-10.

necessary to appreciate the criterion of the gravity of the charges. The charges being dismissed, the Prosecution should have proven that they were of a special gravity to justify the continued detention of the Acquitted pending appeal.

37. The Defence first submits that the charges brought against the Acquitted and dismissed by the Majority were not extraordinary when compared to the other cases heard by the Court. The Defence will provide a full overview of the charges examined by Trial Chambers and by the Appeals Chamber in other cases during the hearing to be held on 1st February 2019.

38. Second, the Prosecution fails to justify why only property offences or offences against the administration of justice should be deemed of a lesser gravity in the specific context of the application of article 81(3)(c)(i) of the Statute.⁶⁰ The Appeals Chamber held that they were of a lesser gravity while generally comparing crimes against the administration of justice and the core crimes under article 5 of the Statute,⁶¹ and not as a specific assessment under the meaning of article 81(3)(c)(i) of the Statute. The Prosecution also fails to demonstrate why alleged politically motivated crimes would be of an exceptional gravity.⁶² The Prosecution, during its oral submissions on 3 October 2018, acknowledged that motive is irrelevant to crimes against humanity:⁶³ “we say that motive is irrelevant **as a matter of law** to link the attack to the policy”.⁶⁴

39. Third, the Prosecution has failed to prove why an alleged participation to crimes from the highest levels of the State apparatus would make the charges extraordinarily serious,⁶⁵ let alone that it has failed to prove that Charles Blé Goudé was at the highest levels of the State apparatus.

40. Fourth, the Prosecution's argument that “the gravity of the charges informs the risk of flight assessment”⁶⁶ has been rendered inoperative by the acquittal of Charles Blé Goudé and the continued cooperation he has shown to the Court, refraining from

⁶⁰ Prosecution’s Appeal, para. 31.

⁶¹ ICC-01/05-01/13-558 OA2, para. 64; ICC-01/05-01/13-559 OA3, paras 1, 88; ICC-01/05-01/13-560 OA4, para. 113.

⁶² Prosecution’s Appeal, para. 31.

⁶³ ICC-02/11-01/15-T-223-ENG ET, pp. 42-43.

⁶⁴ ICC-02/11-01/15-T-223-ENG ET, p. 43, lns 4-5, emphasis added.

⁶⁵ *Ibid.*

⁶⁶ Prosecution’s Appeal, para. 32.

seeking interim release until the Majority decided *proprio motu* to review his pre-trial detention.

(d) Response to the fourth ground of appeal

41. At the outset, the Defence submits that the Prosecution is mistaken in stating that the current and temporary unavailability of the reasoned judgement to be released by the Chamber should increase the probability of success on appeal.⁶⁷ First, the Prosecution makes a speculative argument as nothing allows assuming that the reasoned decision to come will provide sufficient grounds of appeal to the Prosecution. Second, the Prosecution proceeds to a legal shortcut, deliberately concealing the effect the principle *in dubio pro reo*.
42. As a well-established general principle of criminal law, the principle in *dubio pro reo* also applies, *mutatis mutandis*, to the proceedings following an acquittal, when the immediate release of the acquitted person is at stake.⁶⁸ In its appeal, the Prosecution argues that “[t]he lack of proper written reasons by the Majority has greatly hampered the Prosecution’s present ability to make fully informed arguments about the probability of success on appeal”.⁶⁹ The Defence first submits that the same argument could be raised when considering the Defence’s ability to respond to the Prosecution’s arguments. However, the current unavailability of the reasoned decision implies that doubt exists as to the probability of success on appeal. Second, such a doubt, given the general nature of the principle *in dubio pro reo* which, as recalled by Pre-Trial Chamber II in Bemba, applies to all stage of the proceedings,⁷⁰ shall benefit the Acquitted and lead to their immediate release pursuant to article 81(3)(c) of the Statute.
43. Before examining further the Prosecution’s argument under this ground of appeal, the Defence makes three preliminary observations on the criterion of probability of success on appeal. First, the Defence submits that the existence of a dissent is

⁶⁷ Prosecution’s Appeal, para. 42.

⁶⁸ Decision pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, ICC-01/05-01/08-424, para 31; *Prosecutor v. Katanga*, Trial Chamber II, Judgment pursuant to Article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 50; *Prosecutor v. Galic*, ICTY, Case No. IT98-29-T, Judgement and Opinion, para. 93; *Prosecutor v. Kayishema and Ruzindana*, Trial Judgement, 21 May 1999, Case No. ICTR ICTR-95-1-T, para. 103.

⁶⁹ Prosecution’s Appeal, para. 6; See also Prosecution’s Appeal, para. 40.

⁷⁰ ICC-01/05-01/08-424, para. 31.

irrelevant to appreciate the probability of success on appeal. As already argued by the Defence, in the instant case, and more generally before Trial Chambers composed of three judges, dissenting opinions are not exceptional. Second, the Defence recalls that the Appeals Chamber has examined two major issues relating to the proceedings in the present case, namely the admission of documentary evidence⁷¹ and the application of Rule 68(3) of the Rules.⁷² On these two occasions, the Appeals Chamber has validated the approach adopted by the Chamber. Third, turning to the way the proceedings have been handled in the instant case, the Defence incorporates by reference the oral submissions made during the hearing held before Trial Chamber I on 16 January 2019.⁷³

44. Regarding some of the arguments raised in the Prosecution's Appeal,⁷⁴ the Defence submits that the Majority did not apply an incorrect legal standard when assessing the probability of success on appeal under article 81(3)(c)(i) of the Statute.
45. First, the Prosecution submits its own subjective interpretation of the analysis of the probability of success on appeal performed by the Majority. By doing so, it does not substantiate how the Majority would have adopted what it refers to as a "subjective approach".⁷⁵ The Prosecution does not provide any element to consider as to this alleged subjective approach that would allow the Defence to efficiently respond and the Appeals Chamber to appreciate the argument.
46. On the contrary, nothing indicates that the Majority made a subjective assessment of the Prosecution's evidence. By referring to the exceptional weakness of this evidence, in a context where the Defence had not even presented evidence,⁷⁶ the Majority noted the objective weakness of the evidence, considering that it could not reasonably continue the proceedings.
47. Second, the Prosecution elaborated its own standard of the criterion of probability of success on appeal, considering the standard used by the Majority as incorrect, but refraining from demonstrating to which extent its own standard would be correct

⁷¹ ICC-02/11-01/15-995 OA11 OA12.

⁷² ICC-02/11-01/15-744 OA8.

⁷³ ICC-02/11-01/15-T-233-CONF-ENG, pp. 18-19.

⁷⁴ Prosecution's Appeal, paras 34-48.

⁷⁵ Prosecution's Appeal, para. 35.

⁷⁶ Impugned Decision, p.4, lns 3-5.

instead.⁷⁷ The Majority made a consistent appreciation of the criterion of probability of success on appeal, taking into account that article 81(3)(c)(i) of the Statute is *lex specialis*, as recalled by the Appeals Chamber.⁷⁸

48. Such a special legal standard appears consistent with the Majority’s finding that the existence of a dissent, in the instant case, “does not imply that there is a high probability that the Appeals Chamber would overturn the acquittal”.⁷⁹

49. The Prosecution cannot reasonably submit that the standard of probability of success on appeal should be compared with the one used in some national jurisdictions when considering whether to grant bail to a convicted person pending their appeal.⁸⁰ Such a standard has been applied domestically to convicted persons, while article 81(3)(c)(i) of the Statute applies to acquitted persons, rendering the Prosecution’s argumentation on this issue irrelevant.

50. Therefore, the Prosecution has failed to show that the Majority applied a subjective approach and an incorrect legal standard to the criterion of probability of success on appeal. The weakness of the Prosecution’s evidence, as considered by the Chamber, is a factor of an objective nature. The legal standard of an appeal “reasonably arguable and not manifestly doomed to failure”,⁸¹ as having been applied nationally to convicted persons pending appeal, cannot be applied to acquitted persons pending appeal.

51. Third, the Prosecution also misinterprets the scope of the criterion of probability of success on appeal by stating that “[d]isagreements among the Trial Chamber Judges on these fundamental and procedural issues [namely, the standard of proof and the process of assessing evidence] are relevant considerations to which the Majority failed to give appropriate weight”.⁸² However, in the realm of a Trial Chamber’s discretion, there mere existence of a dissent is not decisive.

⁷⁷ Prosecution’s Appeal, para. 36.

⁷⁸ ICC-01/04-02/12-T-2-ENG ET pp. 7-8, lns 24-2. See para. 32, above.

⁷⁹ Impugned Decision, p. 4, lns 7-10.

⁸⁰ Prosecution’s Appeal, para. 36.

⁸¹ *Ibid.*

⁸² Prosecution’s Appeal, para. 41.

52. Fourth, contrary to the Prosecution's assertion,⁸³ with the Impugned Decision, the Majority did not modify the acquittal, nor did it clarify to alter, or to add to the substance of their decision. First, the Majority responded to the arguments raised in writing by the Prosecution on the probability of success on appeal, including the ones based on Judge Herrera Carbuccion's dissent.⁸⁴ Second, materially, it would have been impossible for the Majority to alter or to add to its decision, given the fact that the reasons were and are still unknown.

53. Fifth, the Prosecution does not substantiate why the standard of proof should be lower at the no case to answer stage.⁸⁵ There is no statutory provision setting the standard of proof to be considered at the no case to answer stage. If there had been one, the Prosecution would not have requested guidance from the Chamber.⁸⁶

54. The Prosecution's argument on "the procedural flaws" that allegedly affected the proceedings is totally incomprehensible, notably on the issue of admissibility of evidence. It is striking that the Prosecution uses these past debates to support that "this trial was characterized by a number of procedural flaws",⁸⁷ whereas, back in the days, it did not discern any procedural flaw in the decisions taken by the Chamber, by majority, on admissibility of documentary evidence, and thus opposed the appeals lodged by the Defence on these decisions.⁸⁸

(e) Response to the Prosecution's request for conditional release: immediate vs conditional release

55. The paradigm of immediate release pursuant to article 81(3)(c) of the Statute fundamentally differs from the paradigm of interim release pursuant to article 60(2), (3) and (4) of the Statute. Article 60(2), (3) and (4) of the Statute allows a Pre-Trial Chamber – or a Trial Chamber – to grant interim release to a suspect or an accused, to maintain this person in detention or to grant interim release with conditions set forth by Rule 119 of the Rules. The Defence is of the view that, in the realm of immediate

⁸³ Prosecution's Appeal, para. 42.

⁸⁴ Impugned Decision, pp. 4-5.

⁸⁵ Prosecution's Appeal, para. 43.

⁸⁶ Prosecution's Appeal, para. 45; See ICC-02/11-01/15-1179.

⁸⁷ Prosecution's Appeal, para. 44.

⁸⁸ See, for example, ICC-02/11-01/15-937-Conf; See also ICC-02/11-01/15-644.

release, a Chamber has not been granted the power to attach conditions to the release of an acquitted person.

56. However, if the Appeals Chamber were to reach a different conclusion, the Defence will be willing to secure Charles Blé Goudé's release, even under conditions. Therefore, Charles Blé Goudé will abide to all the conditions that would be deemed necessary by the Appeals Chamber.

57. In the extraordinary case where the Appeals Chamber would overturn the Impugned Decision, the Defence opposes the request to have the Appeals Chamber substitute its discretion to the Trial Chamber's and find that there are exceptional circumstances justifying continued detention. The Defence respectfully submits that the Appeals Chamber does not have all relevant information necessary to make these findings.⁸⁹ Given the complexity of the procedure,⁹⁰ the matter should be remanded back to the Trial Chamber, which is the best suited Chamber for a new determination. The Prosecution's suggestion that it would allow the Trial Chamber more time to draft a written decision on the acquittals is totally inappropriate.⁹¹ It is not the Prosecution's role, or even the Appeals Chamber's, to "protect" this independent and resourceful Trial Chamber from further workload. In the same vein, it is not within the Appeals Chamber's legal power to limit the number of days in which the Trial Chamber should issue that decision and thirty days would anyhow be completely unreasonable.⁹²

RELIEF SOUGHT

58. The Defence respectfully requests the Appeals Chamber to reject the Prosecution's Appeal.

Respectfully submitted,

⁸⁹ Prosecution's Appeal, para. 7.

⁹⁰ As pointed out by the Trial Chamber, "The Chamber sat for 231 hearing days, receiving evidence from 82 Prosecution witnesses in court and through video link. Thousands of documents were submitted into evidence, hundreds of submissions, motions, requests by the parties and participants and decisions by the Chamber were filed". See Transcript of 15 January 2019, ICC-02/11- 01/15-T-232-ENG ET, p. 2, lns 15-18.

⁹¹ Prosecution's Appeal, para. 7.

⁹² Prosecution's Appeal, para. 8.



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Dated this 29 January 2019

At The Hague, the Netherland