

1 International Criminal Court
2 Appeals Chamber
3 Situation: Republic of Côte d'Ivoire
4 In the case of The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé
5 ICC-02/11-01/15
6 Presiding Judge Chile Eboe-Osuji, Judge Howard Morrison,
7 Judge Piotr Hofmański, Judge Luz del Carmen Ibáñez Carranza and
8 Judge Solomy Balungi Bossa
9 Appeals Hearing - Courtroom 1
10 Thursday, 6 February 2020
11 (The hearing starts in open session at 9.36 a.m.)
12 THE COURT USHER: [9:36:33] All rise.
13 The International Criminal Court is now in session.
14 Please be seated.
15 PRESIDING JUDGE EBOE-OSUJI: [9:37:12] Thank you very much.
16 Court officer, please, the matter.
17 THE COURT OFFICER: [9:37:23] Good morning, Mr President, your Honours.
18 The situation in the Republic of Côte d'Ivoire, in the case of The Prosecutor versus
19 Laurent Gbagbo and Charles Blé Goudé, case reference ICC-02/11-01/15.
20 And for the record, we are in open session.
21 PRESIDING JUDGE EBOE-OSUJI: [9:37:40] Thank you very much, Officer.
22 Now we will take appearances, beginning with counsel for the Prosecution.
23 MS BRADY: [9:37:51] Good morning, your Honours. Appearing today for the
24 Prosecution we have Mr Reinhold Gallmetzer, appeals counsel; Ms Priya Narayanan,
25 appeals counsel; Mr Eric MacDonald, senior trial attorney; our case manager,

1 Ms Neera Mandavia; and I'm Helen Brady, I'm the senior appeals counsel. Thank you.

2 PRESIDING JUDGE EBOE-OSUJI: [9:38:13] Thank you.

3 And next, appearances from counsel for Mr Gbagbo.

4 MR ALTIT: [9:38:19](Interpretation) Good morning, Mr President, your Honours.

5 The Defence team is made up of Jennifer Naouri, sitting beside Mr Gbagbo. Behind
6 me, Professor Jacobs, * Angèle Jeangeorge, case manager, Fiana Gantheret, legal
7 assistant, and Galadrièle Marchais, case manager. And as for myself, I am Emmanuel
8 Altit, lead counsel representing Mr Laurent Gbagbo.

9 PRESIDING JUDGE EBOE-OSUJI: [9:38:54] *Merci*. And next up, counsel for
10 Mr Blé Goudé.

11 MR KNOOPS: [9:38:59] Good morning, your Honours. Mr Blé Goudé is today
12 represented by co-counsel Mr Claver N'Dry, my left side. In the second row,
13 Mr President, legal assistant Mr Seri Zokou, the Bar Brussels; Madam Antonina Dyk,
14 legal assistant; Sara Pedroso. And on the second row you find one of our new
15 assistants, Ms Despoina - and I have to pronounce it very correctly, I was
16 told - Eleftheriou. I hope I pronounce it correctly. Thank you, Mr President.

17 PRESIDING JUDGE EBOE-OSUJI: [9:39:41] Can you spell it, please, for the record so
18 that the court record can get it correctly.

19 MR KNOOPS: [9:39:47] Yes. We can also send the names later too, to save time.

20 PRESIDING JUDGE EBOE-OSUJI: [9:39:52] Fair enough. Fair enough.

21 MR KNOOPS: [9:39:52] I'm lead counsel for Mr Blé Goudé, Alexander Knoops.
22 Thank you.

23 PRESIDING JUDGE EBOE-OSUJI: [9:39:57] Thank you.

24 And the record will reflect that both Mr Gbagbo and Mr Blé Goudé are in the
25 courtroom.

1 Next we take appearances from the Office of Public Counsel for Victims.

2 MS MASSIDDA: [9:40:09] Good morning, Mr President, your Honours. Victims
3 participating in this proceeding are represented by counsel from the Office of Public
4 Counsel for Victims. In attendance this morning, next to me Ms Peña Ana, case
5 manager. And I am Paolina Massidda, principal counsel.

6 PRESIDING JUDGE EBOE-OSUJI: [9:40:28] Thank you very much.

7 And lastly we take appearances from counsel for the government of Côte d'Ivoire.

8 MR BENOIT: [9:40:41](Interpretation) Good morning, Mr President, your Honours.

9 The government of Côte d'Ivoire is represented at this hearing by Mr Mignard,
10 Mr Blard, a member of the Paris Bar, and myself, also a member of the Paris Bar.
11 Mamadou Kone, and Abdoulaye Meite, who is a member of the Abidjan Bar. I thank
12 you, Mr President.

13 PRESIDING JUDGE EBOE-OSUJI: [9:41:07] Thank you very much.

14 We also take appearances from the office of the Registrar.

15 MR DUBUISSON: [9:41:16](Interpretation) Thank you, Mr President, your Honours.

16 With me representing the Registry, Jamila Zoubir, and Romina Morello, who is an
17 adviser dealing with external relations and cooperation. As for myself, I am
18 Marc Dubuisson, the Director of the Division of Judicial Services representing the
19 Registrar Mr Peter Lewis.

20 PRESIDING JUDGE EBOE-OSUJI: [9:41:47] Thank you very much.

21 We have taken appearances from everyone. Thank you.

22 The Appeals Chamber is convened to hear oral submissions in the application of
23 Mr Gbagbo dated 7 October 2019 requesting the Appeals Chamber to reconsider an
24 earlier decision, which hereafter I will refer to as "Request for Reconsideration".

25 I will now summarise the background to the proceedings of today.

1 By a majority judgment announced on 15 January 2019, the Trial Chamber acquitted
2 Mr Gbagbo and Mr Blé Goudé of all charges against them in the present case.
3 Judge Herrera-Carbuccia dissented.

4 The next day, on 16 January 2019, the Prosecutor made an application to the Trial
5 Chamber requesting that Mr Gbagbo and Mr Blé Goudé should not enjoy the benefit
6 of absolute freedom that usually accompanies an acquittal. Instead, they should
7 only be released subject to conditions to a State willing to accept them on its territory
8 with such conditions.

9 But in the event that no such State may be found, the Prosecutor requested that
10 Mr Gbagbo and Mr Blé Goudé should be kept in detention pending the outcome of
11 the appeal that the Prosecutor intended to file against the acquittal. The Trial
12 Chamber by majority rejected that application. Again, Judge Herrera-Carbuccia
13 dissented.

14 On 23 January 2019, the Prosecutor appealed against the Trial Chamber's decision
15 rejecting her request for conditional release of Mr Gbagbo and Mr Blé Goudé.

16 On 1 February 2019, the Appeals Chamber heard oral submissions from the parties
17 and participants in that appeal.

18 On the same day, the Appeals Chamber issued its decision on the Prosecutor's appeal
19 on that matter. In the decision the Trial Chamber did the following, amongst other
20 things:

- 21 (a) the Appeals Chamber amended the Trial Chamber's decision and imposed
22 conditions on Mr Gbagbo and Mr Blé Goudé upon their release to a State willing to
23 accept them on its territory and willing and able to enforce such conditions;
24 (b) the Appeals Chamber directed the Registrar to identify and enter into
25 arrangements with a State willing to accept Mr Gbagbo, Mr Blé Goudé or both of

1 them on their territory and enforce the conditions; and

2 (c) the Appeals Chamber indicated that it may vary the conditions of release in the
3 future on the motion of the Appeals Chamber itself or on the motion of a party or
4 participant.

5 On 7 October 2019, Mr Gbagbo filed his Request for Reconsideration of the
6 Appeals Chamber's decision -- of the decision of 1 February 2019.

7 Responses to Mr Gbagbo's Request for Reconsideration were received on 16 and
8 17 October 2019.

9 On 20 December 2019, the Appeals Chamber scheduled a hearing in this matter to be
10 held on 6 and potentially also 7 February 2020.

11 With leave of the Appeals Chamber, on 22 January 2020, the Government of
12 Côte d'Ivoire filed observations in relation to Mr Gbagbo's request for
13 reconsideration.

14 On 30 January 2020, the Appeals Chamber issued a decision on the conduct of the
15 hearing including questions to guide the submissions of the parties and participants,
16 as well as the order in which they are invited to address the Appeals Chamber.

17 That is the summary of the background to the proceedings of today.

18 Turning now to the conduct of these proceedings, it is recalled that in the decision on
19 the conduct of hearing, the Appeals Chamber indicated both the order and the time
20 allocated to the parties and participants to dress the Appeals Chamber. The
21 proceedings will thus be conducted in accordance with that schedule.

22 Before we begin with hearing from counsel, I would like to direct the parties and
23 participants on a few modalities with respect to the hearing. In addressing the issues,
24 the participants should be guided by the questions set out in the decision on the
25 conduct of the hearing. They are free to speak to those questions in the manner that

1 is most convenient to them.

2 May I also remind counsel that they are expected to complete their submissions
3 within the indicated time frame. The court officer will be monitoring the time and
4 will indicate to the party or participant five minutes before the end of the time, that
5 the time is about to end.

6 The time allocated is based on three Court sessions with time for questions from the
7 Bench, which may come at any time.

8 Without further ado, I now recite the questions that the parties have been given to
9 keep in mind.

10 One, in what circumstances may the Appeals Chamber reconsider its judgment taken
11 pursuant to Rule 158 of the Rules of Procedure and Evidence?

12 (b) If the Appeals Chamber may reconsider its judgments taken pursuant to Rule 158,
13 what is the applicable standard?

14 Beyond the question of reconsideration, are there any other reasons for the Appeals
15 Chamber to review and revoke the conditions of release set out in its decision of
16 1 February 2019?

17 (d) Does the relief sought by the Prosecutor in her appeal brief in the main appeal
18 against the acquittal of Mr Gbagbo and Mr Blé Goudé, namely, the declaration of a
19 mistrial, have any bearing on the necessity of the continued imposition of the
20 conditions of release set out in the judgment?

21 Those are, in brief, the questions the parties are to turn their minds to in addressing
22 us.

23 Now I would invite submissions from counsel.

24 Counsel for Mr Gbagbo will go first and you have 30 minutes.

25 MR ALTIT: [9:50:29](Interpretation) Thank you, Mr President.

1 Mr President, your Honours, Professor Jacobs will address the Chamber on these
2 issues.

3 MR JACOBS: [9:50:56](Interpretation) Mr President, your Honours, in response to
4 your first question concerning the circumstances in which an Appeals Chamber may
5 reconsider a judgment taken on the basis of Rule 158 of the Rules of Procedure and
6 Evidence, the Defence's position is as follows:

7 First of all, the issue of reconsideration as such, we looked at reconsideration and
8 review and we thought that reconsideration was necessary. And why did we come
9 to this decision? Because reconsideration relates to the rationale for the decision for
10 which we are asking a fresh review, in this case, the decision of 1 February 2019,
11 whereas review has to do with modalities of the decision, not the rationale for a
12 decision.

13 Now, it is the rationale for the restrictions placed upon the freedom of Laurent
14 Gbagbo, that is what we discussed in our application of 7 October 2019.

15 Indeed --

16 PRESIDING JUDGE EBOE-OSUJI: [9:52:42] Counsel, do you have an authority for
17 that definition of distinction between reconsideration and review? Is there a legal
18 authority that you can refer to us that should guide that understanding?

19 MR JACOBS: [9:52:59] (Interpretation) Thank you, Mr President. It appears to us
20 that it's the very logic of the two operations that lead one to make this distinction.

21 *Insofar as review allows one to ask a Chamber again to look at certain conditions in
22 light of changes in circumstances, whereas a reconsideration allows us to ask a
23 Chamber to review the very substance, the very grounds for a decision. For example,
24 to avoid an injustice on the basis of erroneous reasoning or a lack of factual
25 foundation.

1 The Defence is thus of the view that in principle no restrictions can be placed on the
2 freedom of a person who has been acquitted. This person should be able to enjoy all
3 his rights, including his civil and political rights. This principle is recognised by all
4 international courts and tribunals that safeguard human rights.

5 For example, the European Court of Human Rights in the Labita decision of the year
6 2000 was of the view, and I quote from paragraph 171 of that decision:

7 Detention "[...] for the purposes of Article 5 § 1 (c) [...] ceases to be justified 'on the day
8 on which the charge is determined' [...] and that, consequently, detention after
9 acquittal is no longer covered by that provision ..." End of quote.

10 In this regard, the Defence notes that the *2004 Assanidze ruling from the European
11 Court of Human Rights was much the same, contrary to what the Legal

12 *Representative of Victims would have us believe, as she set out in her response of
13 16 October 2019 to the Defence application *.

14 In actual fact, the representatives -- the Legal Representatives of Victims stated that
15 the existence of a judicial decision was sufficient for restriction of the freedom of an
16 acquitted person and she was of the view that was lawful. I refer you to paragraph
17 37 of filing 1278, a filing from the Legal Representative of Victims.

18 PRESIDING JUDGE EBOE-OSUJI: [9:56:08] (Overlapping speakers) but Mr Gbagbo
19 is not in detention. Is there a difference?

20 MR JACOBS: [9:56:35](Interpretation) Mr President, we are of the view that --

21 PRESIDING JUDGE EBOE-OSUJI: [9:56:50] Okay, I was told that I had not activated
22 my microphone. Thank you, Colleague.

23 My question was this: That the detention -- the authority you cited from the
24 European Court of Human Rights was focused on detention of an acquitted person,
25 but my question is that Mr Gbagbo is not in detention. So does that authority apply,

1 does it guide our discussion now?

2 MR JACOBS: [9:57:27] (Interpretation) Thank you, Mr President. We are of the
3 view that the jurisprudence of the ECHR can apply to any restriction upon the liberty
4 of a person who has been acquitted. And the principle is clear: An acquitted
5 person is immediately released, unless there are any reasons*, for example, relating to
6 other cases under way or ... this is what the jurisprudence says. But essentially once a
7 person has been acquitted, there is no legal foundation to place restrictions on this
8 person's freedom, ranging from detention to conditions for release. This is our
9 understanding of the jurisprudence, Mr President.

10 PRESIDING JUDGE EBOE-OSUJI: [9:58:13] Does that scenario take its bearing from
11 the essential circumstance that in a national jurisdiction when an accused person is
12 acquitted, in a national jurisdiction, and there is an appeal against that acquittal, if
13 that appeal succeeds, it's just a matter of the police attending and rearresting that
14 person for purposes of any further trial, so in a national jurisdiction that would not
15 pose a serious problem as such.

16 But on the ICC, there is that disability that the Court does not have the facility of
17 going and having somebody rearrested so easily if there's a need to continue a trial.
18 Does that scenario make a difference? If not, why not?

19 MR JACOBS: [9:59:50] (Interpretation) Thank you, Mr President. Well, there are
20 two things at hand. First of all, we are of the view that respect for fundamental
21 rights is an absolute principle and the principle should not be infringed upon for
22 pragmatic reasons. * International criminal justice is supposed to be an example in
23 this area and thus a pragmatic matter of the difference between domestic courts in
24 relation to what you were saying, we are of the view that it is not relevant and it does
25 not allow one to disregard fundamental rights. First point.

1 Secondly, in relation to your remarks just now, I will come to that point in a few
2 moments, but there is a difference here. In these proceedings, the Prosecutor is
3 asking for a mistrial. In other words, even if her appeal is successful --

4 PRESIDING JUDGE EBOE-OSUJI: [10:01:01] (Overlapping speakers) But that's a
5 different consideration. If you want to base an argument on that, there is a separate
6 argument segment. But you just said that the distinction doesn't matter, you say.
7 Simply you're saying it doesn't matter. And the premise of that argument is because
8 you say the respect for human rights is an absolute principle.

9 Is it an absolute principle? Does the European Convention on Human Rights and
10 does the International Covenant on Civil and Political Rights say that human rights
11 are fundamental, absolutely so? There is never a scenario where some exceptions
12 may be made; is that what you're saying?

13 * MR JACOBS: [10:01:52] (Interpretation) Well, possibilities do exist in human rights
14 treaties, possibilities to derogate from certain rights. We are not going to enter into
15 that discussion today. Some rights do not allow (Overlapping speakers)

16 PRESIDING JUDGE EBOE-OSUJI: [10:02:18] But that's exactly where we are. We
17 want to see the limits to which some of these liberties could be modulated, offset by
18 other considerations, other considerations others may think are also valid
19 considerations. And you're saying we're not going to go there, but that is exactly
20 where we are.

21 MR JACOBS: [10:02:39](Interpretation) To answer simply, the answer is no. *There
22 are no pragmatic considerations that would justify a derogation from a human right
23 that is recognized ... the right to freedom is recognised as a right that allows for no
24 exception. Pragmatic difficulties in international justice do not justify any
25 derogation from a fundamental human right.

1 With your leave, I would remind you that the Supreme Court of Kosovo --

2 PRESIDING JUDGE EBOE-OSUJI: [10:03:16] Now, of course, I do not know whether
3 there has been misinterpretation. I did not say pragmatic considerations. I said
4 other considerations.

5 MR JACOBS: [10:03:26](Interpretation) Yes, thank you.

6 It was me who used the word "pragmatic" because you raised what I thought was a
7 pragmatic matter, namely * rearresting a person as opposed to a problem of principle.

8 As I was saying, the Supreme Court of Kosovo itself in relation to the Special

9 Chambers for Kosovo, an international hybrid tribunal, said on the 17th -- correction,

10 * on 26 April last, refused to adopt an identical provision, identical to Article 81(3)(c)(i)

11 of the Rome Statute, saying that that provision was contrary to the constitution of

12 Kosovo and, secondly, to international human rights jurisprudence. So it was an

13 international tribunal that was of the view that even in the circumstances you set out,

14 it is not possible to restrict the freedom of an acquitted person.

15 JUDGE MORRISON: [10:04:37] Professor Jacobs, is there any difference in principle

16 between an acquitted person who has gone through a judicial or legal proceedings

17 and a person who is accused of an offence but is nevertheless to be regarded as

18 innocent under the presumption of innocence?

19 MR JACOBS: [10:05:05](Interpretation) As you know, on an ongoing basis we have

20 asked for the release of Mr Gbagbo throughout the course of the trial to respect the

21 principle of presumption of innocence and his right to freedom, a very principle that

22 we upheld even during the trial. That is our starting point. This right continues

23 even during a trial.

24 We have now come to a later stage in the proceedings.

25 JUDGE MORRISON: [10:05:46] Dealing with it as a matter of principle, Professor,

1 the reality is that in many cases where somebody is awaiting trial and is presumed
2 innocent until that trial has been completed according to due process, there are
3 restrictions often placed upon a person's liberty. For instance, they may be required
4 to surrender their passport to the police or to regularly attend at a police station in
5 order that they should not flee the jurisdiction.

6 Now, that's commonplace as conditions of bail pending a trial and yet that person is
7 to be regarded as innocent under the presumption of innocence.

8 MR JACOBS: [10:06:30](Interpretation) Thank you, your Honour.

9 Indeed those circumstances do exist and I think it's important to realise that those
10 measures can be imposed only if there is an identifiable material risk * that has been
11 demonstrated to change the rule , that is to say, freedom even during the trial.

12 And once again, acquittal changes the situation radically. To our mind the situation
13 is radically different and this is what we find in human rights * jurisprudence, which
14 tells us that once a person has been acquitted there are no legal grounds in the
15 Convention for imposing restrictions upon freedom. That is not the case during the
16 actual trial.

17 PRESIDING JUDGE EBOE-OSUJI: [10:07:29] Is public order a ground for
18 modulation of human rights?

19 MR JACOBS: [10:07:47](Interpretation) Yes, the convention does allow for a number
20 of exceptions for the protection of the public order, but once again those exceptions
21 must be demonstrated and the risks must be demonstrated, *they must be true risks
22 based on objective and identifiable *facts. It can't be some vague risk of a threat to the
23 public order. There has to be a concrete material risk that would * justify imposing
24 the restriction of freedom. It can't be a general waiver.

25 PRESIDING JUDGE EBOE-OSUJI: [10:08:22] I doubt that many people will disagree

1 with that proposition that it cannot be based on vague -- that modulation of human
2 rights, obstruction to human rights cannot be based on vague suppositions. I think
3 many would agree with you. So then it boils down ultimately to a matter of
4 demonstration of reason for the exception, isn't it? And if it boils to that, what does
5 it do to your original premise that human rights as an absolute principle cannot be
6 derogated from?

7 MR JACOBS: [10:09:04](Interpretation) Mr President, the fact that there may be
8 derogations to certain rights, that does not apply to all rights or -- and our position is
9 clear. The right of an acquitted person to freedom is not -- cannot be derogated from,
10 no matter what the circumstances.

11 PRESIDING JUDGE EBOE-OSUJI: [10:09:35] You may proceed.

12 MR JACOBS: [10:09:36](Interpretation) Thank you, Mr President.

13 Briefly, I will speak to reconsideration at the ICC and the ongoing jurisprudence
14 which says that reconsideration is possible if a clear error of reasoning has been
15 shown or in order to prevent an injustice.

16 And for example, I can quote the decision handed down by the Presidency in the
17 Katanga case, * Decision 3833 of 26 June 2019, paragraph 25. This Court has also set
18 out that a Chamber can reconsider its own decisions under circumstances where the
19 decision is manifestly ill-founded and the consequences are manifestly unsatisfactory.
20 And I refer you to the Lubanga case and this is * decision 2505, 30 March 2011,
21 paragraph 18. * This jurisprudence was based directly on jurisprudence from the ad
22 hoc tribunals and other international courts. For example, the Rules of Procedure and
23 Evidence at the STL state,* article 140, that it is possible to have a reconsideration if,
24 and I quote,
25 "if necessary to avoid injustice".

1 So we can clearly see the main thread that runs through the jurisprudence.

2 Reconsideration is allowed to prevent an injustice. In this case, an extended
3 violation of the rights of a person who has been acquitted and drastic restrictions on
4 his freedom to come and go, his freedom of expression, his freedom to exercise his
5 civic rights.

6 I think it's also important to note that this violation of the rights is not frozen in time.

7 This violation becomes worse and worse as time goes on because temporary
8 violations of the rights of the acquitted person become the long-lasting removal of the
9 person's rights. The acquitted person is stripped of his rights, stripped of his most
10 essential rights as time goes on, his rights as a citizen and his rights as a man.

11 Another element to take into consideration is the procedural context. Indeed, the
12 Prosecution's appeal has considerably extended the period of time during which
13 Laurent Gbagbo has been deprived of his rights. This extension of time is such that
14 reconsideration is now required, that is to say, the situation must be considered in
15 light of this new development.

16 The Prosecution's notice of appeal of 16 September 2019 are --

17 PRESIDING JUDGE EBOE-OSUJI: [10:13:34] Counsel, one second, please. The
18 reason I ended up intervening, I want to separate two things. You move from one
19 thing to the other now, so first let's consider the first matter. You're now talking
20 about the extended period which you say necessitates reconsideration, so that's a
21 separate proposition. But dealing with your original premise as to clear error, that's
22 what I want to get at now, you said the jurisprudence authorises reconsideration
23 where the original decision was based on clear error. That's what I want you to
24 address us now. And the argument to make in that regard as to clear error, are these
25 new arguments? Were they not made in the original debate on whether or not to

1 grant the conditional release? The argument that to grant conditional release would
2 be limitation of freedom and thus should not be. That was argued before, wasn't it
3 the case? If that was argued before and the Appeals Chamber nevertheless proceeded,
4 can we say that there is a clear error that warrants reconsideration, or are you just
5 rearguing against the judgment of the Appeals Chamber afresh?

6 MR JACOBS: [10:15:18](Interpretation) Thank you, Mr President.

7 Indeed we expressed that principle in * the hearing of 1st February 2019. * All the
8 same, the issue of a clear error in reasoning was not part of our submissions at the
9 time. Rather, it was part of the reasoning of your Appeals Chamber in your decision
10 of 1st February 2019. And until we can take -- until we can review that decision we
11 cannot know in which way * you argued that issue, the legal foundation that you
12 adopted. For example, on 7 October 2019 we made an application and we could
13 have explained why we believe that the articles of the Rome Statute or the Rules
14 found in the Rules of Procedure and Evidence that you quoted in your decision did
15 not allow one to justify the restriction on the freedom of an acquitted person. *We
16 were not aware of the grounds that you based yourselves on during the discussion
17 preceding the judgment. * So the fact that our position of principle has not varied, has
18 not changed, does not mean that we cannot raise specific issues that arise from your
19 decision itself in terms of reasoning, or errors of law or of fact, in our view. And that
20 should not prohibit reconsideration, since, by definition, the parties make
21 submissions before the Chambers before any decision. If that fact were to prohibit any
22 reconsideration, there could never be any reconsideration.

23 JUDGE MORRISON: [10:17:03] Professor Jacobs, I have to be slightly cautious.

24 You've quoted the jurisprudence of the Special Tribunal for Lebanon, the rules of
25 evidence and procedure, and the reason I have to be slightly cautious is that I assisted

1 in the drafting of that when I was a judge in that court many years back. And I'm
2 trying to, I'm trying to recall the parameters of the expression "to avoid injustice".
3 What you're saying is that something which might not have been so readily apparent
4 as an actionable injustice at a point in time nevertheless might grow and mature into
5 an active injustice as a result of what happens or what doesn't happen through the
6 passage of time. Is that a basic but fair --

7 PRESIDING JUDGE EBOE-OSUJI: [10:18:06] Understanding.

8 JUDGE MORRISON: [10:18:07] Yes.

9 MR JACOBS: [10:18:07](Interpretation) Your Honour, yes, that is our position.

10 Once -- if we begin with the initial injustice, namely the restriction on the freedom of
11 the person, with time the violation or the -- this violation of freedom becomes worse
12 and is more founded. This as an argument, in addition to other arguments, allows
13 one to justify reconsideration.

14 I shall continue. Just to save some time I'll move on to standard, namely, our
15 response to your second question.

16 I think we've partially responded already because in the circumstances where
17 reconsideration is possible, each circumstance includes its own standard, in a manner
18 of speaking. So if it is a matter of preventing an injustice, the applicable standard
19 depends on the demonstration of the injustice. If it is a matter of demonstrating an
20 error in reasoning to show that a decision is ill-founded, the jurisprudence requires
21 the errors to be shown manifestly.

22 I won't hark back to the details of our 7 October application, but we believe that in
23 that application we demonstrated that, as I just said, from a legal point of view there
24 was manifestly a lack of grounds. And I would add from a factual point of view, we
25 were of the view that the Appeals Chamber in its decision of 1 February 2019 only

1 referred back to earlier decisions taken by * the Trial Chamber to allege the risk of
2 flight, without themselves assessing this risk, without any true material information
3 that could underpin that allegation. So there was no factual foundation.
4 Above all, we stress that your Chamber in the decision of 1 February 2019 decided to
5 trust the Judges of the Trial Chamber by referring back to their earlier decisions * of
6 2017 and 2018. And so they rely -- rather, you relied upon the decisions they took to
7 keep Mr Gbagbo in detention, but then when the time came to trust the Trial
8 Chamber, when that Trial Chamber decided * on 15 and 16 January 2019, that there
9 would be an immediate unconditional release, there was no trust. * Whereas it was
10 the same Chamber that the Appeals Chamber trusted for the 2017 and 2018 decisions.
11 To our mind, the legal and factual errors that we have identified are manifest and
12 lead to an injustice and the injustice is such that * --- this is the perspective from which
13 we must view this drastic violation of an acquitted person's fundamental rights..
14 Now I will move on to question 3 -- question (c). Even if the Appeals Chamber were
15 to decide that its decision was well-founded and principled, all the same, we are of
16 the view that a review must be conducted. A review, a review as you yourself
17 provided for in paragraph 4 of the disposition of your decision of 1 February 2019.
18 * As for the framework for this review, by analogy with proceedings to review
19 detention during the course of the trial, during which the burden of proof lies with
20 the Prosecution, and as Judge Morrison has stated, on account of the presumption of
21 innocence, it follows logically that it is up to the Prosecution, which is opposed to the
22 lifting of conditions, and possibly the Appeals Chamber -- if the Appeals Chamber
23 decides to maintain the conditions, to demonstrate that the violations of the rights are
24 justified today in the current context, for diriment reasons. Briefly, three reasons why
25 a review is necessary:

1 First of all, as we said earlier, the Prosecutor's appeal --

2 THE COURT OFFICER: [10:23:49] Counsel, you have five minutes left.

3 MR JACOBS: [10:23:53](Interpretation) Thank you.

4 First of all, as we said earlier, the Prosecutor's appeal is a new development, a new
5 fact, because with this appeal the violations of Mr Gbagbo's rights are growing worse
6 and worse as time goes on.

7 Secondly, the Appeals Chamber needs to explain exactly on what factual basis you
8 rely upon to place these restrictions on the freedom of Mr Gbagbo today. And as we
9 have said earlier, it is not enough to refer to older rulings that date back three years.
10 To our mind, unless there is an updated relevant item of information brought before
11 the Chamber, since the Prosecution in their response of 18 October 2019 provided no
12 concrete or new information justifying a restriction of freedom, the only logical
13 outcome is to lift all conditions placed upon Mr Gbagbo's freedom.

14 Third, one word about the Prosecutor's decision to ask your Chamber to make a
15 declaration of a mistrial, and this leads me to your last question, your Honours.

16 PRESIDING JUDGE EBOE-OSUJI: [10:25:43] Would it be fair then to say, perhaps,
17 that - it's a question - the facility of review rather than reconsideration on grounds of
18 clear error, the facility of review might be the better way of dealing with a scenario
19 where an original decision that may have seemed right at the time, but over time then
20 the passage of time may have shown to perhaps be inapposite? That's one way to
21 deal with the matter, through the facility of review, would that be one way to look at
22 this?

23 MR JACOBS: [10:26:41](Interpretation) Absolutely, Mr President. We are of the
24 view that if you take it from the perspective of a review, it is quite possible for your
25 Chamber to review the conditions that * you decided upon on 1st February 2019. * It

1 is a legal avenue available to your Chamber and justified here. Yes, indeed.

2 Thus regarding the mistrial, in our view this application from the Prosecution

3 changes things considerably because currently, with the current state of play, there

4 are two possibilities. Either your Chamber does not grant the Prosecutor's

5 application and the trial comes to an end and Laurent Gbagbo's fundamental human

6 rights will have been violated for nothing. Or your Chamber grants the Prosecutor's

7 request for a mistrial and then the proceedings merely end, because at this stage the

8 Prosecution is not asking for a referral to the Trial Chamber or a new trial. And in

9 that particular scenario, once again Laurent Gbagbo's fundamental rights will have

10 been violated for nothing.

11 Furthermore, in the response from the Prosecutor on 17 October 2019 * they said that

12 their request for a declaration of a mistrial would change nothing in terms of

13 imposing conditions. But that is hard to understand, because if the Prosecutor herself

14 is not -- well, if she does not ask for the trial to continue after * the appeal,

15 what -- why would Mr Gbagbo's rights be restricted -- why were they restricted

16 during the trial -- correction, what would justify restrictions on Laurent Gbagbo's

17 freedom during the appeal?

18 Thus, any question of an alleged flight risk is not applicable under these

19 circumstances because at the current stage of the proceedings the trial shall come to

20 an end. In other words, Laurent Gbagbo has nothing to flee from.

21 To conclude, we are of the view that no matter what perspective you take, whether

22 you opt for a review or a reconsideration, the circumstances are such that it is fitting

23 to entirely lift the restrictions placed upon the freedom of Laurent Gbagbo's freedom

24 so that he may regain each and every one of his fundamental rights.

25 Thank you, Mr President.

1 PRESIDING JUDGE EBOE-OSUJI: [10:29:22] Thank you very much, Counsel.
2 We will now hear from counsel for Mr Blé Goudé. You have 30 minutes.
3 We are in open session, just so you know.
4 MR KNOOPS: [10:29:47] Thank you, Mr President.
5 Mr President, your Honours, good morning.
6 We will address the first and second question together from a purely theoretical
7 perspective, particularly in light of the fact that the Court's statutory framework
8 provides little to no guidance as to the circumstances for reconsideration of appellate
9 decisions.
10 Of course, needless to say, that the framework does not exclude the inherent powers
11 of the Appeals Chamber to reconsider its decisions to prevent an injustice, leaving
12 apart now the question whether there was an injustice or not. We are answering
13 these questions from a theoretical perspective for now, Mr President.
14 It's our view that principles of reconsideration of ICC Trial Chamber decisions could
15 also apply to the Appeals Chamber. Practice before the ad hoc tribunals, where
16 reconsideration of Appeals Chamber decisions is commonplace, may provide your
17 Chamber with additional guidance as to which tests could be applied.
18 Let us first see what the jurisprudence, briefly, dictates when it concerns the ICC itself,
19 after which I will delve briefly into the jurisprudence of the ad hoc tribunals on
20 reconsideration of appellate decisions.
21 First, speaking about the ICC precedents with the decision of 1 October 2019 - that's
22 our exhibit 1 in our table of authorities -- Prosecutor versus Ntaganda, where the
23 Appeals Chamber ruled on a request of the Defence for reconsideration of one of its
24 decisions which related to the ordering of an extension of time and page limit.
25 Although the Appeals Chamber did not, as itself admitted, take the opportunity to

1 articulate the circumstances in which reconsideration might be ordered, it nonetheless
2 granted the request in part.

3 And interesting, Mr President, the test which was applied and put forward by the
4 Defence was previously formulated by Trial Chamber IV on 23 September 2019,
5 according to which the Trial Chamber has the inherent power to reconsider previous
6 decisions to prevent an injustice, paragraph 4.

7 Again, I'm not going to the question yet whether this phenomenon occurs, whether in
8 this situation there was an injustice. We're just addressing the topic from a
9 theoretical perspective for now.

10 You see, therefore, Mr President, the Appeals Chamber exercised in that case its
11 inherent discretion to vary its previous decisions on an exceptional basis and took
12 into account whether the Defence had shown that reconsideration would prevent an
13 injustice. Paragraphs 6 and 8 of its decision.

14 The Appeals Chamber rejected the request in part, as mentioned, where it considered
15 that the Ntaganda Defence merely attempted to reargue points which were already
16 made.

17 What does this recent ICC Appeals Chamber decision in the case of Mr Ntaganda tell
18 us, Mr President, your Honours?

19 First, it's within the inherent discretion of the Appeals Chamber to reconsider its own
20 decisions in accordance with Rule 158; that's our first submission. Second, it may do
21 so to prevent an injustice. Three, parties may not use reconsideration as a way to
22 relitigate points already made. And fourth, reconsideration might be ordered on an
23 exceptional basis. So this is my first point, the standard derived from ICC case law.
24 Now let's briefly look into the Appeals Chamber decision and why it could apply the
25 principles applied by Trial Chamber decisions to reconsider its own decisions as it did

1 in the Ntaganda case.

2 For instance, as a precedent in the Ruto and Sang case - that's authority number 3 on
3 our list of authorities - the Chamber held that reconsideration was not an alien
4 concept at the Court and had been occasionally granted, such as in the Kenyatta case.
5 That's authority number 2 of our list of authorities.

6 The Trial Chamber endorsed as justification for reconsideration where, I quote, it was
7 "[...] necessary to better serve the cause of justice, if the question of law is still with the
8 Chamber and there is merit to the urge for the adjustment."

9 It seems to me, Mr President, that this is more an extensive interpretation of the
10 criterion to prevent an injustice.

11 But as held by you, Mr President, in that same case, the Trial Chamber - I quote from
12 your own opinion, the opinion at the Ruto and Sang decision, paragraph 87, quote,
13 should be better -- should not -- "[...] should be neither shy nor afraid to take another
14 look at a question of law that the Chamber had earlier passed upon [...]" Unquote.
15 And therefore it could adjust and refine a previous decision.

16 Mr President, you had further observed in that same opinion that, I quote, "[...] it is
17 not beyond the realms of possibility that the Chamber did not get it fully right on the
18 first occasion." End quote. And "[...] that suppositions of judicial infallibility are
19 never borne out by the corrective facilities of reconsiderations, reviews and appeals."
20 Paragraph 136 of your opinion.

21 Therefore, we submit, Mr President, your Honours, that these same principles could
22 apply to Appeals Chamber decisions and that it is precisely this reasoning which is
23 implicit in the Appeals Chamber decision in Ntaganda when it partially granted the
24 Defence request for reconsideration.

25 Finally, Mr President, touching upon the questions (a) and (b), if the Chamber would

1 delve into the standard applied by the ad hoc tribunals, you might find further
2 guidance.

3 There's ample case law. We have identified six precedents. We will mention now
4 specifically three of ICTY and ICTR Appeals Chamber decisions which have
5 constantly relied on its inherent power to reconsider its own decisions in indeed
6 exceptional circumstances.

7 We mention three. First, Prosecution versus Stanislav Galić, our authority number 4
8 list, 16 July 2004, where the Appeals Chamber articulated a disjunctive test, either a
9 clear error of reasoning in the decision or the particular circumstances justify
10 reconsideration to avoid injustice.

11 Now here, I would take the liberty to answer the question of the Bench addressed to
12 Professor Jacobs, if you don't mind.

13 The first question was from Judge, honourable Judge Morrison. Is there a difference
14 between an acquittal on the one hand and a person who's charged but not yet tried
15 and is presumed innocent?

16 Yes, we believe there is a difference. The person who is acquitted in that scenario,
17 the charges are non-existent. The charges are non-existent. And therefore, the
18 approach as to conditional release should be referent.

19 In the scenario where a defendant is charged but presumed innocent, he is still
20 subjected to charges and therefore conditions to safeguard the investigation or
21 judicial process might be justified. But in the scenario where a defendant is
22 acquitted, in most jurisdictions and also here, the charges are no longer existent and
23 that's why in this scenario, the approach of this disjunctive test should be also put in
24 the context of the acquittal as opposed to the person charged but not yet tried.

25 And secondly, the question whether the expiration of time could be a reason to say

1 that the second prong of this disjunctive test has been met, namely to avoid injustice.
2 The European Court of Justice in many cases, like the first one in 1991, Letellier versus
3 France, for the first time ruled that when time progresses, the grounds for conditional
4 release or even provisional custody might attenuate. Therefore, for the European
5 Court, that's a reason to sometimes say when a defendant is arrested because the
6 public order has been infringed, when time passes over, that public order might
7 perceive a certain crime different, and that might be a reason to lift provisional
8 custody.

9 Therefore, the expiration of time or the progression of time in itself might be an
10 argument for reconsideration. This is just an observation from the bench of -- from
11 the bar of Mr Blé Goudé.

12 Speaking about the case law of the ICTY --

13 PRESIDING JUDGE EBOE-OSUJI: [10:41:35] Before you proceed, Counsel, before
14 you proceed, you tried, and we are very grateful for your assistance in trying to
15 answer questions from the Bench asked of other counsel, we welcome that very much.
16 But in the process, you engaged a question from the Bench as to what is the
17 distinction between the scenario where somebody who is standing trial and
18 presumed innocent, what is the distinction between that and someone who has been
19 acquitted and then given back full presumption of innocence, so to speak. You
20 answered to that saying there is a sharp distinction. Is it that clear? Is it that clear
21 in the circumstances of this case? For two reasons.

22 Ordinarily after an acquittal, if the Prosecution indicates or does launch an appeal
23 against that acquittal, does it give us that neat distinction that the charge doesn't exist
24 any more? Which is the basis of your answer that there is a distinction, an existence
25 of the charges. Can we really say that so confidently when there is an appeal of the

1 acquittal? That's one question, a general one in a general scenario.

2 But in the particular circumstances of this case, there is a further wrinkle possibly and
3 that wrinkle being this: The case was stopped halfway, the close of the case for the
4 Prosecution, and a no case to answer submission was made. The Trial Chamber
5 accepted the no case to answer submission. The Prosecutor appealed that judgment,
6 the natural effect of which would be, should the Prosecutor's appeal succeed, the trial
7 continues.

8 Given those two scenarios, are we able to say with confidence that there is that -- that
9 the distinction you drew really exists so clearly?

10 MR KNOOPS: [10:44:20] Thank you, Mr President. In my submission, there is no
11 distinction between an acquittal based on a no case to answer and an acquittal after
12 the Defence has presented its case. There is a clear determination of the evidence by
13 a Bench. A Bench has determined that the charges ought to be dismissed, are
14 therefore legally nonexistent --

15 PRESIDING JUDGE EBOE-OSUJI: [10:44:47] But it's an appeal of that decision.

16 MR KNOOPS: [10:44:50] It doesn't take away that in the scenario of an acquittal,
17 there is a determination of the charges being made, while in the scenario of a person
18 still charged, under investigation, but presumed innocent, the charges are still there.
19 They are not yet determined by judicial authorities and not determined as nonexistent
20 or existent.

21 In my submission, there is therefore no differentiation whether that determination has
22 been the result of a no case to answer or based on a full trial with the Defence
23 presentation, because ultimately the acquittal is based on the Prosecution evidence,
24 which is the core of the case. And therefore, doctrinally, there is a distinction
25 between conditions pertaining to a person charged but not yet tried and conditions to

1 a person who is already determined not guilty. Therefore the charges, again, for the
2 Judge, are dismissed, are nonexistent.

3 PRESIDING JUDGE EBOE-OSUJI: [10:45:59] So effectively you are saying that the
4 system needs to recognise the basic distinction in a scenario where somebody has
5 been acquitted, that is where somebody is still standing trial, that's what you're
6 saying.

7 But is it possible to recognise that perhaps that distinction might have been
8 accommodated - this is not a statement from me, I'm just asking you a question
9 now - in the sense that in the particular circumstances of this case, when they were in
10 trial, they were in detention fully. But after the judgment of the Trial Chamber, they
11 have been released from detention but placed on conditional release. Isn't that
12 recognising the basic distinction between one stream versus the other?

13 MR KNOOPS: [10:46:56] Well, this of course is the interpretation made by the
14 Appeals Chamber on 1 February 2019. But it's really the question whether, when in
15 culmination with the time which has progressed in this case, that could be an
16 argument for reconsideration. And I was just alluding to a very interesting question
17 of honourable Judge Morrison that, in my submission, legally, there is a
18 differentiation between the two concepts.

19 JUDGE MORRISON: [10:47:34] I mean, the real position is this, isn't it, the Crown or
20 the Prosecution, rather - I reverted to my own jurisdiction for a minute there - the
21 Prosecution has to approve its case by the time it closes its case. There's no
22 obligation on the Defence to call evidence or any evidence and it can simply rest at
23 that point and proceed to submissions that the Crown -- the Prosecution has not
24 proved its case. That's a plain and obvious principle and no doubt you would say
25 that that underscores the distinction between the two positions as well.

1 You add to that that, that apart, injustices can grow and there would be nothing
2 unusual in a court redetermining an issue after the fluxion of time if the argument
3 was that there had been consequences that were not foreseeable or foreseen at the
4 time that the original order was made.

5 This is really thinking aloud, but it's commonplace certainly in many jurisdiction that
6 where somebody has not been granted bail at all pending trial, that if the trial is for
7 any reason adjourned beyond a reasonable time, the defence is empowered to go back
8 to the court and use that as an argument for either altering the conditions of bail or
9 having an absolute bail, and that has happened on many occasions. And you would
10 say that the principle that underlies that is in effect, without having to give absolute
11 detail, a principle which is active in this case.

12 MR KNOOPS: [10:49:35] Yeah.

13 JUDGE MORRISON: Yes, okay.

14 MR KNOOPS: [10:49:37] Mr President, may I add, 1 February 2019 your Chamber
15 could not foresee, of course, the length of the appeals proceedings, so the fact that we
16 are now dealing with also the issue of time when the appeals proceedings could
17 ultimately conclude might also be a reason based on the case law of the European
18 Court for reconsideration, in combination with the distinction between the acquittal
19 and the situation whereby a defendant is still charged. That's my argument. It
20 reinforces the two elements together.

21 Mr President, in light of the time, I see --

22 PRESIDING JUDGE EBOE-OSUJI: [10:50:16] I know you have --

23 MR KNOOPS: [10:50:19] -- I just have seven minutes left --

24 PRESIDING JUDGE EBOE-OSUJI: [10:50:21] Fair enough. We will give you a few
25 more minutes because of questions.

1 There's one point you made, if you can help us with that I'd appreciate it very much.
2 You did say that among the reasons from which reconsideration may be granted -- or
3 rather, grounds, you said in exceptional circumstances that may also be done, that in
4 exceptional circumstances reconsideration may be done. Can you help us what you
5 mean by exceptional circumstances?

6 MR KNOOPS: [10:51:04] Well, exceptional circumstances is not an invention of
7 myself, of course. It's the presentation of the case law to the Chamber. It's for the
8 Chamber to determine whether exceptional circumstances exist. There's no
9 definition, I didn't find any definition in the case law what is exceptional
10 circumstances. It's really depending on the facts. It could of course include the, for
11 instance, unforeseeable situation that a trial, even an appeal trial takes longer than
12 perhaps at the time the conditions were set were foreseen, that might be exceptional
13 circumstance, but I cannot give you a clear definition.

14 PRESIDING JUDGE EBOE-OSUJI: [10:51:43] Fair enough, fair enough.

15 MR KNOOPS: [10:51:44] Mr President, to conclude the questions and (a) and (b) I
16 mentioned three cases of the ICTY. I mentioned Galić. I will skip it because of the
17 time. For this precedent I only mention two other examples, we mention in
18 exhibit -- in our table of authorities authority 5 and 6, the Prlić case and the Stanisic
19 and Zupljanin case where you also find the same test applied by the
20 chamber -- appeals chamber as compared with Galić.

21 Now we turn now to the question (d) and I'll close with question (c). Is there a
22 reason, now the Prosecution request for mistrial, is that a reason to reconsider the
23 decision of the Chamber of 1 February 2019?

24 Also here, Mr President, we as Defence team for Mr Blé Goudé will address this topic
25 purely from an international law perspective, purely from a theoretical perspective

1 without giving any normative conclusions.

2 Mistrial would mean, and you will find in our appeal brief in due course a more
3 extensive exposé of what is a mistrial under certain jurisdictions, but a mistrial
4 would -- could have the effect of rendering the first trial against Mr Charles
5 Blé Goudé null and void.

6 Therefore, it would imply that the proceedings are no longer to be considered
7 necessary under Article 81(3)(c)(i) of the Statute. That is for us the logical and legal
8 sound result stemming from the observation that proceedings are no longer necessary
9 and need to be safeguarded, assuming of course hypothetically that a mistrial would
10 occur in this case.

11 Now, the conditions on Mr Blé Goudé were imposed after the Appeals Chamber
12 found merit in the Prosecution assertion that there was a risk of Mr Blé Goudé to flee
13 the country after acquittal and not appearing for the Court such that the proceedings
14 against him might continue in the event the Appeals Chamber would reverse the
15 decision.

16 Conditions imposed by Mr -- on Mr Blé Goudé were found necessary by your
17 Chamber upon request of the OTP, therefore to safeguard the integrity of the
18 proceedings. Given that in the present case the Prosecution seeks for a mistrial and
19 no retrial, leaving apart the legal basis for it, that's for the appeal itself of course,
20 Article 81(3)(c)(i), the basis upon which your Chamber rendered a judgment on
21 1 February no longer applies. And this might also constitute I say a reason for
22 reconsideration. At the time your Honours rendered the decision of 1 February 2019,
23 you were not familiar with this relief the Prosecution is seeking for.

24 Now, the Chamber is confronted with a totally different relief than expected. That
25 might be, answering your question, exceptional circumstances, Mr President. This

1 might be an example of an exceptional circumstance which was not foreseen by the
2 Appeals Chamber, which was actually not expected, could not have been expected,
3 and therefore might justify the conclusion this is an exceptional circumstance for
4 reconsideration that the reasons to apply Article 81(3)(c)(i) therefore is no longer
5 applicable.

6 In conclusion from a purely doctrinal perspective, we submit that the announcement
7 of the Prosecution that does not wish to retry Mr Blé Goudé implies therefore already
8 the lifting of conditions pertaining to his release simply because that Article 83(1)(c)(i)
9 (sic) no longer applies, leaving apart, Mr President, I stress, the question whether
10 mistrial at this Court under the circumstances of the acquittal Mr Blé Goudé can
11 constitute a legal basis as a remedy in this case. That's something for the appeal, of
12 course. But for now, the Chamber is confronted with a new circumstance which was
13 not foreseeable on 1 February 2019.

14 Finally, Mr President, question number (c). The Defence of Mr Blé Goudé is in
15 somewhat a dilemma. Let us suppose that a Chamber would anticipate this
16 potential remedy, let us suppose, remedy the Prosecution is seeking for, let us
17 suppose that you, Chamber, are willing to contemplate this potential remedy in the
18 confines of this discussion today, preliminary discussion. Let us suppose that the
19 Chamber upon this anticipation is considering the lifting of the conditions of the two
20 accused -- of the two acquitted I have to say, sorry.

21 At this juncture for Mr Blé Goudé it is still important that the Court will impose
22 measures which will safeguard his right to participate at the appeals proceedings
23 without interference of the domestic authorities.

24 And why are we seeking and asking for this measure?

25 As the Court knows from our exhibits, document 8, for instance, of the list of exhibits,

1 the court of first instance in Abidjan convicted Mr Blé Goudé on 30 December 2019
2 *in absentia* for basically the same facts as he was prosecuted for before this Court.

3 He was convicted *in absentia* to 20 years imprisonment, 10 or years entry ban in
4 Côte d'Ivoire, 10 years limitation in participation of his civic life and a fine of
5 200 million FCFA, based on a hearing which took less than three and a half hours --

6 PRESIDING JUDGE EBOE-OSUJI: [10:59:03] Counsel, as I said earlier, we are in
7 public session and you made reference to some filings you have made. Please keep
8 that in mind.

9 MR KNOOPS: [10:59:19] I will not address the filings of the Defence. I'll address
10 just the exhibits.

11 PRESIDING JUDGE EBOE-OSUJI: [10:59:25] Fair enough. What I'm saying is --

12 MR KNOOPS: Yes, I understand.

13 PRESIDING JUDGE EBOE-OSUJI: -- just keep in mind that we are in public session.

14 MR KNOOPS: [10:59:28] Thank you, Mr President.

15 PRESIDING JUDGE EBOE-OSUJI: [10:59:30] While at it, one thing you can help us
16 clarify is whether now you are saying you are parting company with Gbagbo in the
17 submission you're on to right now. In other words, you're saying that you're not in
18 the same circumstance as Mr Gbagbo. Is that what you're making us understand?

19 MR KNOOPS: [10:59:57] No.

20 PRESIDING JUDGE EBOE-OSUJI: [10:59:57] Because when you say that you still
21 want some conditions to be imposed --

22 MR KNOOPS: [11:00:01] No, Mr President.

23 PRESIDING JUDGE EBOE-OSUJI: [11:00:03] -- to ensure that Mr Blé Goudé
24 comes -- Mr Gbagbo is saying lift all conditions.

25 MR KNOOPS: Yes.

1 PRESIDING JUDGE EBOE-OSUJI: [11:00:06] And you're saying -- what are we
2 telling us, so we know who is where. Thank you.

3 MR KNOOPS: [11:00:12] Exactly. That's really a good question. And that's the
4 dilemma. We are with the team of Mr Gbagbo when we say from a legal perspective,
5 and we have elaborated this extensively this morning, legally the conditions are to be
6 lifted. But even when conditions are lifted, the Court, in our view, has the responsibility
7 that the acquitted person, i.e., Mr Blé Goudé, is prevented from any external
8 interference from his home country which prevents him from participating at the
9 appeals proceedings. And that's the reason why we submitted the exhibits, to show
10 that he was subjected to a trial which was in contravention to international law and --

11 PRESIDING JUDGE EBOE-OSUJI: [11:01:05] But maybe you can address us on that
12 later on what specific --

13 MR KNOOPS: [11:01:08] Yes, yeah.

14 PRESIDING JUDGE EBOE-OSUJI: [11:01:08] -- measures you are saying need to be
15 imposed. If you are saying, yes, all conditions should be lifted so you are on the
16 same page as Mr Gbagbo, yet there are some measures you want put in place. So it
17 requires some sort of fine argument to let us know exactly what it is.

18 MR KNOOPS: [11:01:29] Diplomatic pleading. Diplomatic pleading I was saying,
19 Mr President.

20 PRESIDING JUDGE EBOE-OSUJI: [11:01:38] Diplomatic pleading you said.
21 All right. Fair enough.

22 MR KNOOPS: [11:01:39] I can address that later, Mr President. I can finish --

23 PRESIDING JUDGE EBOE-OSUJI: [11:01:43] You can return to that later.

24 MR KNOOPS: [11:01:44] Yes. To finish, Mr President, our submissions under
25 question (c), there are therefore also for the situation of Mr Blé Goudé special

1 circumstances which warrant the lifting of conditions, but at the same time the Court,
2 when it would lift conditions, could in its disposition, in its ruling stress the need that
3 Mr Blé Goudé is not at any moment subjected to interference from external
4 proceedings which interfere also with Article 20(2) of the Statute. You will see in our
5 exhibits that this proceeding *in absentia* where he was convicted in one hour 20 after
6 the *réquisitoire* of the prosecutor there convicted, that this trial, this conviction actually
7 went into the same facts, the same materials as being part of the case file here.
8 On top of this, there is evidence also shown at the trial in first instance there is also
9 prosecution witness that Mr Blé Goudé was subjected, before he arrived here,
10 subjected to an inhuman treatment by the authorities. All this is to say that if the
11 Court is to lift conditions because of the standard we suggested, because of the
12 presence of exceptional circumstances, i.e., the potential mistrial and the other
13 arguments, that we still seek the Court to render a ruling that Mr Blé Goudé is not to
14 be interfered by the authorities. And, Mr President, therefore it is of paramount
15 importance that this Court will stress the need that his presence in The Hague is
16 secured. That declaration itself, although we are not in an Article 20(2) proceeding,
17 in itself will be very important. We can announce, Mr President, that this Defence
18 team will proceed for an Article 20(2) application in due course because the evidence
19 before this Chamber, produced also by the Prosecution, and we submitted this
20 yesterday in our table of authorities and the Court can look in the documents 8 till 12.
21 Also the arrest warrant against Mr Blé Goudé issued on this conviction *in absentia*
22 relates to the same facts as being put by the Prosecution before this Court, and the
23 Ivorian government in March 2014 transferred Mr Blé Goudé for trial here. You
24 cannot eat the cake from two sides, Mr President. And therefore in light of also this
25 arrest warrant which is issued against him, document 12 on our exhibit list, we at the

1 closing of our submissions we seek therefore from the Chamber a declaration that
2 even if the conditions are to be lifted, that the national authorities are not to interfere
3 with Mr Blé Goudé's right to participate at this appeal. Thank you.

4 PRESIDING JUDGE EBOE-OSUJI: [11:05:20] Do we understand your submission to
5 be to ensure that if he needs to be in The Hague for his hearing that needs to
6 (Overlapping speakers).

7 MR KNOOPS: [11:05:34] Yes, Mr President.

8 PRESIDING JUDGE EBOE-OSUJI: [11:05:36] -- takes place.

9 MR KNOOPS: That's the point we are trying to make.

10 PRESIDING JUDGE EBOE-OSUJI: [11:05:38] Thank you. All right. We will leave
11 it at that from you. Prosecution, I think it's your turn now.

12 MR GALLMETZER: [11:05:55] Thank you, your Honour. I understand that you
13 wanted to take a break in about 10 minutes, so I wonder whether it would be a good
14 time to break now and perhaps start 10 minutes earlier, or do you want us to
15 proceed?

16 PRESIDING JUDGE EBOE-OSUJI: [11:06:14] You can proceed until we get to the time.

17 MR GALLMETZER: [11:06:18] Okay, very well. Before I do proceed, I would like to
18 raise a housekeeping point, and could we go into closed session for a moment, please?

19 PRESIDING JUDGE EBOE-OSUJI: [11:06:27] We'll go to closed session.
20 We will do private session.

21 MR GALLMETZER: [11:06:46] Very well. Thank you.

22 PRESIDING JUDGE EBOE-OSUJI: [11:06:47] Members of the audience, the blinds
23 will be drawn for now so we can have some housekeeping discussions.

24 (Closed session at 11.07 a.m.)

25 THE COURT OFFICER: [11:07:22] We are in closed session, Mr President.

Appeals Hearing

(Closed Session)

ICC-02/11-01/15

1

2

3

4

5

6

7

8

9

10

11

12

13 Page redacted – Closed session

14

15

16

17

18

19

20

21

22

23

24

25

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Open session at 11.11 a.m.)

22 THE COURT OFFICER: [11:11:17] We are back in open session, Mr President.

23 PRESIDING JUDGE EBOE-OSUJI: [11:11:25] Let's see what we can do in five
24 minutes. Proceed.

25 MR GALLMETZER: [11:11:29] I'll give an overview of our position in five minutes.

1 Can I proceed?

2 So before I address you on each of the four questions that you posed, I'll sum up our
3 position with the following two points:

4 First, irrespective of whether and under what condition the procedure of
5 reconsideration of judgments under Rule 158 is permissible, there is no need to result
6 to such a remedy in this case. This is because other procedures are available to
7 review the Appeals Chamber's judgment of 1 February 2019.

8 And second, there is no need to review and revoke the conditions of release set out in
9 your judgment last year for any other reasons. This is because since 1 February 2019
10 nothing has changed.

11 I will elaborate after the break that there has been no change of circumstances for
12 either Mr Gbagbo or Mr Blé Goudé. Nothing has happened which would affect the
13 Appeals Chamber's conclusion that their release on conditions is necessary, that they
14 do not abscond and to prevent the appearance before the Court.

15 In addition, there has been no change in the Prosecutor's position with respect to the
16 remedy that we seek in our appeal. The Prosecutor intends to continue proceedings
17 against Mr Gbagbo and Mr Blé Goudé. This means that if her appeal succeeds, the
18 Prosecutor intends to retry Mr Gbagbo and Mr Blé Goudé. My counsel will
19 elaborate on that point later on.

20 So perhaps now we can take the break because I will then start elaborating in detail
21 on each.

22 PRESIDING JUDGE EBOE-OSUJI: [11:13:33] Fair enough. I think you've been
23 asking for that break, we might as well take it. This is the time for it now.

24 The Court will rise for the morning break. We will reassemble in 30 minutes.

25 THE COURT USHER: [11:13:51] All rise.

1 (Recess taken at 11.13 a.m.)

2 (Upon resuming in open session at 11.50 a.m.)

3 THE COURT USHER: [11:50:14] All rise.

4 Please be seated.

5 PRESIDING JUDGE EBOE-OSUJI: [11:50:43] Thank you very much.

6 Mr Gallmetzer.

7 MR GALLMETZER: [11:50:58] Thank you, your Honour. I will now answer the
8 first two questions in your scheduling order.

9 Our position on whether and in what circumstances interlocutory appeals judgments
10 may be reconsidered and, if so, what is the standard can be summed up in the
11 following four points:

12 First, in principle, a judgment of the Appeals Chamber under Rule 158 is a final
13 decision on the merits of an interlocutory appeal. As such, the decision is *res judicata*
14 and should not be reconsidered. This prevents parties from endlessly relitigating the
15 same issues and is necessary to fulfil the very purpose of permitting interlocutory
16 appeals. Namely, to allow certain issues to be finally resolved prior to the final
17 resolution of the case.

18 Second, we do recognise that there might be a need for an exception to this principle
19 in a Court like the ICC with only one tier of appellate review. Bearing in mind the
20 potential range of interlocutory appeal judgments under Rule 158, it may well be
21 important to allow a meaningful opportunity for the Appeals Chamber to reconsider
22 its prior interlocutory appeals judgments if needed to prevent an injustice.

23 However, and this is my third point, reconsideration of interlocutory appeals
24 judgments under Rule 158 should be only permissible in wholly exceptional
25 circumstances, namely, when the following high standard is met: It is shown that

1 there has been a clear error of reasoning or new circumstances have arisen and that
2 the error or new circumstances justify reconsideration to avoid an injustice. I would
3 refer you to an ICTY authority where the same standard is being applied, and that is
4 Mrksić, the appeals decision of 22 January 2010 and the authority is on our list of
5 authorities. In such circumstances the Appeals Chamber may exceptionally invoke
6 its inherent powers.

7 Fourth, because reconsideration is a wholly exceptional remedy, the
8 Appeals Chamber should never reconsider a judgment under Rule 158 if another
9 procedure is available to review the judgment to prevent an injustice. This is also
10 why in the context of Article 1 appeals, the Appeals Chamber should likewise never
11 reconsider a judgment of appeal against a decision of conviction or sentence as that
12 judgment may be subject to revision under Article 84.

13 Your Honours, as we have set out in our written response to Mr Gbagbo's request,
14 reconsideration is unnecessary in this case. The conditional release judgment
15 already expressly provides that the Appeals Chamber may review and vary the
16 conditions of release in the future.

17 In addition, the Appeals Chamber has the power to review the conditional release
18 judgment acting under Article 60(3) of the Statute, read together with Articles 83(1)
19 and 64(3)(f), as well as Rules 119 and 149. Accordingly, the Appeals Chamber
20 should not assess Mr Gbagbo's request in light of the previously discussed test for
21 reconsideration. There is simply no need in the present case to resort to such an
22 exceptional remedy.

23 I will now turn to your third question, in which you have asked whether beyond the
24 question of reconsideration, there are any other reasons for the Appeals Chamber to
25 review or revoke the conditions of release previously imposed.

1 In its provisional release judgment, the Appeals Chamber found that there were
2 compelling reasons to impose conditions on Mr Gbagbo's and Mr Blé Goudé's release.
3 We submit that those compelling reasons continue to exist today. As such, there are
4 no reasons for the Appeals Chamber to amend or revoke the conditions of their
5 release.

6 The Appeals Chamber imposed conditions upon their release to mitigate the risk that
7 they might abscond. Based on previous findings of the Pre-Trial Chamber and the
8 Trial Chamber, the Appeals Chamber held that the seriousness of the charges with the
9 resulting potential high sentence, the existence of a network of supporters and the
10 means available to Mr Gbagbo constituted incentives to abscond. The
11 Appeals Chamber made a similar finding also in relation to Mr Blé Goudé.

12 The Prosecution has continued to assess information available to it and has concluded
13 that in relation to both individuals, the circumstances have not changed.

14 In our list of authorities at items A3 to A6 we refer to a number of documents which
15 support the following facts:

16 As of January 2020, Mr Gbagbo still has a large and organised network of supporters
17 who campaigned for the end of the ICC proceedings and for his return to
18 Côte d'Ivoire. These groups include Mr Gbagbo's political party, the FPI, and
19 affiliated political groups. These parties have formed an alliance called the EDS,
20 which coordinates demonstrations in support of Mr Gbagbo and Mr Blé Goudé, both
21 in Côte d'Ivoire and in Europe.

22 One of these activists, an associate of Mr Gbagbo's son-in-law, in fact called for
23 today's demonstration outside the Court through social media to resist against ICC
24 proceedings.

25 Additionally, in terms of Mr Gbagbo's means to abscond, although he has been

1 declared indigent, the pro-Gbagbo network clearly has access to resources.

2 Mr Gbagbo's son-in-law is a businessman based in France and he also owns the
3 pro-Gbagbo newspaper *Le Nouveau Courrier* and its holding company. In 2017 he
4 was accused of financing attacks in Côte d'Ivoire aimed at destabilising the
5 government.

6 The seriousness of the charges against Mr Gbagbo and Mr Blé Goudé with the
7 resulting risk of a high sentence and their incentives to abscond remain. Nor does
8 the remedy requested in this appeal have any bearing on their flight risk, as my
9 co-counsel will elaborate shortly.

10 In fact, their flight risk may be further exacerbated by recent developments in
11 Côte d'Ivoire. Last year, Mr Gbagbo was convicted for economic crimes and
12 Mr Blé Goudé was recently convicted for crimes related to his role in the post-election
13 violence. Both were sentenced to 20 years imprisonment.

14 These convictions and sentences could well incentivise Mr Gbagbo and Blé Goudé in
15 the event that the Appeals Chamber were to release them unconditionally to go to
16 a country other than Côte d'Ivoire from where they will not be extradited to
17 Côte d'Ivoire or surrendered to the Court. If they did so, their appearance before
18 the Court for the continuation of the proceedings in the event of a successful appeal
19 cannot be secured. The issue of time that was raised before the break also has no
20 bearing in these circumstances.

21 When this Court imposed the conditions on 1 February 2019, it was foreseeable that
22 the appellate process would take its course, and the Prosecution filed its appeals
23 briefs within the time allocated by the Court. We asked for an extension of the time,
24 it was not granted. So there is no delay. Everything was foreseeable and therefore
25 nothing has changed with respect to the time.

1 Mr Gbagbo's request does not advance any additional facts or arguments that
2 demonstrate that there has been a change in circumstances. Instead, he repeats
3 arguments that the restrictions imposed on him violate his human rights. These
4 arguments were squarely before you one year ago. The Appeals Chamber has fully
5 considered them. In particular, the Appeals Chamber has assessed the compatibility
6 of restrictions of liberty of an acquitted person pending a prosecution appeal in light
7 of the jurisprudence of the European Court of Human Rights and other human rights
8 law.

9 Although Mr Gbagbo now refers to additional authorities and makes additional
10 arguments, that does -- is not sufficient to demonstrate that there has been a change of
11 circumstances requiring the Appeals Chamber to review and revoke the previously
12 imposed conditions on his release.

13 In any event, the human rights jurisprudence cited by Mr Gbagbo is inapposite to the
14 facts of this case. Critically, Mr Gbagbo primarily refers to cases where a person was
15 acquitted and the acquittal was final because no appeal was pending. In those
16 circumstances, the European Court of Human Rights found the violation of article 5(1)
17 of the convention, but the situation here is different. The acquittal against
18 Mr Gbagbo and that against Mr Blé Goudé is not final. An appeal is pending. The
19 proceedings may continue. And, therefore, there is no incompatibility.

20 I also would like to address some of the authorities that were raised this morning by
21 the Defence of Mr Gbagbo, in particular the Labita case. The Labita case is wholly
22 inapposite to the case before you, because it deals with a situation where Mr Labita
23 was acquitted but the prosecution has not appealed. And it is in those circumstances
24 where the appeal -- the acquittal was final that the court found that the restrictions
25 that had still been imposed by the court were not justified in those circumstances.

1 We are in a very different circumstance here. The appeals are ongoing. The case is
2 not finished.

3 Also, your Honour, there is authority that clearly distinguishes the scope of
4 application of article 5-1 and any restrictions on movement.

5 I refer you to the case *de Tommaso v Italy*, also from the European Court of Human
6 Rights. In that case, it was made clear that if a person -- that the restrictions on
7 liberty equivalent to those that you have imposed in your decision of 1 February, they
8 do not fall within the scope of article 5-1. They fall within the scope of article 2(3) of
9 Protocol 4 of the European Convention.

10 And also, it is important to note that the right of freedom of movement under the
11 provision is clearly not an absolute right. It is restricted when a Court, following
12 due process, imposes restrictions that are proportionate and appropriate in order to
13 manage a legitimate risk. And this is exactly what we are here to discuss today.

14 So again I would like to refer you to that case *De Tommaso v Italy*. We have not put
15 it on our list of authorities, but we would be pleased to provide you with a copy after
16 this hearing.

17 The same logic also applies to any restrictions on freedom of speech. Freedom of
18 speech, although a human right, it is not an absolute right. It may be restricted by
19 a court of law following due process in order to protect a legitimate interest. And
20 this is what you have done in your judgment of 1 February 2019, and there is no
21 reason, either in law or in fact, to change anything.

22 I would now like to hand over to my colleague.

23 MS NARAYANAN: [12:04:35] Good afternoon, your Honours. You have asked in
24 question 1(d) whether the relief sought by the Prosecutor in her appeal brief, namely,
25 a declaration of mistrial, has any bearing on the need to continue the conditions of

1 release set by this Chamber in its judgment last year.

2 Your Honours, the Prosecution's view is that the release conditions imposed on

3 Mr Gbagbo and Mr Blé Goudé in February last year are still necessary. And the

4 nature of the precise relief that we have sought in our appeal, namely a declaration of

5 mistrial, does not alter this.

6 Why? Because the Prosecutor remains committed to continuing proceedings in this

7 case if she succeeds in her appeal. In fact, your Honours, based on the Prosecutor's

8 instructions to us, we can also give your Honours further precision about the manner

9 in which she intends to continue proceedings.

10 In the event that her appeal is successful, she intends to pursue a new trial before

11 a new Trial Chamber, in other words, a retrial. And she has taken this decision very

12 much bearing in mind that the victims of the 2010 and 2011 post-election violence in

13 Côte d'Ivoire are yet to see justice.

14 So, your Honours, in this sense, nothing has changed. The conditions of release

15 which have been imposed upon the two of them, that's Mr Gbagbo and Mr Blé Goudé,

16 are inextricably tied to future proceedings in this case and the concrete risk that they

17 may not appear for those proceedings.

18 And, in our view, they remain as necessary as they were when we first requested this

19 Chamber to impose them a year ago.

20 You will find authorities in support in B1 of our list.

21 And my colleague Mr Gallmetzer has just explained the factual basis for why those

22 conditions should be maintained.

23 PRESIDING JUDGE EBOE-OSUJI: [12:06:45] Counsel for the Prosecution, sorry, you

24 say that the circumstances have not changed, that the Prosecution intends to proceed

25 with a trial but before a new Trial Chamber. Is that what is contemplated in the

1 circumstances where we are? If the idea of no case to answer is that the case returns
2 to the Trial Chamber for continuation of trial, where it was at the stage a declaration
3 of mistrial -- sorry, declaration of no case to answer, are we still in the same zone if
4 what the Prosecutor would like to do is to erase the whole thing and start afresh
5 before a new trial -- before a new Trial Chamber? Starting afresh, meaning
6 the Prosecution has to redo its case. Not only that, but before a new Trial Chamber.
7 Is that what -- are you saying that is not a material change in circumstances?

8 MS NARAYANAN: [12:08:18] Well, your Honours, the short answer is for the
9 purposes of this hearing and whether or not the conditions are needed, no,
10 your Honours, there should not be any difference, because what matters for the
11 purposes of this hearing is whether the Prosecution intends to continue the
12 proceedings. That was the basis -- any proceedings, for that matter. That was the
13 basis on which the original conditions in February 2009 were imposed because it was
14 to ascertain that the future proceedings would be secure and both that the presence of
15 the accused would be possible at those future proceedings, whatever they may be,
16 and that the integrity of those proceedings are also maintained, again, whatever they
17 may be.

18 At this point, your Honours, what has perhaps slightly been more refined or adjusted
19 is also because of the fact that we now have the written reasons. And so, based on
20 that, we possibly further refined the fact in terms of the manner in which we might
21 wish to continue the proceedings but not the fundamental fact that there is no change
22 in circumstances in her intention to continue proceedings in this case. That intention
23 was there in February 2019 and that intention remains one year hence in
24 February 2020.

25 PRESIDING JUDGE EBOE-OSUJI: [12:09:35] Is it that simple really? Now let's look

1 at it this way:

2 At the stage of no case to answer, the matter is no longer in the hands of
3 the Prosecution. The Prosecution have finished its case, handed the case over,
4 the Chamber said judges have finished our case, we rest our case. Prosecution no
5 longer has control over the case at that stage. But if you restarted the trial it gives
6 the Prosecutor back control over the case; control, after having read the judgment that
7 resulted in a no case, and you say it is a slight difference?

8 MS NARAYANAN: [12:10:36] Your Honours, I think that what might really make
9 a difference would be the nature of the errors in this case and which is why this is
10 possibly a discussion for the merits appeal when we are able to argue our errors in
11 a way that justifies our remedy.

12 But that said, your Honours, we are still back to the fact that at this point the
13 continuation of proceedings is very much on foot. So for the purposes of the
14 conditions and whether they should be maintained at this point, they absolutely
15 should be.

16 Your Honours, on that note, we note your interest in paragraph 266 of our appeal
17 brief on the precise nature of the remedy that we seek on appeal. As your Honours
18 have noted, we have in our appeal brief asked first and foremost for the decision, the
19 acquittals, to be reversed and for this Chamber to declare a mistrial. And to be clear,
20 this would be a mistrial without prejudice.

21 But the matter does not stop there. As you can also see from our brief, we have also
22 asked for the case to be placed back in the Prosecutor's hands for her further decision,
23 including on a possible retrial. Your Honours, we are grateful for this opportunity
24 to clarify so allow me to explain further how our position has evolved in the past year
25 and to dispel any lack of clarity that may exist.

1 First, at the February 2019 hearing, when this matter was first discussed before you,
2 the Prosecutor was not able to specifically identify the exact nature of future
3 post-appeal proceedings for which Mr Gbagbo and Mr Blé Goudé would be required,
4 if her appeal succeeds.

5 You will find authority for this in B2 of our list.

6 This was because, in February 2019, we had only an oral decision by which
7 Mr Gbagbo and Mr Blé Goudé had been acquitted, but no written judgment and no
8 written reasons. The 1,000-plus page document containing the reasons, and the
9 dissenting opinion, were issued five months later in July 2019. And so, without
10 those extensive written reasons, the Prosecutor could only forecast a broad intention
11 to appeal and to continue proceedings post-appeal. But they could not - I beg your
12 pardon - but she could not determine with precision what that appeal or remedy may
13 be. So, accordingly, the Prosecution declared its intention to continue proceedings in
14 some form, but did not, because it could not, state exactly what form those continued
15 proceedings could take.

16 For instance, would it be a new trial before a new Trial Chamber?

17 Would it be a continuation of the same trial from where it was stopped at the halftime
18 stage? As your Honour referred to just now.

19 Would it be a remand to the same Chamber to hear some discrete issues or to assess
20 the existing evidence anew?

21 It was only once we had the written reasons that the Prosecutor could determine that,
22 if given the choice, she could continue proceedings in the form of a new trial before
23 a new Trial Chamber. And accordingly, our appeal brief in paragraph 266 mentions
24 this possibility.

25 Second, regarding the position we took in our appeal brief, paragraph 266 in

1 particular, once we were able to properly study the underlying reasons for the
2 acquittals we were also able to further refine the remedy that we intended to seek on
3 appeal. And in so doing, we were guided by the principle that the nature of the
4 errors on appeal often determines the remedy given. And this comes back to the
5 point that I was trying to make earlier. So, in other words, the remedy should match
6 the errors.

7 And you will find support for that proposition in B3 of our list.

8 And this is why the remedy we seek involves two steps, both steps tailored to the
9 circumstances of this case. As a first step, we have asked this Chamber to declare
10 a mistrial and to quash or negate the acquittals. Once that is done, and as a second
11 step, we have asked that this Chamber return the case to the Prosecutor so that she
12 may ascertain what form this new trial or retrial may take.

13 Now, your Honours --

14 PRESIDING JUDGE EBOE-OSUJI: [12:15:43] Ms Narayanan, you could see, can't
15 you, how one may -- I'm not taking that position now -- may think that the
16 submission or the remedy of quashing the whole trial and starting afresh is
17 a convenient one, but only for the Prosecution? You could see that. Do we not
18 have, at the stage at which the case was, a logic, the proceedings having a logic of its
19 own? And the logic of its own being the -- there was only a case for the Defence to
20 do after the Prosecution has rested its case. And if the Trial Chamber was wrong
21 and the Appeals Chamber overruled the Trial Chamber, that logic being the case goes
22 back to trial so it continues from where it stopped? If that is the case, do we see in
23 that logic a scope for the Prosecution at that stage to say we want the whole thing
24 quashed and so we start all over again?

25 MS NARAYANAN: [12:17:04] By all means, your Honours, in a very broad way and

1 without committing to anything, there is certainly a logic because of the fact that the
2 case was abruptly stopped at the halftime stage in this case. And that is definitely
3 one of the questions --

4 PRESIDING JUDGE EBOE-OSUJI: [12:17:18] But after you rested your case.

5 MS NARAYANAN: [12:17:20] Indeed. Indeed, your Honours.

6 But if I might explain, at this point the Prosecutor's intention to seek a new trial before
7 a new Trial Chamber is perhaps informed by two factors, one pragmatic in the sense
8 that Trial Chamber I, as it was previously composed, to my knowledge does not exist
9 because the Presiding Judge, his mandate has ended. And more fundamentally than
10 that, that the errors that we say happened and that the majority judges committed, in
11 our view of course - and this, of course your Honours will decide that - were not
12 merely routine legal or procedural errors but they went fundamentally to the
13 circumstances in which the acquittals were rendered.

14 And, your Honours, in those circumstances and if you agree with us, this is why the
15 remedy of having a mistrial that would then negate the acquittals in the sense that we
16 would no longer be content with the remedy -- or, rather, with the fact that the
17 Trial Chamber record mentions that they were acquitted at that stage, but rather that
18 it would go more fundamental to that, and the fact that at that point the Prosecutor
19 would humbly request that this case be returned to her for purely practical and
20 operational reasons which I would like to go into, if your Honours wouldn't mind.

21 PRESIDING JUDGE EBOE-OSUJI: [12:18:48] But were those circumstances you just
22 mentioned, the judges in the case having mandates ended and so forth, were they
23 really anchored in the circumstances at the time that the order of conditional release
24 was imposed?

25 MS NARAYANAN: [12:19:30] I'm sorry, your Honours, can I just have one second,

1 please?

2 THE COURT OFFICER: [12:19:46] Excuse me, Counsel, you have five minutes left.

3 MS NARAYANAN: [12:19:52] Your Honours, I believe I might have about five
4 minutes left, I think.

5 But just to answer your question, your Honours, I believe you asked were those
6 circumstances that I mentioned just now before you in terms of when the order for
7 conditional release was imposed?

8 PRESIDING JUDGE EBOE-OSUJI: [12:20:14] In the sense that those were the
9 premise, so to speak, that operated on the order that was made at the time, or that
10 those circumstances formed part of the premise for that, or was the premise solely
11 that the case may continue before that Trial Chamber, perhaps with the extension of
12 mandate of the judge whose mandate had ended at the time.

13 MS NARAYANAN: [12:20:42] Well, your Honours, it wasn't so specifically there, of
14 course. But, your Honours, the Prosecution had also anticipated quite broadly in the
15 2019 hearing that these -- your order could concern any manner of future proceedings,
16 and that would include a remand, a continuation at halftime and as well as a retrial,
17 your Honours.

18 So if I could just have a few more minutes to finish? Yes. Thank you.

19 Your Honours, it might on that basis likely assist you to know a little bit more about
20 these different aspects of our remedy.

21 Firstly, why a declaration of mistrial in particular? I am conscious that at this stage
22 we should not be arguing the merits of the appeal as such. It would be premature to
23 do so since we have not even received the response briefs from the Defence. So my
24 response will be limited. But suffice to say that, again, our analysis of the majority's
25 written reasons, which was available to us after, showed that the circumstances in

1 which Mr Gbagbo and Blé Goudé were acquitted were fundamentally flawed. And
2 those flaws are reflected in grounds 1 and 2 of our appeal.

3 And ultimately, your Honours, our appeal seeks to capture the particular legal and
4 procedural errors made by the Trial Chamber majority which, in our view, led to the
5 acquittals. And, your Honours, again in our view, seeking a declaration of mistrial
6 without prejudice best captures the harm caused by the majority's errors. And in
7 doing so, we were informed by some of the judicial views expressed in Ruto and Sang,
8 for instance, on when serious procedural errors may be said to vitiate the trial itself.
9 Now, the circumstances in Ruto and Sang may be different, but the logic remains the
10 same.

11 And secondly and finally, why did we ask the Chamber to place the case in the hands
12 of the Prosecutor rather than requesting the Appeals Chamber to itself order a retrial
13 directly under Article 83(2)? Of course, your Honours, you do have the power to
14 order retrials when circumstances so require. Or, for that matter, shape the remedy
15 to fit the case, whatever that remedy might be, and that is clear from Article 83(2)(b).
16 But we chose the path that we did for practical and operational reasons.

17 Your Honours, the Prosecutor has always been of the view that justice has not been
18 done in this case and that continuing proceedings was required in the interests of
19 justice. That was why she appealed the decision, and also why she asked for the
20 conditions on their release. And this intention remains unchanged. But she is also
21 aware that, in the particular circumstances of this case, she will have to make a final
22 assessment when your Honours render your decision on the merits of the appeal and
23 if we are successful.

24 Now, when the appeals judgment is rendered, and assuming that your Honours do
25 not foreclose the retrial option entirely, the Office would have to assess the scope of

1 any retrial against a number of critical factors that will be apparent only at that time.
2 And this simply recognises that there will always be some residual uncertainty that
3 accompanies a retrial, in the sense of whether a full second prosecution remains
4 possible in the circumstances.

5 Critically, the Prosecution will need to consider what your Honours say in your
6 judgment on the merits, including whether you make any orders on the scope of a
7 retrial. This will inform our decision on how best to proceed with any continued
8 proceedings. Also, given the views expressed by the majority judges at trial, and in
9 particular by the dissenting judge, Herrera-Carbuccia, the Prosecution will need to
10 determine if the scope of the retrial should be limited to a more narrow version of the
11 existing case.

12 And finally, the Prosecution will need to determine a number of operational factors.
13 For instance, what witnesses are available, whether the retrial could be conducted on
14 the existing record or if additional evidence would be needed, and what the state of
15 cooperation with the relevant authorities would be at that point in time. So, in other
16 words, the Prosecutor would need to make, and indeed can only make, a final call on
17 how the proceedings may be continued, following the appeal, based on a number of
18 considerations. And of course, your Honours, the Prosecutor will make this decision
19 at the earliest possible time once the final appeals judgment is available.

20 So, your Honours, to conclude, the Prosecutor intends to retry this case if her appeal
21 succeeds, and this is why the release conditions remain necessary.

22 That should conclude my submissions and the Prosecution's for the moment, unless
23 you have any further questions.

24 PRESIDING JUDGE EBOE-OSUJI: [12:26:03] One question that you may think of
25 now, Ms Narayanan, if you are in a position to answer it now, you may, but -- and

1 any of you, in any event. As well, the counsel on this side should also think about
2 this question when it comes their time to respond.

3 The question is this:

4 We are looking here at -- looking at the first condition of the release at paragraph 60
5 of the Chamber's order. The first condition is this, to sign an undertaking that they
6 will abide by all instructions and orders from the Court, including to be present at the
7 Court when ordered and accepting that the proceedings before the Appeals Chamber
8 may proceed in their absence should they fail to appear before the Court when
9 ordered to do so.

10 Now, is it possible that the solution to all this dilemma lies here, not only for purposes
11 of proceedings before the Appeals Chamber if -- but also proceedings before any
12 chamber of the Court as the case may be? There is an undertaking to that effect, an
13 order made to that effect, would that be cleaner solution to all of this so that, in the
14 event of failure to appear before any chamber of this Court for continuation of
15 proceedings, or retrial, as the case may be, that the trial may proceed in the absence of
16 the defendants?

17 MS NARAYANAN: [12:28:14] Your Honours, I can attempt a short answer and then
18 maybe my co-counsel Mr Gallmetzer might want to address you in more detail.

19 Your Honours, the Prosecution's position is that the conditions that you granted as
20 such are the minimum needed to ensure the integrity of any future proceedings, and
21 that's for all the reasons that Mr Gallmetzer has just put forward before you and the
22 fact that our appeal did not really change that.

23 Moreover, your Honours, in terms of whether the defendant should be present at any
24 future trial, at this point the Statute does not allow for their nonpresence, as such -- or,
25 rather, for their absence. Of course, your Honours, that would, that would then, I

1 think, just not be what the Prosecution foresees at this point.

2 PRESIDING JUDGE EBOE-OSUJI: [12:29:07] You know, that's a -- jurisprudence on
3 that question, whether it is that the Statute forbids it or whether the Statute imposes
4 an obligation on accused persons to be present for their own trial, which is an
5 obligation on them, that is not basically an imposition of the Court, forbidding
6 the Court to proceed in the event that the accused persons do not live by that
7 obligation to be present at their own trial.

8 MS NARAYANAN: [12:29:43] Your Honours, I suppose there are two concepts here,
9 one is trials *in absentia* in general and the Statute does not allow that. And to that
10 extent I would also rely on Judges Bossa and Judges Ibáñez's view in the Bashir
11 interlocutory judgment on that point. Now there is a separate question,
12 your Honours, of course, for any future proceedings if, once the defendants are here,
13 whether they may be excused on some basis. But, your Honours, without actually
14 knowing the nature of those continued proceedings, as well as what factors might be
15 in play, I would be a little bit reluctant to commit any further on that, with your
16 permission.

17 PRESIDING JUDGE EBOE-OSUJI: [12:30:25] Fair enough.

18 MS NARAYANAN: [12:30:26] Thank you.

19 MR GALLMETZER: [12:30:28] Your Honours, if I may add, this takes us squarely
20 back to the discussion that we had one year ago on the same issue.

21 During appellate proceedings the Statute does not require the presence of the
22 appellants or the respondents and, therefore, these first conditions was crafted exactly
23 to reflect that legal reality.

24 When it comes to a continuation of the proceedings before a Trial Chamber, the legal
25 position in the Statute is different. We have Article 63(1) that says the trial should be

1 conducted in the presence of the accused.

2 PRESIDING JUDGE EBOE-OSUJI: [12:31:09] Can you read exactly what is said in 63.

3 MR GALLMETZER: [12:31:30] I read paragraph 1 of Article 63(1):

4 "The accused shall be present during the trial."

5 PRESIDING JUDGE EBOE-OSUJI: [12:31:39] It is not quite the same thing as saying

6 "the trial shall be conducted in the presence of the accused."

7 MR GALLMETZER: [12:31:46] Fair enough.

8 We are aware, your Honours, of the jurisprudence on that matter, both from the

9 Trial Chamber in the Ruto case and from the Appeals Chamber. We are also aware

10 of the change of the Rules of Procedure and Evidence that have been made after that,

11 in particular Rule 134*bis* and *ter*.

12 What we understand the jurisprudence to mean is that the presence of the accused at

13 the trial is not only a matter of the right of the accused that may be waived. It is

14 a matter that is a key feature of the trials before this Court and, as such, although

15 there are some exceptions - and the exceptions are clearly carved out in the

16 Appeals Chamber's judgment, as well as in the Rules of Procedure and Evidence - the

17 principle remains that the trial shall be conducted in the presence of the accused.

18 Very important now, your Honour, I would like to add that whether to invoke any of

19 these principles, whether they apply, should be a matter for the Trial Chamber to

20 determine. We believe that it is not now the time or the place for this

21 Appeals Chamber to pre-empt matters that concern the conduct of any future trial

22 proceedings. And this squarely falls within the discretion of the Trial Chamber if

23 and when the proceedings continue.

24 PRESIDING JUDGE EBOE-OSUJI: [12:33:31] What is the basis or the premise of the

25 rule that require accused persons to be present at their trial? Is it -- is there a reason

1 for that or not? Could it be that a reason might be a scenario where in some
2 jurisdictions an accused person may be actively prevented from being before their
3 trial while a trial continues in their absence? Is that scenario different or the
4 considerations or concerns different in a scenario where the system actually wants the
5 accused person to be present for their own trial but they decide to abscond? Can we
6 have one rule that collapses into a principle that accused persons shall be present, if
7 they are not present the case cannot continue?

8 MR GALLMETZER: [12:34:29] Your Honours, this question, I would suggest, far
9 exceeds the scope of this appeal. This is a separate legal question that should be
10 fully briefed and it might not be the right time for the Appeals Chamber to rule on
11 this matter.

12 PRESIDING JUDGE EBOE-OSUJI: [12:34:45] Here is your opportunity to answer
13 a question that's put to you.

14 MR GALLMETZER: [12:34:48] And I am very grateful for the opportunity.
15 I think if we look at the scope of Article 63(1), as we said back then when we briefed
16 the appeal and when we also made our arguments before the Trial Chamber, we said
17 this is not only a matter of the rights of the accused; there is a public interest that is
18 involved that the trial be conducted in the presence of the accused, that victims and
19 witnesses, they can face the person, that the prosecutor can face the person. There is
20 a public interest that really justifies the principle that goes beyond the mere right of
21 the accused.

22 Now -- and I am reminded to emphasise that even the exceptional rule that was
23 carved out does not allow for the entire trial to be conducted *in absentia*, it only
24 provides that certain persons who are subject to a summons to appear, as opposed to
25 an arrest warrant, under certain conditions when they fulfil certain functions and only

1 for (Overlapping speakers)

2 PRESIDING JUDGE EBOE-OSUJI: [12:36:10] That's Rule 134*bis*, isn't it, and *ter*?

3 Yes.

4 MR GALLMETZER: [12:36:14] Yes. But critically, also only for particular portions
5 of the trial, not for the entire trial.

6 And I think this is the law as it stands today and, for the purposes of this appeal, we
7 should be guided by the law.

8 Thank you.

9 PRESIDING JUDGE EBOE-OSUJI: [12:36:31] Thank you.

10 MS MASSIDDA: [12:36:41] Thank you very much, Mr President.

11 PRESIDING JUDGE EBOE-OSUJI: [12:36:44] Ms Massidda, your turn.

12 MS MASSIDDA: [12:36:44] I essentially share the arguments put forward by
13 the Prosecution, although I will be, let's say, less nuanced in my consideration in
14 relation to the possibility or not possibility to have a reconsideration procedure.
15 It is indeed my submission that reconsideration is not a procedural avenue in the
16 circumstances of this case.

17 In the judgment of 1 February 2019, at paragraph 33, the Appeals Chamber indicated
18 that its power to impose conditions on the acquitted persons pending appeal stems
19 from the interplay between the incidental power under Article 81(3)(c)(i) and
20 Article 83(1) of the Statute when it comes to the appeal stage.

21 Said power also results from the construction of Rule 149 of the Rules of Procedure
22 and Evidence read in conjunction with Articles 57(3)(a), 60(2) and 64(6)(f)
23 of the Statute and Rule 119 of the Rules.

24 These provisions allow, in my submission, the Appeals Chamber to review the
25 exercise of its power to impose conditions, either *proprio motu* or on the motion of a

1 party or participant, as also underlined in the judgment of 1 February 2019 at
2 paragraph 4.

3 I refer what Mr President called this morning the facility of review, if I am not
4 mistaken.

5 Given the express provision under the law of modalities to review a decision on
6 interim release, it is my submission that it is unnecessary, as well as inappropriate, to
7 resort to the exceptional measure of reconsideration.

8 In his separate opinion of 30 March 2011 in the Lubanga case, Judge Blattmann
9 recalled, and I quote:

10 "Given that a review mechanism for a variation of a previous order - in that instance
11 [it was] on admission of evidence - is provided for in the law, the judges should not
12 create or resort to, a reconsideration based on the so-called 'inherent discretionary
13 power' of the Chamber."

14 The reference is to the separate opinion of Judge Blattmann, ICC-01/04-01/06-2707,
15 30 March 2011, paragraph 39.

16 More recently, in 2018, the Appeals Chamber in the Bemba and others judgment
17 emphasised, and I quote:

18 "... in the legal framework of the Court 'inherent powers' should be invoked in a very
19 restrictive manner and, in principle, only with respect to matters of procedure".

20 And the reference for the record, ICC-01/05-01/13-2276, redacted version of the
21 judgment, 8 March 2018, paragraph 75 *in fine*.

22 Even more recently, last week in the Ayyash case, the Appeals Chamber of the Special
23 Tribunal for Lebanon also clarified that, and I quote:

24 "... the object and purpose of [reconsideration] is to give Chambers a discretionary
25 power to reconsider decisions in order to avoid an injustice" and "recourse to

1 reconsideration should be limited in order to ensure the certainty and finality of
2 the Tribunal's judicial decisions. ... Reconsideration is not available as an ordinary
3 remedy to redress imperfections in a decision or to circumvent the unfavourable
4 consequences of a ruling." End of quote.

5 It is a decision of 28 January 2020 in the Ayyash case, Decision on Judge Re's
6 Application to Reconsider the Appeals Chamber, paragraphs 7 and 8.

7 Therefore, since the possibility to review a previous decision on interim release by
8 the Chamber is expressly provided in the law, reconsideration is not an option in this
9 instance. This conclusion is, in my view, also supported by the practice of the Court
10 which indicates that reconsideration is an exceptional measure and that Chambers, in
11 accordance with Article 21 of the Statute, shall apply first and foremost the statutory
12 framework.

13 Having expressed my position according to which reconsideration is not an avenue in
14 the present instance, I will not address question (b) of the order of the Chamber on the
15 conduct of the hearing.

16 Turning to the other reasons, if any, for the Appeals Chamber to review and revoke
17 the conditions of release set in its judgment of 1 February 2019, it is my submission
18 that the reasons which justified said decision still exist.

19 It is still justified to maintain the conditions imposed on the defendants because of
20 the Court's continued jurisdictional interest in the acquitted persons pending the
21 appeal against the acquittal, as underlined in paragraph 33 of the judgment of
22 1 February 2019.

23 Moreover, there continue to be compelling reasons for maintaining the conditions
24 imposed on the defendants.

25 In particular, and also as recalled by the Prosecution, a concrete risk of flight

1 continues to exist. In this regard, the finding of the Appeals Chamber at
2 paragraph 60 of the judgment of 1 February 2019 that there is a sufficient factual
3 indication that Mr Gbagbo and Mr Blé Goudé may abscond if released
4 unconditionally and that the flight risk identified can be mitigated by the imposition
5 of conditions remains actual.

6 In its observations filed on 21 January 2020, the Republic of Côte d'Ivoire presented
7 some arguments on the risk of flight which I consider pertinent and should still be
8 considered by the Chamber, and I refer to the chance of success of an appeal and the
9 fact that both defendants continue to have great support and a well-organised
10 network of supporters. The Appeals Chamber, in paragraph 59 of its
11 1 February 2019 judgment, already found that this constitutes an incentive to abscond.
12 This is again a finding which, in my submission, remains actual.

13 The existence of a strong network of supporters may also be prejudicial for the
14 victims participating in the proceedings and witnesses who benefited from protective
15 measures before the Court. The impact that a release without conditions may have
16 on the safety and well-being of victims and witnesses is another factor that the
17 Appeals Chamber shall also consider.

18 Victims remain indeed very concerned about the possibility of the commission of
19 further crimes and attempts to compromise the integrity of the proceedings if the
20 defendants are released without conditions, particularly because said release may
21 galvanise the defendants' supporters who, in the past, demonstrated animosity
22 towards victims still perceived to be partisans of the opposite side. In this regard,
23 the political climate in Côte d'Ivoire is deteriorating with the approaching elections to
24 be held this year and victims fear a reiteration of the events which culminated in
25 crimes in the post-electoral crisis in 2010-2011.

1 One word, your Honour, regarding the alleged deprivation of civil and political rights,
2 I concur with the observations submitted by the Republic of Côte d'Ivoire, that the
3 conditions imposed by the Appeals Chamber do not deprive Mr Gbagbo, and actually
4 both defendants, from enjoying their rights.

5 It is worth noting that no later than few weeks ago, Mr Gbagbo and Mr Pascal Affi
6 N'Guessan, his former prime minister and current president of the
7 Front Populaire Ivoirien, met in Brussels.

8 This is not the first time Mr Gbagbo is allowed to meet in person high level political
9 figures. He also met Mr Henri Koné Bédié, former president of Côte d'Ivoire, and
10 allegedly discussed, amongst other topics, the national reconciliation.

11 These examples show, in my submission, that the current conditions imposed by
12 the Chamber are not preventing Mr Gbagbo from enjoying his rights and should be
13 maintained until the end of the proceedings before this Court.

14 Finally, on the issue of whether the relief sought by the Prosecution in its appeal,
15 namely a declaration of mistrial, may have an impact on the matter that we are
16 discussing today. I take note, with a certain relief, of a Prosecution intention
17 expressed this morning. But I think, your Honour, that the factor of relief sought is
18 not a factor to be taken into account at this stage at all. The discussion on the
19 necessity of the continued imposition of the conditions of release is distinct, in my
20 view, from any possible request from the parties or participants in these proceedings.
21 While a specific remedy may be sought by a party or participant, this does not mean
22 that the Appeals Chamber will automatically grant said relief and could not choose
23 instead to amend or reverse the impugned decision.

24 In any case, if the declaration of mistrial was to be granted, a new trial or re-trial
25 could follow, or a continuation of trial. Indeed, the Prosecution has the power to

1 immediately restart an action against the defendants and the Appeals Chamber has
2 the power to order the continuation of a trial or a retrial if the interests of justice so
3 require. Therefore, the relief sought cannot be taken into account as a factor
4 eventually justifying a modification of the current situation of interim release with
5 conditions or, even less, the revocation of the interim release itself.

6 On the contrary, the ample margin of discretion that the Appeals Chamber enjoys is
7 in these circumstances and the possibility of a full new trial, also as a possible
8 consequence of granting a declaration of mistrial, are all circumstances that militate
9 for maintaining the conditions imposed by the Chamber in its judgment of
10 1 February 2019.

11 Very briefly, your Honour, and finally, I wish to convey the concerns of the victims as
12 they were indicated to me recently. Victims expressed their fear that releasing the
13 defendants would allow them to return to Côte d'Ivoire and seek political power in
14 order to actively hinder the appeals proceedings before the Court. Victims also
15 indicated that, should the defendants be re-elected, they may use their powers to
16 obstruct the course of justice before the Court and render a further prosecution
17 impossible.

18 Unfortunately, the brief history of the Court already reveals that it is -- that this is far
19 from constituting a remote hypothetical possibility if we look at what happened in the
20 Kenya situation.

21 PRESIDING JUDGE EBOE-OSUJI: [12:50:54] Ms Massidda, pause a minute. How
22 would the obstruction of proceedings before Appeals Chamber, how would it happen
23 if, in the scenario you just evoked, how would that be? And then after that I will ask
24 you a question about the second part, which is, if there is a continuation of
25 proceedings there will also be obstruction. Can you tell me.

1 MS MASSIDDA: [12:51:33] Thank you very much, your Honours.

2 In my submission I am now referring more or less verbatim at what my clients refer
3 to me. So I have of course --

4 PRESIDING JUDGE EBOE-OSUJI: [12:51:45] Just their fear? They just expressed
5 their fear?

6 MS MASSIDDA: [12:51:48] Yes.

7 PRESIDING JUDGE EBOE-OSUJI: [12:51:49] Fair enough.

8 MS MASSIDDA: [12:51:49] They use this term "obstructing justice". And I have to
9 make a comment about that because we are talking of words that clients can say to
10 a lawyer without knowing the full extent of a legal term. So this is something that I
11 have to say.

12 What they intend by obstructing justice, the words that they use were, "Well, if they
13 are coming back to Côte d'Ivoire, then there is a possibility that they can contact the
14 witnesses. That they can find out documents and that they destroy the document."
15 These are real words that victims pronounced during the recent meetings that I had
16 with them. And this is the reason why I am using the term "obstructing the
17 proceedings" in the sense of doing something that could not allow the proceedings to
18 continue.

19 PRESIDING JUDGE EBOE-OSUJI: [12:52:51] You cannot give us an example of how
20 such a thing might possibly happen?

21 MS MASSIDDA: [12:52:58] Well, what they told me was, essentially, the possibility.
22 Because of the power that they still have, both defendants, the possibility to contact
23 witnesses or potential witnesses and the possibility to somehow interfere with the
24 possibility for these witnesses eventually to continue to provide evidence. This is
25 one of the main concerns that they expressed clearly to me.

1 PRESIDING JUDGE EBOE-OSUJI: [12:53:26] Thank you.

2 MS MASSIDDA: [12:53:27] I think I have -- no, I have answered both, isn't it?

3 PRESIDING JUDGE EBOE-OSUJI: Judge Morrison has a question for you.

4 MS MASSIDDA: Please.

5 JUDGE MORRISON: [12:53:37] Ms Massidda, you quoted the jurisprudence from

6 the STL and said, and I quote, "reconsideration is not a remedy to redress

7 imperfections".

8 What do you say is the remedy, if any, or does the Court simply allow imperfections

9 to persist even if they touch, in the Court's view, upon issues of injustice, bearing in

10 mind the Appeals Chamber is the court of last resort and an aggrieved person can go

11 no further?

12 MS MASSIDDA: [12:54:07] Thank you very much, your Honour, for this question.

13 My submission is that because there is already a remedy in the law - this is my main

14 submission - there is a remedy in the law. The law provides the possibility for the

15 Appeals Chamber to review a previous decision. So this will be covered in the

16 provisions which provides the possibility for the Appeals Chamber to review the

17 decisions without resort to reconsideration. And is the reason why at the beginning

18 of my intervention I quoted the provisions that in my view support this submission.

19 JUDGE MORRISON: [12:54:44] I anticipated that. Which leads me to my next

20 question: What's the difference, in practical terms, between a review and

21 a reconsideration?

22 MS MASSIDDA: [12:54:56] If we apply the provisions in the law for reviewing the

23 decision, it means that the Appeals Chamber will need to consider if all the factors

24 already captured in the judgment of 1 February 2019 still are valid and actual.

25 If we go to reconsideration, then reconsideration has a different standard, as it was

1 also recalled by the Defence and as it was also recalled, by the way, very recently by
2 the tribunal for Lebanon indicating essentially the two criterion. That the decision
3 has resulted in an injustice and that such injustice, at a minimum, involves prejudice.
4 So, in my submission, the review is based on the power of the Chamber in accordance
5 with the established procedure in the law. A reconsideration is a completely
6 different procedural avenue which can be used by the Chamber using its inherent
7 powers only if a decision has resulted in an injustice and that injustice, as a minimum,
8 involves prejudice.

9 In conclusion, your Honour, the victims I represent consider that there are no reasons
10 to modify or revoke the previous judgment of the Appeals Chamber and that the
11 maintaining of the interim release of both defendants with conditions is still necessary
12 and justified pending the resolution of appeal.

13 I thank you very much for your attention.

14 PRESIDING JUDGE EBOE-OSUJI: [12:56:43] Thank you very much.

15 I see we have five minutes to 1 o'clock, which is our time for break.

16 Why don't we rise now and take our lunch break at this time.

17 So court will rise.

18 THE COURT USHER: [12:57:06] All rise.

19 (Recess taken at 12.57 p.m.)

20 (Upon resuming in open session at 2:35 p.m.)

21 THE COURT USHER: [14:35:04] All rise.

22 Please be seated.

23 PRESIDING JUDGE EBOE-OSUJI: [14:35:27] Thank you very much. Welcome back
24 everyone.

25 What we will do now is we will give the floor to counsel for Côte d'Ivoire now so they

1 can make their submissions, and then the -- during the response time everybody will
2 have an opportunity to react to any submissions of interest they make.

3 So we will take submissions from counsel for Côte d'Ivoire. Counsel.

4 MR BENOIT: [14:36:16](Interpretation) Mr President, your Honours, the team of
5 lawyers representing Côte d'Ivoire pursuant to a decision from the minister of justice
6 has entrusted this matter to Mr Jean-Pierre Mignard, for reasons of efficiency, and
7 thus it is Maître Mignard who shall address the Court.

8 MR MIGNARD: [14:36:50](Interpretation) Mr President, your Honours, I am very
9 honoured, on behalf of my colleagues, to have this opportunity to deal with five
10 points.

11 First of all, the very substance of Côte d'Ivoire's remarks in relation to these
12 proceeding; the necessary representation of Mr Gbagbo under the conditions set by
13 the Court and in the interests of sound administration of justice, in other words; the
14 necessary protection of victims and witnesses; we will speak to the lack of deprivation
15 of civil and political rights that have been argued by Mr Gbagbo; and, finally, the
16 absolute necessity to meet the requirements of justice and reconciliation which are to
17 be found in the mandate that you have been entrusted with.

18 We make these remarks because this is a unique opportunity to remind the Court that
19 it was after Mr Gbagbo and his supporters' refusal to accept their defeat on 2
20 December 2010, and to comply with Ivorian constitutional law, it was then that is
21 a very long conflict emerged in Côte d'Ivoire. And I can tell you, furthermore, that
22 the Côte d'Ivoire -- it has been said that Côte d'Ivoire has been acting in the back
23 corridors of this trial, which is not true. Allow me to move on to the decision by
24 Mr Bakayoko, the president of the independent electoral commission, who designated
25 Mr Ouattara as the victor in the election. This outcome was announced by him and

1 recognised by the UN Security Council and by the ECOWAS, by the Peace and
2 Security Council of the African Union on 10 March 2011, by the European Union on 4
3 December 2010. All of these organisations are made up of States that, in the vast
4 majority, had diplomatic representatives in Côte d'Ivoire and thus were in a position
5 to observe the events that occurred.

6 In resolution 1975, 30 March 2011, the UN Security Council called upon everyone,
7 they urged all parties and other stakeholders to respect the will of the people and the
8 election of Alassane Ouattara as president of Côte d'Ivoire, as recognised by
9 ECOWAS, the African Union, and the rest of the international community.

10 All the same, serious ongoing acts of violence occurred, constituting crimes against
11 humanity, occurred for five months in Abidjan and elsewhere in the country, thus
12 blocking the democratic process. The price that was paid was a civil war that
13 claimed a great many lives on each side of the conflict.

14 On 13 April 2011, Mr Choi Young-Jin, the United Nations Secretary-General's Special
15 Representative and the head of operations at -- of the UN in Côte d'Ivoire stated
16 before the Security Council that the election was one of the world's most open, free,
17 fair, and transparent election, which took place in Côte d'Ivoire on the 28 November
18 2010, and the election has been forfeited to the greed of the outgoing president
19 Mr Laurent Gbagbo. An utterly unnecessary post-electoral crisis erupted lasting
20 more than four months.

21 Given this highly serious -- these highly serious events, by way of resolution 16/25,
22 the Human Rights Council echoed several member states and set up an independent
23 international commission of inquiry to look into the facts and circumstances
24 surrounding the allegations of serious abuses and violations of human rights
25 committed in Côte d'Ivoire following the presidential election of 28 November 2010.

1 Ms Pillay, the High Commissioner for Human Rights at the time, said, on 8 April 2011,
2 after the outcome of the elections were known, she said:

3 "We saw shocking violations of rights, we saw the shelling of the market, the murder
4 of women who were demonstrating peacefully, the use of heavy weaponry against
5 civilians, countless acts of violence, looting, extrajudicial executions, abductions,
6 forced disappearances, and calls for violence over the state television."

7 She concluded that some of the violent acts could constitute crimes against humanity.

8 On 30 March 2011, the Security Council came to the same conclusions in resolution
9 1975, and I quote:

10 "The attacks currently taking place in Côte d'Ivoire against the civilian population
11 could amount to crimes against humanity and the perpetrators of such crimes must
12 be held accountable under international law, and noting that the ICC may decide on
13 its jurisdiction over the situation in Côte d'Ivoire on the basis of Article 12(3) of the
14 Rome Statute."

15 On 8 April 2011, the High Commissioner stated:

16 "The top priority is to do everything possible to end the violence, to halt any
17 violations or murders. And it's also important to end impunity in Côte d'Ivoire.

18 Thus, the President's commitment to punish those responsible for all of these horrific
19 crimes that have occurred in Côte d'Ivoire, independent of whoever they may support
20 politically, and to make a serious effort to come to reconciliation in this highly
21 divided country, is necessary."

22 And this is why the High Commissioner asked President Ouattara to ensure that
23 those responsible for the violence would be brought to justice in a sovereign
24 manner -- in a completely independent fashion. During that very long period of
25 time the Republic of Côte d'Ivoire has done everything it could to cooperate

1 transparently and faithfully in relation to the proceedings before the ICC.

2 It must be said, Mr President, your Honours, that the Pre-Trial Chamber confirmed
3 four crimes against humanity standing in the name of Mr Gbagbo, murder of at least
4 160 people, rape of at least 38 people, other inhumane acts causing great suffering or
5 serious injury to body, or attempted murder in relation to at least 118 people,
6 persecution of at least 316 people for political -- (Overlapping speakers)

7 PRESIDING JUDGE EBOE-OSUJI: [14:44:30] One second: You know you had
8 20 minutes of submissions and you have about 12 left. Just so you know. But
9 continue.

10 MR MIGNARD: [14:44:40](Interpretation) Yes, you are familiar already with the
11 many acts of violence that were committed by the FDO under the responsibility of
12 Mr Gbagbo or people close to him.

13 Now the Republic of Côte d'Ivoire wishes to state that the legitimacy of a decision of
14 a court can only come after all charges have been considered, after all witnesses have
15 been heard, after all testimonies have been confronted against one another. But that
16 is not the case. The charges remain, despite the acquittal, which is currently the
17 subject of appeal. We have the -- there is no change that would -- in the interest of
18 proper administration of justice, Mr Gbagbo should remain present at trial, and this
19 morning we heard a discussion about the concept of presence. It is not so much
20 a matter of presence in the sense of what the drafters thought, but, rather, he must be
21 present so he can answer questions put to him. He must be present to be confronted
22 with the testimony of witnesses so that he also can defend himself so that your
23 decision, no matter what it may be, will be entirely legitimate in the eyes of all.
24 And on this point we stress, so that this trial go to the very end, the principle of
25 equality of arms is at the very heart of judicial proceedings before the Court. This

1 means that you can't have half of a trial. Trial -- justice is forever and must go to the
2 very end.

3 Mr Gbagbo, if released, may make good use of his freedom and he may say he will
4 attend, but what do we know? What can we count on, the protestations of someone
5 who says he will attend? But in some cases there are suspects who are still at large
6 and, as you know quite well, the Court does not have the means to apprehend them.
7 So right now, Mr Gbagbo is free, conditional release without the right to comment
8 upon his trial, which is quite a common state of affairs in many domestic jurisdictions.
9 He can receive visitors well beyond his circle of family and friends. He can receive
10 political friends, and the like. He still under the responsibility of the Court and he
11 can defend himself.

12 And ultimately, your Honours, no matter what the decision, that decision is up to you,
13 the decision that you take will be completely sovereign, completely yours:

14 If Mr Gbagbo is put on trial and found guilty, it's necessary that the people of
15 Côte d'Ivoire, who have suffered so much, must be able to say the trial was legitimate,
16 the trial went to the very end.

17 If Mr Gbagbo is acquitted, in that case he must be able to go back to Côte d'Ivoire and
18 people will say, "Yes, the trial was legitimate."

19 No reconciliation is possible in this country that has suffered so much unless there is
20 reconciliation, and that reconciliation is so dependent on your decision. No half trial.
21 The trial must run its full course.

22 The Republic of Côte d'Ivoire finds itself in a particular position and, as you can see,
23 it's a very firm decision. We support your ruling of 1 February 2019. The Republic
24 of Côte d'Ivoire will continue to cooperate with the Court, as it has done in the past,
25 and, ultimately, calm shall prevail. And just one quote, one very fine sentence:

1 (Speaks English)

2 "We must therefore act together as a united people, for national reconciliation, for
3 nation building, for the birth of a new world. Let there be justice for all. Let there
4 be peace for all."

5 (Interpretation) So this is the moral, legal, and spiritual message of Côte d'Ivoire.

6 This is the message we wanted to transmit to you, your Honours. Thank you for
7 listening to our arguments. And I believe this is a first, I don't know if this will be
8 the last, but in any event thank you for allowing us to address the Court.

9 PRESIDING JUDGE EBOE-OSUJI: [14:50:00] Thank you very much.

10 Now we will take the responses, response submissions from replies.

11 Mr Gbagbo's counsel first.

12 MR ALTIT: [14:50:20](Interpretation) Thank you, Mr President.

13 I have a question to put to you first, a question of organisation. Initially, we were
14 supposed to be allowed 10 minutes to respond to the Prosecutor and the LRV, and
15 then 15 minutes to Côte d'Ivoire. So do you want us to go directly to the
16 observations of Côte d'Ivoire, which will be done by the co-counsel, or do we begin
17 with the 10 minutes to contribute to the discussion that was ongoing a short while
18 ago?

19 PRESIDING JUDGE EBOE-OSUJI: [14:51:34] Thank you. That's a very -- thank you
20 for that question. Yes, we were trying to combine the submissions so we don't need
21 to have to split proceedings. So you will now address both, so we will give you
22 extended time. It's up to you whether you want to reply to counsel for Côte d'Ivoire
23 first, or the Prosecution first, but you will have enough time to deal with both, since
24 we rolled up both formats together.

25 MR ALTIT: [14:52:14](Interpretation) Thank you, Mr President.

1 We will begin with the observations of Côte d'Ivoire and, as you suggest, we will
2 continue to the other questions. And it will be Professor Jacobs who will begin -- it
3 will be Professor Jacobs who will deal with that second part.

4 MS NAOURI: [14:52:59](Interpretation) Mr President, your Honours, the
5 representatives of Côte d'Ivoire are here because, on 20 December 2019, your
6 Chamber authorised them to participate in the proceedings, not as a party and not as
7 a participant, but as *amicus curiae*, that is, a friend of the Court.

8 What is a friend of the Court? A friend of the Court is someone who provides the
9 Judges, parties and participants, specific and useful elements that are useful to the
10 resolution of a specific point currently under discussion. This presupposes that
11 the friend of the Court has some expertise or some specific knowledge, that is why
12 they are legitimate. A friend of the Court should limit themselves to the scope of his
13 or her expertise or they are no longer a friend of the Court. A fortiori, they must not
14 interfere in the proceedings or appropriate the role of a party or a participant, which
15 they are not.

16 And yet, be it in the written or oral submissions of Côte d'Ivoire, I did not hear
17 anything, not a single argument that may help the Court to settle the question under
18 discussion.

19 The question is as follows: Is it possible to limit in a drastic manner and over a long
20 period of time the fundamental rights of a person who has been acquitted of all
21 charges?

22 The reality is that from the observations, written and oral, of Côte d'Ivoire, it becomes
23 very clear that they are supposed to oppose the freedom of Laurent Gbagbo and
24 transfer themselves into a party or participant. These observations do not add
25 anything to the fundamental issue of the restitution of Laurent Gbagbo.

1 Let us look at a few useful elements from the judicial aspect. The analysis of the
2 observations of Côte d'Ivoire shows that they do not have any useful point to provide
3 to the Court. Amongst the examples of errors of incomprehension, I will deal with the
4 no case to answer motion and the appeal procedure. For example, the statement of
5 the Côte d'Ivoire reveals their ignorance of the no case to answer procedure which led
6 to the acquittal. And that is why in paragraph 16 they said the Prosecutor was not in
7 a position to present the entirety of all the incriminative evidence before the Chamber,
8 the Trial Chamber. About 50 witnesses were not heard and, in fact, the presentation
9 of the incriminating evidence was prematurely terminated following the no case to
10 answer motion granted by the Chamber. This argument was done today on page 77.
11 Some of these observations are, quite simply, flabbergasting. The Prosecutor
12 presented his evidence for two whole years. They were able to present their case
13 freely as they wanted and they presented all the evidence that they felt necessary to
14 support the accusation against Mr Gbagbo. Not only did they have the possibility of
15 presenting their evidence, they summarised it in two documents, MTP 2 -- 364 pages,
16 and about a thousand pages in response to our answer.
17 If the witnesses that when initially due to arrive did not come, it was because the
18 Prosecutor did not call them.
19 Regarding the no case to answer, it was submitted only after the end of the
20 presentation of the Prosecution evidence. So when you look at all the evidence of
21 the Prosecution, it was only after that that the Chamber fully acquitted Mr Gbagbo.
22 To state, as Côte d'Ivoire has said, that the Chamber interrupted the presentation of
23 the Prosecution case, paragraph 17, makes no sense. And in paragraph --
24 PRESIDING JUDGE EBOE-OSUJI: [14:59:16] Counsel, counsel, wait. Let's, let's
25 watch the tenor of the submissions, the tenor of the submissions, so that - even for

1 purposes of public information - so if your aim is to explain to those who are not
2 familiar with the structure of trials at the ICC, so explain it to them so that they
3 understand it, not only counsel in the courtroom who may not be regulars at the ICTR,
4 but also the public in Côte d'Ivoire or elsewhere who may be following the
5 proceedings, it is possible to explain that in a language that does not inflame passion.
6 If your point is that it could be that in the submissions of counsel for Côte d'Ivoire
7 they were proceeding from the premise of how a trial would unfold, either in Côte
8 d'Ivoire or in France or in Belgium, or elsewhere, you want to explain to them at the
9 ICTR -- at the ICC, rather, an international tribunal, there is a different format,
10 perhaps it's slight, and that's what you are trying to tell, where the Prosecutor calls
11 their evidence first, then they stop. And then it's up to the Defence whether to call or
12 make a no case to answer.

13 That we can do without using certain kinds of language. Thank you.

14 MS NAOURI: [15:00:51](Interpretation) The purpose of the exercise is to
15 demonstrate what the observations were, and given the interpretation problems I will
16 try to adapt my presentation and represent what I intended to tell you.
17 I was talking about paragraphs 18 and 24 of the representatives of Côte d'Ivoire, in
18 which they stated that they have to wait for the presentation of new evidence -- by the
19 Prosecutor of new evidence and new witnesses. This procedure is not what is
20 envisaged. A no case to answer is a technical affair and it concerns the conditions of
21 the handing down of their decisions, so the Prosecution cannot provide new evidence
22 or witnesses at this stage.

23 Another point raised by Côte d'Ivoire, paragraph 18, is the possible conviction of
24 Laurent Gbagbo on appeal. Once again, they do not seem to have grasped the
25 procedure, because it is certain that this procedure cannot end with a conviction

1 because this is an appeal procedure. So this is an erroneous technical analysis and
2 the representatives of Côte d'Ivoire are making arguments to prevent Laurent Gbagbo
3 from having back all his rights.

4 There is another example. We note that, as friends of the Court, they do not provide
5 any relevant information. They simply parrot what the Appeals Chamber, Appeals
6 Chamber said in 2019, and this does not add any pertinent point on the factual issues.

7 Regarding factual elements, the representatives of Côte d'Ivoire simply provide
8 personal opinions that are not supported. It is exactly the contrary of what is

9 expected from a friend of the Court. There is no expertise. For example, they say
10 that the presence of Gbagbo in his country will be a factor of serious disorder -- of
11 disorder. Not only is this a frivolous statement, but it goes against the desires

12 expressed by a large part of the Ivorian civil society, and a great proportion of the
13 Ivorian political class feel that the return of Laurent Gbagbo will lead to pacification
14 and make it possible for a true national reconciliation process to take place.

15 In reality, the real intention of Côte d'Ivoire seems to be to oppose by all means the
16 return of Laurent Gbagbo to his country. Why? Because Alassane Ouattara wishes
17 to clear the way in anticipation of presidential elections scheduled in October 2020.

18 That is why MPs are arrested and imprisoned, political opponents are persecuted.

19 And even Guillaume Soro, his closest ally and former prime minister, was chased out
20 of Côte d'Ivoire. So the only purpose of these interventions is to prevent

21 Laurent Gbagbo, an Ivorian citizen, to return to his country and to enjoy all their
22 inalienable rights as a man and as a citizen.

23 And that is what they themselves say in the meaning of their intervention in certain
24 pages of their submissions. They are telling us that Laurent Gbagbo is still

25 victim -- or, rather, is still guilty, without any regard to the fact that he has been tried

1 at the International Criminal Court. They are repeating the narrative defended by
2 the supporters of Alassane Ouattara during the post-electoral crisis, narrative taken
3 by the Prosecutor in his various documents and containing the charges and narrative
4 rejected by the Trial Chamber. So they are trying to oppose the conclusions and,
5 therefore, they wish to convince the Chamber to convict Laurent Gbagbo.

6 And this is surprising, after what Alassane Ouattara said. It was said during this
7 procedure, and I will show you video CIV-D15-0004-2152 --

8 PRESIDING JUDGE EBOE-OSUJI: [15:07:51] Can you wait a minute, please?

9 Housekeeping. You know, you have had a total, your side now, a total of 25 minutes,
10 because you were supposed to respond to Côte d'Ivoire for 15 minutes. And you
11 have used up the 15 minutes and I think you are about 16 or 15 and a half minutes,
12 so -- and you had 10 minutes for the main response.

13 So just so you know, so you have less than 10 minutes. Thank you.

14 MS NAOURI: [15:08:17](Interpretation) Thank you, Mr President.

15 And so we will use the rest of the time to show the scheduled video. I would like to
16 ask the court officer to give me control. CIV-15-004-2952, CIV-D15-004-3961, and the
17 time code is 14:30 to 15:04.

18 THE COURT OFFICER: [15:09:03] Could the counsel please check the level of
19 confidentiality of the video? Is it public or confidential?

20 MS NAOURI: [15:09:12](Interpretation) It's a public video, Madam court officer.

21 The video will be displayed on evidence 2.

22 (Viewing of the video excerpt)

23 THE INTERPRETER: (Interpretation of the video excerpt)

24 "... this is intoxication. There have never been a request of the Ivorian government.

25 The Ivorian government took an initiative. It was their initiative, and we were never

1 associated with this initiative of the lawyers. And when you have lawyers, and
2 these are lawyers, they took the initiatives, it is their right. And these are judicial
3 questions, we do not interfere. We have told you. And we repeat, this is an
4 ongoing trial and there are no reasons for the government to interfere. This has been
5 said. So this is pure intoxication. The government did not preoccupy itself with
6 this situation."

7 MS NAOURI: (Interpretation) We are therefore surprised that the representatives of
8 Côte d'Ivoire are saying precisely the opposite of what Alassane Ouattara the head of
9 state said, that is, not to interfere with the proceedings of the Court. So for all those
10 reasons we respectfully ask to ignore all these submissions of the representatives of
11 Côte d'Ivoire.

12 MR ALTIT: [15:11:10](Interpretation) Thank you, Mr President. Mr Jacobs will
13 now take the floor.

14 PRESIDING JUDGE EBOE-OSUJI: [15:11:23] There is a question left over from the
15 Prosecution where we ended it, so you will of course take that into account and speak
16 to it. In other words, whether the trial could continue by giving a waiver and that
17 sort of thing.

18 MR JACOBS: [15:11:45] (Interpretation) Thank you, Mr President.

19 Mr President, let me raise a few points relating to what the Prosecutor spoke of this
20 morning and what was raised by the Legal Representatives for Victims.

21 First on the *mistrial, raised by the Prosecutor this morning. *We understood that
22 if the Prosecutor's appeal were to be successful, then they would ask for a retrial of
23 Laurent Gbagbo. Now, that is a very surprising *new position, mindful of what the
24 Prosecution said at paragraph 266 of its *appeals brief, when she explicitly stated that
25 she was not going to ask for a *new trial or a referral to the Trial Chamber. *She

1 simply argued that there were defects in the trial and that the decision should be left
2 in the hands of the Prosecutor. So there is no need for a new trial here.

3 This is not a small matter *or the detail, given the difference between what is
4 contained in the *appeals brief and what was *argued in Court today. If the
5 Prosecutor *had wanted to amend its appeal brief, she should have done so at that
6 time. But at this *stage in the proceedings, such an application in principle as has
7 been put forward *during the hearing and I believe has no value, Mr President.

8 The Prosecutor tried to *muddy the waters by arguing that nothing had changed
9 since last February, but indeed things have changed between February, July and
10 October 2019. The fact is quite simply *that in October, September 2019 the written
11 judgment was available to the Prosecutor. She had all the information to be able to
12 *clearly determine the content of her appeals brief. *That was not done. And nothing
13 has changed since then.

14 Therefore, these are not legal reasons that can *explain the change that we observed
15 today. The appeals brief has been available for several months now, but the reasons
16 for this change must be elsewhere.

17 Now if we understand what the Prosecutor is arguing, it would appear that they are
18 asking for these restrictions to be maintained regarding Laurent Gbagbo, regardless
19 of the time frames so that the proceedings may continue, particularly we see that
20 there is no certainty in this matter. And we also observe that in the appeals brief, the
21 Prosecutor refers to the Ruto case in this connection, but this decision was issued four
22 years ago, Mr President, your Honours, and as far as we know, nothing happened in
23 that case.

24 If we are to understand what the Prosecutor is saying, it would *mean that Gbagbo
25 should be *endure these conditions for four years, maybe more, *in order to afford the

1 Prosecutor time to *bring a new case or *for the matter to be referred back to the
2 Trial Chamber. After eight years of detention and one year of detention *under
3 inhumane conditions in Côte d'Ivoire, Laurent Gbagbo *would thus be subjected to
4 these conditions eternally, so to speak, and I think that the Trial Chamber cannot
5 come to such a determination.

6 Now, when it comes to reference to the so-called network, the Prosecutor and the
7 Legal Representatives have deliberately maintained a confusion between the network
8 and supporters. They want the Chamber to believe that there is a network.

9 However, all they have placed before the Chamber is material indicating that Laurent
10 Gbagbo has supporters. *Yet, there is a supposition of an elicited objective, which
11 might lead to Laurent Gbagbo's flight. *However, they do not provide you with any
12 material to demonstrate the existence of the network. This so-called network. It has
13 no leader, it has no organisation, it has no intent to cause Laurent Gbagbo to abscond.
14 So they are simply talking to you, your Honours, about political support.

15 The FPI is a legal political party in Côte d'Ivoire and a significant part of civil society
16 *in that country supports Laurent Gbagbo, who is African. President Bédié, a former
17 president of Côte d'Ivoire and former political ally of Alassane Ouattara, went to see
18 Laurent Gbagbo -- *about reconciliation, I don't believe *this adds up to what should
19 be referred to as a network.

20 Now, according to the Prosecutor, Laurent Gbagbo's freedoms should be *restricted
21 simply because he is a *very popular man in Côte d'Ivoire, in Africa and throughout
22 the world.

23 *Laurent Gbagbo is a key Ivorian *personality and he is popular and supported across
24 the world, beyond Côte d'Ivoire *and even outside the FPI. Therefore given that he is
25 such *an overwhelmingly popular person, the argument *made by the Prosecutor that

1 he should not be given back his rights. That seems to be the argument of the
2 Prosecutor. In fact, *they would have you believe and the argument is that there was
3 no trial, no acquittal, *no case that lasted two years.

4 THE COURT OFFICER: [15:18:05] Excuse me, Counsel, you have three minutes left.

5 MR JACOBS: [15:18:09] (Interpretation) Thank you.

6 Basically the reasoning behind all of the Prosecutor's arguments this morning *as well
7 as those of the Legal Representatives of Victims is that they *still believe that
8 Mr Gbagbo is still guilty, and *that is at variance with the position of the Judges.

9 One last point, quickly. The Prosecutor referred to the Tommaso decision of 2017,
10 arguing that restricting *of freedoms would fall under Article 2 rather than Article 5
11 of the European Convention. However, the Prosecutor failed to point out to you that
12 *the ECHR found that the rights of the interested party had been violated and that is
13 what matters regardless of the legal basis.

14 Let me conclude by answering your question, Mr President. We simply want to
15 point out that Laurent Gbagbo has committed himself in writing to respect any orders
16 from the Court to be present as and when necessary and to comply with all the
17 conditions in order to ensure that the proceedings unfold smoothly. In that
18 connection we do not *foresee any difficulty.

19 Now about the legal issue of his presence *at the proceedings or in the hearings, this
20 morning, you referred to the Rome Statute and the Regulations -- and the Rules,
21 rather, and the various possibilities that are open for an individual to be absent from
22 trial as such. But *this does not arise in this *case because Laurent Gbagbo has
23 committed himself to be present and to comply with all the rulings of the Chamber.

24 PRESIDING JUDGE EBOE-OSUJI: [15:20:02] That's a different question. There's a
25 specific question now and that specific question is in the event that -- now this is

1 not -- does not indicate what the Appeals Chamber will do, in fact. We just want to
2 hear all the information to take into account during our deliberations. The question
3 is in the event that the -- assuming the appeal from the Prosecutor succeeds, and that
4 is only an assumption given for the purposes of argument, that happens and the trial
5 has to continue, would the Gbagbo Defence or Mr Gbagbo himself object to the trial
6 continuing if he does not show up as ordered by the Court? That is the specific
7 question.

8 MR JACOBS: [15:21:47] (Interpretation) Thank you, Mr President. I am not able to
9 provide you with any answer other than Mr Gbagbo's commitment to be present in
10 court. We have no other theory that we can put forth on this matter.

11 PRESIDING JUDGE EBOE-OSUJI: [15:22:06] We will leave it at that. We note for
12 the record that Mr Gbagbo is in the courtroom. We leave it at that. Thank you.
13 Counsel for Mr Blé Goudé.

14 MR KNOOPS: [15:22:25] Mr President, I will first address the observations by the
15 Prosecution, also address the question of Prosecution, after which Mr N'Dry,
16 co-counsel, will address the observations of the State of Côte d'Ivoire.

17 Mr President, the Office of the Prosecution during their submissions actually created
18 itself two exceptional circumstances for the Chamber to warrant the reconsideration.
19 I will address them briefly.

20 First, it created an uncertainty as to the future course of these proceedings. Scenario
21 A, it would be a mistrial, the case would be handed to the Prosecution, and it's to its
22 discretion to decide its further course, scenario A.

23 Scenario B, which is also alluded to today, is a mistrial and a retrial.

24 Now needless to say, Mr President, that both scenarios will probably take us for many
25 years in this courtroom if, hypothetically, this course would be followed, because the

1 Prosecution actually asked you to hold your horses and to wait after the appeals
2 judgment on the merits and then hear from the Prosecution what the future course of
3 the proceedings will be.

4 Now the relevance of this observation is that the length of this prospective trial, if the
5 Prosecution scenarios would be followed, either A or B, would take us in a trial for
6 many years. And based on the undue delay clause enshrined in the human rights
7 instruments and also endorsed by the European Court of Human Rights, that in itself
8 creates for now an exceptional circumstance.

9 So the Prosecution, because it's not able to present to this Chamber, after nine years of
10 investigation, a concrete course of proceedings, after nine years, that in itself is not
11 only worrisome but creates, as mentioned, an exceptional circumstance. And the
12 Prosecution simply assumes that in case of a mistrial it is without prejudice, but your
13 Chamber can in this hypothesis decide a mistrial with prejudice because the alleged
14 errors the Prosecution has put forward in its brief relate to errors allegedly done by
15 the Judges, i.e., the time limit for the written decision, the judgment, and the second
16 appeal ground, the standard of proof. This has nothing do with interference in
17 proceedings on the part of the accused persons. It has nothing to do with the
18 endangerment of the integrity of the proceedings which is normally akin to a mistrial,
19 Mr President.

20 So let us assume if you follow the path of the Prosecution, you could even determine
21 a mistrial with prejudice and this might also include the situation that the case ends
22 there. I'm saying this not to say that this course is to be unrolled but to say to your
23 Chamber that in light of the uncertainty of the future course of this trial and its
24 prospective length, the Chamber is confronted with now an exceptional circumstance
25 because the Prosecution today creates this scenario B while in the appeal brief in

1 paragraph 266 it creates scenario A.

2 The second creation by the Prosecution of an exceptional circumstance relates to the
3 concept of a mistrial. Actually, we had hoped for that discussion during the merits
4 of the appeal, but now we also as Defence forced to go into the concept of mistrial in
5 light of the existence of special circumstances.

6 Mr President, the Supreme Court of the United States in 1978 in the case of
7 *Arizona v Washington*, a landmark case, ruled that the double jeopardy clause
8 protects the defendants from prosecution who try to use mistrials as an opportunistic
9 tool to avoid an acquittal. I think this is an observation we are entitled to make
10 today because the draft solution the Prosecution presents to the Chamber in terms of
11 remedy assumes that there were reasons for a mistrial.

12 Well, we all know from the Ruto and Sang case that this concept does not apply here
13 automatically. The basic forensic premises for a no case to answer were met, unlike
14 Ruto and Sang, as you yourself, Mr President, ruled in paragraph 139 of your opinion,
15 unlike Ruto and Sang, the Chamber in this case was able to come to a final disposition
16 of the case. It acquitted Mr Blé Goudé, Mr Gbagbo after a thorough evaluation of the
17 evidence, after which it determined that the case was so weak to make a defence case
18 unwarranted. There was no issue of interference of tampering witnesses. The
19 forensic premises for a no case to answer were met, Mr President. It was very clear.
20 It would mean if the Prosecution asked the Court now for a mistrial, it would render
21 actually null and void the protection of Article 20 of the Statute. If granted, it would
22 preclude Mr Blé Goudé from asserting that he has already been tried and acquitted of
23 the crimes under Article 20.

24 In other words, the argument of a mistrial with the prospect of a retrial is really
25 a question whether this Chamber, when it will go to the merits of the case, will follow

1 this option. We are not yet at the appeals stage, but now the Prosecution has alluded
2 to it during its submissions. We say that this actually contradicts exceptional
3 circumstances, the absence thereof by the Prosecution.

4 I note here that in the landmark book of Professor Triffterer and Professor Ambos, the
5 Rome Statute of the International Criminal Court, a commentary, 3rd edition,
6 page 645, is being discussed whether a Trial Chamber judgment on the merits may
7 suffice to trigger *ne bis in idem* and they answer that question in the affirmative.

8 PRESIDING JUDGE EBOE-OSUJI: [15:31:06] Now, Counsel, I have no question for
9 you, just do not forget to give either now or later the reference to the Arizona and
10 Washington case you mentioned.

11 MR KNOOPS: [15:31:21] Yes, we will.

12 So first this is an argument to say the argument of the Prosecution of a mistrial and
13 the analysis on its face, whether this is a valuable legal concept here warrants the
14 acceptance of exceptional circumstances because clearly the conditions for mistrial are
15 not met.

16 Secondly, even if the Court would follow scenario A or B of the Prosecution, and
17 therefore would go along with a mistrial based on mere errors, errors by Judges,
18 alleged errors by Judges are no mistrials, but even let us assume for the sake of the
19 argument that the Chamber would follow the Prosecution's reasoning then still, Mr
20 President, Article 81(3)(c)(i) of the Rome Statute is saying that the conditions are no
21 longer necessary.

22 So even in the Prosecution theory scenario A or B that article, which is the basis of
23 your judgment of 1 February, is no longer applicable.

24 Lastly, a mistrial and a retrial, either in scenario A or B, has the Chamber realised that
25 Article 20(3) of the Statute would probably preclude a new trial to this Court.

1 Mr Blé Goudé is convicted on 30 December *in absentia*. I'm not speaking now about
2 the legality of this judgment, he is convicted and the cour de cassation in
3 Côte d'Ivoire rejected his appeal, also *in absentia*. That means that scenario A or B of
4 the Prosecution will be confronted with the procedural obstacle of Article 20(3) of the
5 Rome Statute. And that means as it concerns for today, that the prospect of a new
6 trial, either a retrial or the case comes back into the hands of the Court, will also
7 probably be confronted with this obstacle. And for today, it means that conditions to
8 be maintained in this scenario is highly improbable and constitutes an exceptional
9 circumstance.

10 We now know that Mr Blé Goudé is convicted in Côte d'Ivoire, but to the
11 supreme court there, for the same facts, the evidence is in the exhibits 8 till 12 we
12 submitted yesterday, all the incidents mentioned in the verdict were tried before this
13 Court, Mr President. Everything. Same timeslot, post-electoral crisis, the same
14 location, the same subject matter. And if you look at case law of the European Court
15 of Justice, like the Van Asbroeck case of 2006, if you look at the European Court of
16 Human Rights in the case of Zolotukhin v Russia, that is authority 7 of our list, you
17 will see that the principle of non-double jeopardy therefore would apply.
18 So these are two exceptional circumstances which now have arisen from the
19 submissions of today by the Prosecution.

20 Finally, two observations: Is there any need for conditions apart from this whole
21 exposé on the mistrial? No, Mr President. The Prosecution said this
22 morning - that's the English transcript page 50, lines 19 till 20 - that there is a risk that
23 Mr Blé Goudé would flee to a country other than Côte d'Ivoire, which country there
24 would be no extradition treaty. But is the Prosecution aware that the Netherlands
25 has no extradition treaty with Côte d'Ivoire?

1 PRESIDING JUDGE EBOE-OSUJI: [15:36:10] Now I want to ask you a question,
2 Counsel, before you proceed. Again, keeping in mind that we are in open session,
3 I'm mindful of that. You made reference to -- or, rather, you relied on the process in
4 Côte d'Ivoire, the conviction in Côte d'Ivoire, that's the basis of the argument you
5 made just before your last point. And you are saying that the incidents of that event,
6 to put it colloquially, may have put the Prosecutor's theory in a difficulty, let's put it
7 that way, that there may be a retrial later.

8 Do we know what the law on trial *in absentia* is in Côte d'Ivoire? There are some
9 regimes where trial *in absentia* says an accused person who did not show up, after
10 notice, reasonable notice of the proceedings had been given to that person, and didn't
11 show up, the trial may proceed in the absence of the person. But if the person comes
12 back and shows that they could not have attended, that they could not have attended
13 the trial at home, the trial had to be redone.

14 MR KNOOPS: [15:37:52] Yes.

15 PRESIDING JUDGE EBOE-OSUJI: [15:37:54] That is one factor. Again, is that the
16 case? Is that the regime you have of that there in Côte d'Ivoire on this question? If
17 that is, does that make a difference to your own analysis? Coupled with the fact that
18 Mr Blé Goudé was in detention at the ICC, wasn't he, at all times?

19 MR KNOOPS: [15:38:19] Yes.

20 PRESIDING JUDGE EBOE-OSUJI: [15:38:20] Okay. Keep all that in mind in --

21 MR KNOOPS: [15:38:21] Yes. Mr N'Dry will address this question, but I'm not
22 trying to evaluate the legality of this trial in Côte d'Ivoire because I can speak for
23 hours about it. I just say the Prosecution simply assumes that a retrial is possible. I
24 say Article 20(3) might be an obstacle, it's not for now, but the Court cannot exclude
25 that the retrial on the current situation would be impossible apart from the legality of

1 the proceedings. Then it's up to the Prosecution to show that the trial didn't meet
2 the standards of international law.

3 Mr N'Dry will address the question on *in absentia*. There is a provision in the *cour*
4 *pénale de Côte d'Ivoire* and he can explain whether this was met or not. For now, I
5 simply say to the Court this whole hypothesis of the Prosecution scenario A or B is
6 a scenario which is so uncertain for the Chamber that this creates exceptional
7 circumstances in terms of the timing of the proceedings and the way these
8 proceedings might continue.

9 Mr President, last remark, there is no extradition treaty with Côte d'Ivoire and the
10 Netherlands --

11 PRESIDING JUDGE EBOE-OSUJI: [15:39:38] Okay, can we --

12 THE INTERPRETER: [15:39:51] Microphone, Mr President.

13 PRESIDING JUDGE EBOE-OSUJI: [15:39:59] Closed session.

14 (Private session at 3.40 p.m.)

15 THE COURT OFFICER: [15:40:21] We are in private session, Mr President.

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Open session at 3.41 p.m.)

15 THE COURT OFFICER: [15:41:51] We are back in open session, Mr President.

16 MR KNOOPS: [15:42:03] The last remark before I give the floor to Mr N'Dry, the
17 question of the Prosecution and the Chamber on the presence of Mr Blé Goudé.

18 PRESIDING JUDGE EBOE-OSUJI: [15:42:12] Definitely. I'm very interested in that
19 question.

20 MR KNOOPS: [15:42:14] Three observations. First, Article 63(1) does not exclude
21 waivers, it doesn't exclude waiver from defendants not to be present or vice versa
22 statements that the Court could continue even without his presence.

23 PRESIDING JUDGE EBOE-OSUJI: [15:42:34] So your point is that, yes, the
24 proceedings can go ahead if --

25 MR KNOOPS: [15:42:40] Technically they could, because at the ICTY there is

1 a similar provision, it's Article 63(1), and the practice there that defendants can sign
2 waivers to not appear one or two days in court if that's for a certain reason. So
3 legally it's possible on the basis of the statement the Court has before it that the
4 proceedings could continue.

5 I have to say though of course that the waiver should be voluntarily because if
6 Mr Blé Goudé would have potentially be detained elsewhere, I'm not going to details,
7 then of course the waiver to continue would have to be perceived differently. But
8 our submission is that with the statement the Court has before it, the proceedings
9 could continue. Thank you.

10 PRESIDING JUDGE EBOE-OSUJI: [15:43:29] And you will be prepared to give that
11 waiver?

12 MR KNOOPS: [15:43:33] Yes, of course to secure the proceedings. Of course
13 Mr Blé Goudé prefers to be present, but -- and he will be present at all times the Court
14 orders so.

15 I will give the floor to Mr N'Dry who will address the observations of the State of
16 Côte d'Ivoire.

17 PRESIDING JUDGE EBOE-OSUJI: [15:43:56] Thank you. You have five minutes
18 left.

19 I've been told that you have eight minutes and not five. Please proceed.

20 MR N'DRY: [15:44:32](Interpretation) Good evening, Mr President, ladies and
21 gentlemen, honourable Judges, good evening.

22 Mr President, I would like to find out whether when it comes to the question you
23 raised with Maître Knoops on the *absentia* trial process, will that be counted as part of
24 my time or would it be dealt with separately? Because you put a question on the
25 issue of trial *in absentia* in Côte d'Ivoire.

1 PRESIDING JUDGE EBOE-OSUJI: [15:45:04] Do your best to fit it within your time.

2 Do your best. If you can.

3 MR N'DRY: [15:45:12](Interpretation) Very well. Thank you, Mr President.

4 Let me proceed expeditiously. My comments will be based on the written filing of
5 the lawyers of Côte d'Ivoire submitted before today. I will therefore not address
6 anything pertaining to the lengthy presentation that was made by the lawyer for
7 Côte d'Ivoire in court.

8 My first point by way of remarks will deal with the flight risk. In order to justify
9 their flight risk argument, the lawyers for the State of Côte d'Ivoire alleged, and I'm
10 going to quote, that "the ongoing appeal justifies even further the need to maintain
11 the conditions insofar as a risk of a heavy sentence may lead to flight." End of quote.

12 On this point, counsel for Mr Blé Goudé have very serious reservations about the
13 relevance of this argument and for that reason we make the two following points.

14 First, after a decision for acquittal as of 15 January 2019, it appears to us that the
15 natural outcome and consequence of such a decision should be the full enjoyment of
16 their freedom by such acquitted person, freedom of movement.

17 In the conditions that we know, namely, that the Prosecutor -- the Prosecutor's
18 evidence was exceptionally weak as demonstrated by the case file. In those
19 circumstances, we believe that this is incompatible with the theory of a flight risk,
20 under these circumstances, given that Mr Blé Goudé has been acquitted. An
21 acquittal which I may say is unprecedented because I don't know whether there was
22 ever any such qualification of evidence before this Court as being exceptionally weak.
23 So we are dealing here with exceptionally -- an exceptionally weak body of evidence,
24 which led to an acquittal.

25 When you are dealing with evidence that has been referred to as exceptionally weak,

1 we believe then that the theory of a possible flight risk is quite unlikely.

2 Secondly, and unfortunately this argument seems to have changed from this morning,
3 unfortunately the argument changed suddenly this morning because previously we
4 were told of a mistrial but today the Prosecutor has argued that she intends to
5 continue the trial, and this brings further uncertainty into play, which therefore must
6 lead to our understanding to the finding that the conditions which were the reason
7 for the acquittal should be lifted.

8 Secondly, let me address the refusal of freedom based on an argument pertaining to
9 victims and witnesses, and their argument is contained in their filing. On this
10 particular point we would like to point out that most of the witnesses who appeared
11 before this Court and testified in this courtroom live in Côte d'Ivoire. After
12 testifying here in the Court, they returned to Côte d'Ivoire and none of them has come
13 under any pressure from anybody whosoever. That is why when the idea of some
14 fanciful or mythical threat is argued as having to deal with a particular accused
15 person, we believe that such an argument against unconditional release does not
16 hold.

17 We have been told that victims will be deprived of reparations because of acquittal.
18 This kind of argument stands in stark contradiction to the rigour of legal thought and
19 I can tell you why. What the victims are looking for is not a scapegoat. The first
20 thing that witnesses are looking for is not necessarily reparations. What witnesses
21 are looking for is the truth and that truth, we believe, was declared here in this
22 courtroom on 15 January.

23 I believe, therefore, that the only alternative theory that would prosper is that the real
24 perpetrators, since they were victims, the really perpetrators should be sought after,
25 found and prosecuted.

1 Let me conclude by addressing the issue of justice which is a precondition for
2 reconciliation. But before I address that point, let me say that the Legal
3 Representative of Victims had been given the opportunity to call victims to this
4 courtroom to come and speak to the facts during the trial. The Legal Representative
5 for Victims decided in the presence of all and sundry to waive that right to call
6 victims and witnesses here. So we can no longer speculate on that matter, because it
7 is settled and the case led to an acquittal based on adjudication on facts.
8 Now coming to the issue of reconciliation, we do agree that justice is a precondition
9 for reconciliation. However, justice as such -- should justice lead to the conviction of
10 an innocent person simply because we want to achieve justice? If that were the case,
11 then there will be no justice. Mr Charles Blé Goudé was tried, 82 witnesses were
12 called, several documents were filed, and the Judges decided on an acquittal.
13 Now coming to the question, Mr President, of a trial *in absentia*, this is provided for in
14 the legal system of Côte d'Ivoire, but the conditions that apply are as follows.
15 PRESIDING JUDGE EBOE-OSUJI: [15:53:49] Your time is technically up, but if you
16 can quickly make that point.
17 MR N'DRY: [15:53:58](Interpretation) Respectfully, your Honour, I will answer the
18 question that the Chamber has raised.
19 We have the code of criminal procedure in Côte d'Ivoire here, article 354 of that
20 criminal procedure code answers your question and provides as follows: The
21 accused person who may be absent without a valid excuse at the opening of the trial
22 shall be tried *in absentia*. The accused person who is absent without a valid reason at
23 the opening of the trial shall be tried *in absentia*.
24 So without a valid reason is the condition. And I think it is for the Court to
25 determine what that means.

1 Mr Charles Blé Goudé in the circumstances at hand was surrendered to the Court by
2 a decision of Côte d'Ivoire, order number 67 of 21 March 2014. He was tried and
3 acquitted. Your decision appended a number of conditions to this acquittal for him
4 to be maintained where he is. And if the Ivorian legal system came to the
5 determination that he was absent without a valid reason, then it is for the Court to
6 determine whether or not the Ivorian justice system used this provision for its own
7 purposes. And that will be it. Thank you.

8 PRESIDING JUDGE EBOE-OSUJI: [15:55:35] Thank you very much.

9 Now we have time for the Prosecutor to respond, 15 minutes, and that is to Côte
10 d'Ivoire's submission.

11 MR GALLMETZER: [15:55:54] We can be very brief, we could use those 15 minutes
12 to respond to Côte d'Ivoire and also to the other observations that we would want to
13 make in closed session, all in 15 minutes, so we can conclude the hearing today.

14 PRESIDING JUDGE EBOE-OSUJI: [15:56:12] Proceed.

15 MR GALLMETZER: [15:56:13] And also my colleague, Ms Narayanan, would make
16 one quick observation after I respond to Côte d'Ivoire.

17 So we are responding to the observations of the government of Côte d'Ivoire in the
18 assumption that counsel present in the courtroom today have a valid mandate from
19 the government country to the suggestion by the Defence of Mr Laurent Gbagbo,
20 counsel have shared a power of attorney with us. It was signed on 20 January 2020
21 and I'm sure if there's any doubt, counsel would be prepared to share that with the
22 Court.

23 So the government of Côte d'Ivoire objects to the lifting of Mr Gbagbo's conditions on
24 release. According to the government, doing so would likely lead to Mr Gbagbo's
25 return to Côte d'Ivoire. This, in turn, would create a flight risk and also affect public

1 order in Côte d'Ivoire.

2 Based on these submissions, it appears that Côte d'Ivoire is unable to ensure his
3 appearance for any future proceedings before the Court. In these circumstances, and
4 given that you have already found that Mr Gbagbo has an incentive to abscond, the
5 Appeals Chamber should not merely rely on Mr Gbagbo's word that he will appear
6 voluntarily before the Court if released to Côte d'Ivoire.

7 Indeed, Côte d'Ivoire's position matches our own. The Appeals Chamber should not
8 lift the conditions imposed on Mr Gbagbo's release. The compelling reasons
9 justifying the conditions imposed by the Appeals Chamber last year continue to exist
10 today. If these conditions were lifted, Mr Gbagbo were to travel to Côte d'Ivoire or
11 to a third state, his presence in future proceedings simply could not be secured.

12 I now would like to give the floor to Ms Narayanan and then come back to closed
13 session.

14 MS NARAYANAN: [15:58:12] Thank you very much, your Honours. I won't take
15 more than a couple of minutes, but with your permission I'd just like to make a few
16 very brief observations just to clarify a few things about the remedy that we heard
17 just now.

18 First of all, I think it just comes back to paragraph 266 of our appeal brief. So based
19 on a contextual understanding of our brief - and this might go to some of the
20 submissions that Mr Gbagbo's counsel made - we have not said explicitly that we
21 would not seek a retrial. That is simply not there in the language of paragraph 266.

22 Second, we've asked for the case back. Why else would that be? Except that future
23 proceedings are still alive as a possibility. Third, and this I would like to read the
24 language of paragraph 266, which acknowledges that you, Your Honours, can
25 "[...] order a new trial (which would be a possible remedy) ..."

1 So that possibility was always there.

2 And turning next to the submissions of possibly the counsel of Mr Blé Goudé.

3 Your Honours, there really should not be any uncertainty vis-à-vis the Prosecutor's
4 intention regarding future proceedings. I hoped that I'd made that clear in my first
5 round of submissions.

6 But yes, your Honours, the Prosecutor does intend future proceedings. If anything
7 is uncertain, it's only the shape and form of it, which of course will depend as well on
8 the appeal.

9 The remedies of mistrial as well as retrial after that, in our mind, is perfectly
10 compatible and of course we're happy to explain that at a later point in time during
11 the merits appeal. There was some thought about whether the new trial would be
12 particularly onerous. Your Honours, at this point without getting into any particular
13 details because we don't have them, it doesn't necessarily have to be so. As a matter
14 of principle, there are ways to have a more shorter new trial, possibly even on the
15 existing record. It's just that I'm in no position nor is the office to give a commitment
16 at this point in terms of how that might be conducted.

17 And lastly, your Honours, there was some submissions of course on mistrial
18 generally as a remedy. But your Honours, I think we'd be very happy to leave that
19 for the merits of the appeal because we believe that it belongs squarely there.

20 Otherwise, that would be it for me. Thank you.

21 PRESIDING JUDGE EBOE-OSUJI: [16:00:45] Thank you very much.

22 Private session with the curtains drawn.

23 MR GALLMETZER: [16:00:56] Yes.

24 PRESIDING JUDGE EBOE-OSUJI: [16:00:57] Thank you.

25 Your microphone is on.

1 (Private session at 4.01 p.m.)

2 THE COURT OFFICER: [16:01:12] We are in private session, Mr President.

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Closed session at 4.02 p.m.)

19 THE COURT OFFICER: [16:02:17] We are in closed session, Mr President.

20 (Appeals Chamber confers)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

Appeals Hearing

(Open Session)

ICC-02/11-01/15

1

2

3

4

5

6

7

8

9

10

11

12

13 Page redacted - Closed session

14

15

16

17

18

19

20

21

22

23

24

25

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Open session at 4.08 p.m.)

9 THE COURT OFFICER: [16:08:07] We are back in open session, Mr President.

10 PRESIDING JUDGE EBOE-OSUJI: [16:08:27] Thank you.

11 Members of the public, sometimes we have to do these things to have processes in
12 a regular manner.

13 Now we will have -- receive submissions from counsel for Côte d'Ivoire, if they have
14 any to make. Five minutes to react to what was said in response to their submissions.
15 Five minutes.

16 MR MIGNARD: [16:08:59](Interpretation) It is true, yes, we are here as friend of the
17 Court. And as far as we are concerned, we are lawyers representing the government
18 of Côte d'Ivoire and we have a mandate from that government.

19 Now, must a friend of the Court be neutral in relation to all the other parties? It
20 would be ridiculous to make such a claim; that would be ridiculous. We are friends
21 of the Court and also friends of justice. And initially, there was an application from
22 the government of Côte d'Ivoire requesting our presence here; so perhaps that is the
23 point. Perhaps this is why we are under criticism.

24 Now secondly, the major point -- the major request to make before the Court was not
25 to go into procedural matters that basically have to do with the parties, but rather we

1 wish to merely state that we are lawyers representing the government, that is, the
2 guarantee of public order in the country. A country that has suffered greatly; that
3 has seen terrible violations of rights. Great harm has been done. No one wants
4 those days of violence to return. We all want calm and peace. All we want is for
5 the Court to make the wisest decision possible. The most legitimate decision
6 possible. Why would it be that an Ivorian citizen supporting Mr Gbagbo or
7 Mr Blé Goudé ...

8 They want to restart the work of reconciliation. The ICC is unique and we -- they
9 must be able to say that the trial was held. Everything was discussed, reviewed,
10 examined. Every nook, every cranny of the case was examined. And Mr Gbagbo
11 was present and we see -- believe that the conditions were good, humane and the
12 current conditions are such that they're quite broad. The only restriction is that he
13 cannot make comments on politics, but we are saying that the trial must run to its
14 normal end. It must.

15 Sometimes I understand what opposing counsel has said and we are entirely
16 cooperative. If new evidence is required, if new witnesses are called, we will
17 cooperate. We want the proceedings to continue with the proper respect for law and
18 we think that's soon --

19 THE INTERPRETER: [16:12:04] Correction --

20 MR MIGNARD: [16:12:04] (Interpretation) -- it's much too soon for Mr Gbagbo to
21 return to his country. The day he returns, and if he had been -- if he's acquitted by
22 you under such conditions, we assure you that the government of Côte d'Ivoire will
23 be the tireless defender of your decision.

24 PRESIDING JUDGE EBOE-OSUJI: [16:12:31] Thank you very much, counsel. That
25 brings us to the end of your audience with us and we thank you. You will now

1 excuse us. And there are some matters the parties would like to discuss -- there are
2 some matters that are purely between the parties; so thank you very much for coming
3 and good luck with your travels back.

4 Now, we will go into private session once more and from private session ...

5 (Pause in proceedings)

6 (State representatives for Côte d'Ivoire exit the courtroom)

7 PRESIDING JUDGE EBOE-OSUJI: [16:14:23] Let's go into the closed session.

8 (Private session at 4.14 p.m.)

9 THE COURT OFFICER: [16:14:34] We are in private session, Mr President.

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

Appeals Hearing

(Open Session)

ICC-02/11-01/15

1

2

3

4

5

6

7

8

9

10

11

12 Page redacted – Private session

13

14

15

16

17

18

19

20

21

22

23

24

25 (Redacted)

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Open session at 4.22 p.m.)

16 THE COURT OFFICER: [16:22:11] We are back in open session, Mr President.

17 MR JACOBS: [16:22:21] (Interpretation) Thank you for your question, Madam.

18 As we were arguing this morning, we're of the view that the right to freedom of

19 a person who has been acquitted must be absolute. And that in the absence of

20 justification, for example, new charges or others, the person who has been acquitted

21 must enjoy all fundamental rights: * The right to freedom, the right to freedom of

22 expression, to come and go, the right to liberty of thought and conscience, the right to

23 expression. And all those rights are protected because of the acquittal, which returns

24 to the person or allows the person to enjoy all those fundamental rights.

25 Possible waivers or exemptions must be provided for explicitly, which is not in the

1 case -- which is not the case in the European Convention on Human Rights and
2 invoking the theoretical possibility of a * derogation from a right does not replace
3 the demonstration of the necessity of a restriction.

4 As we said this morning, in other words, without concrete established justified
5 reasons for the * allegations against the person, you cannot derogate from a right on
6 the basis of a hypothetical risk.

7 Thus, we believe that the rights of Laurent Gbagbo must not be restricted
8 (Overlapping speakers) --

9 JUDGE IBÁÑEZ CARRANZA: [16:23:57] Just to be clear --

10 MR JACOBS: [16:23:57] (Interpretation) -- and he must be in a position to exercise
11 them freely --

12 JUDGE IBÁÑEZ CARRANZA: [16:24:05] (Overlapping speakers) -- because this
13 morning, you have talked about the derogation, the potential derogation of the
14 human rights of Mr Gbagbo with a decision of this Bench of 1 February 2019. But
15 I'm pointing out that the only non-derogable rights, human rights, are pointed out in
16 the Article 4(2) of the International Covenant on Human Rights. That
17 means -- unless you sustain another position, that means that all the rights like
18 freedom of free movement or freedom of speech are not considered under this Article;
19 unless that your position is that all human rights are absolute.

20 Please, if you have an answer on that.

21 MR JACOBS: [16:25:00] (Interpretation) Thank you, your Honour. To be clearer,
22 the fact that the convention makes that distinction between a non-derogable right and
23 derogable right doesn't mean that you can derogue from all rights just because there's
24 a theoretical possibility.

25 Just because the convention says in theory it is possible sometimes to derogate from

1 a right, that doesn't mean you can give free *rein to a public or legal authority to
2 allow such a derogation without justification in the case of a person who has been
3 acquitted.

4 We're of the view that there is no justification in human rights jurisprudence or the
5 statute to do so. The fact that this right is not listed amongst the non-derogable
6 rights. That does not take away anything from our position. You need a very
7 strong, solid justification because this is a human right, a fundamental right
8 recognised --

9 JUDGE IBÁÑEZ CARRANZA: [16:26:11] (Overlapping speakers) Thank you and
10 this --

11 MR JACOBS: [16:26:11] (Interpretation) -- by the convention.

12 JUDGE IBÁÑEZ CARRANZA: [16:26:13](Overlapping speakers) -- is your position,
13 and this time the question is about, I mean, for you or maybe the OTP will want to
14 answer to this. It's under the legal framework of the Rome Statute. The decisions
15 and judgments of the appeals division are meant to be final and certainly creates or
16 triggers a legal or juridical certainty over a case or a matter for the parties and for the
17 international community.

18 The question is, is your position that the norms of the Rome Statute - and, specifically
19 their wording - permit the reconsideration of a decision that mean to be final?

20 If yes, please point out which norms of -- if any, will be those that permit this
21 reconsideration. Thank you.

22 MR JACOBS: [16:27:12] (Interpretation) Thank you, your Honour. *Indeed, logic
23 would tell us that a decision that goes through an appellate procedure * and the
24 appeals judgment become definitive. There is a second level of jurisdiction.

25 There are no provisions in the Statute * that allow for reconsideration. The Rome

1 Statute does not provide explicitly for reconsideration. * This is a development in
2 jurisprudence that allows one, on the grounds mentioned this morning, to avoid an
3 injustice, etcetera, that this possibility of a reconsideration was recognized by the
4 Statute.

5 Specifically, on this issue of the appeal, we're of the view that in this case, the
6 appellate proceedings on 1 February last as well as the ruling that followed are
7 de facto a first instance proceeding.

8 Why do we say this? If the Appeals Chamber had restricted itself to analysing the
9 reasoning of the Trial Chamber and identifying within the framework of existing law
10 a number of errors or not and come -- and came to a number of conclusions, then it
11 would have been a conventional appeal with a final decision.

12 But that is not what the Appeals Chamber did in this case. * The Appeals Chamber
13 took the discussion out of the framework of the first instance decision and outside of
14 the framework of the appeal made by the Prosecutor at the time, asking parties and
15 participants, during the hearing on 1 February, a number of questions about entirely
16 new matters. For example, compelling reasons, which is not provided for in the
17 Statute.

18 So these are new issues that had never been discussed here at the ICC. * That were not
19 even considered by the Trial Chamber. So this, it was an initial -- a first
20 consideration and led to what is de facto a first instance decision that was not
21 later subjected --

22 PRESIDING JUDGE EBOE-OSUJI: [16:30:08] Mr Jacobs, your submission is, every
23 time an appeals court asks a question in order to discharge its own function, if that
24 question had not been asked before, that makes that judgment a first instance
25 judgment. Is that your hypothesis?

1 MR JACOBS: [16:30:31] (Interpretation) Thank you, Mr President. No. No, that is
2 not my hypothesis. I am invoking that hypothesis in the specific case; namely, the
3 way that the proceedings unfolded here. The fact that a new issue may come up at
4 appeal does not mean that the appeal is necessarily first instance.

5 But we can agree that here, the issue raised by the Appeals Chamber during the
6 proceedings had not been considered by any one. Had not been considered, viewed,
7 and it was --* it was not about Article 81 (3) (c) (i) being interpreted in another
8 manner. * The legal framework that we had been asked about during that hearing of
9 1st February and which served as the foundation for your judgment existed nowhere
10 beforehand. Nowhere.

11 Thus, it was not discussed. There was no previous jurisprudence. There was no
12 jurisprudence from other tribunals. It was a first. It was novel. And it was that
13 specific aspect that we thought -- because of that specific aspect, we thought that you
14 had handed down a --

15 JUDGE IBÁÑEZ CARRANZA: [16:31:52] (Overlapping microphones)

16 MR JACOBS: [16:31:52] -- first instance decision.

17 JUDGE IBÁÑEZ CARRANZA: [16:31:53] -- counsellor, just to be clear, so regarding
18 the legal framework of this Rome Statute, you don't find norms to authorize a
19 reconsideration in appeals -- after an appeals judgment is rendered? Just to be clear.

20 MR JACOBS: [16:32:16] (Overlapping speakers)

21 JUDGE IBÁÑEZ CARRANZA: [16:32:16] Okay, thank you.

22 I don't know if the Prosecution has an intervention?

23 MR GALLMETZER: [16:32:18] I can add a few comments. Yes, your Honour, in
24 principle, a judgment by the Appeals Chamber, be it under Rule 158 or article -- (1), is
25 a final judgment. It is res judicata; that is the principle.

1 Specifically, in relation to judgments under 158, what we do have in our
2 jurisprudence is a separate opinion from Judge Pikis in the Katanga case, that is, filing
3 number 522 (OA3) at paragraph 22 (sic), where he specifically refers to, and I quote:
4 "[...] the finality attached to the appellate process by rule 158 ..." End of quote.
5 Our position is that in wholly exceptional circumstances - and this is because of the
6 nature of this Court, with only one tier of appellate review - there may be instances
7 where the Court may have to refer to its inherent powers to prevent an injustice.
8 The test, however, is very high. It should be referred to only in very exceptional
9 circumstances and definitely not in a situation like this.

10 First, as we said, because there is another procedure that is available to deal with that
11 matter --

12 PRESIDING JUDGE EBOE-OSUJI: [16:33:39] You don't need to repeat the argument
13 you already made.

14 MR GALLMETZER: [16:33:42] Very well. So I sit down, yeah, I've made my case.

15 JUDGE IBÁÑEZ CARRANZA: [16:33:47] Okay, thank you.

16 PRESIDING JUDGE EBOE-OSUJI: [16:33:51] All right, exceptionally I understand
17 the counsel for victims want five minutes or so -- or less? If not, we will leave it at
18 that for the day.

19 MS MASSIDDA: [16:34:03] No, your Honour. Thank you very much for asking,
20 but we don't have any further submission except for saying that if the Prosecution is
21 allowed to file by tomorrow noon a written submission, then we will ask the same
22 deadline for also our submission in writing. Thank you very much.

23 PRESIDING JUDGE EBOE-OSUJI: [16:34:23] All right. Thank you very much,
24 counsel.

25 Then -- yes, Mr. Gallmetzer?

- 1 MR GALLMETZER: [16:34:30] I know I promised the submissions by noon. Can
2 we say 4 o'clock? Tomorrow, 4 o'clock?
3 (Appeals Chamber confers)
4 PRESIDING JUDGE EBOE-OSUJI: [16:35:00] All right, granted, 4 o'clock, and that
5 goes for everyone. Everyone else, also counsel for Gbagbo as well.
6 And that brings us to the close of our proceedings for the day and we thank everyone
7 for their very helpful submissions.
8 We will look forward to your -- those written filings.
9 After that, then we will let you know when the judgment will be rendered.
10 All right, thank you very much.
11 Court is adjourned.
12 THE COURT USHER: [16:35:43] All rise.
13 (The hearing ends in open session at 4.35 p.m.)