



Original: English

No.: ICC-02/11-01/15
Date: 15 January 2019

TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

PUBLIC

Urgent Prosecution's request pursuant to article 81(3)(c)(i) of the Statute

Source: Office of the Prosecutor

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

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Introduction

1. The Prosecution respectfully requests that the Chamber impose conditions on the Accused's release pursuant to article 81(3)(c)(i) of the Statute.¹ The Prosecution, upon a preliminary assessment of the Majority of the Trial Chamber I's announcement to acquit the Accused ("Acquittals"),² has determined that it intends to appeal the full and detailed reasoned Decision ("Decision") following the Acquittals.³ The Prosecution's decision is informed, among other factors, by Judge Herrera Carbuccia's dissenting opinion.⁴

2. Even if at this stage the Majority of the Trial Chamber may not have effectively issued its Decision pursuant to article 74, since the Majority has decided not to provide reasons despite the requirements of article 74(5),⁵ the Prosecution has no choice but to already now announce its intention to file a notice of appeal under article 81(1)(a) against the Decision, once the reasons become known.⁶ This is to preserve the procedural right afforded to the Prosecution under article 81(3)(c)(i) to request the detention of the acquitted persons pending appeal.

3. The Prosecution submits that pursuant to article 81(3)(c)(i), there are exceptional circumstances for maintaining both Accused's detention pending appeal. There is a concrete risk that the Accused will not appear for the continuation of the trial if the Prosecution's appeal against the Decision is successful. In addition, the

¹ The Prosecution notes that, while article 81(3)(c) of the Statute refers to "the accused" ("In case of an acquittal, the accused shall be released immediately, subject to the following"), subparagraph (i) instead refers to "the person" ("Under exceptional circumstances [...] the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal"). For ease of reference, the Prosecution in this submission refers to "the Accused" to mean Laurent Gbagbo and Charles Blé Goudé.

² ICC-02/11-01/11-T-323-ENG-ET.

³ See ICC-02/11-01/11-T-323-ENG-ET, p. 3.

⁴ ICC-02/11-01/11-1234 ("Dissenting Opinion").

⁵ Dissenting Opinion, paras. 11-26.

⁶ Pursuant to rule 150(1) of the Rules of Procedure and Evidence, the Prosecution will file its notice of appeal against the Decision "no later than 30 days from the date on which the party filing the appeal is notified of the decision...". As held by Judge Herrera Carbuccia, the Prosecution will not be able to comply with the formal requirements of a notice of appeal under regulation 57 without being provided with a "fully reasoned decision" Dissenting Opinion, para. 31. In the Acquittals, Judge Tarfusser also indicated that the deadlines for appeal would run from the notification of the full reasoned decision.

offences charged in this case are very serious. There is also a probability that the Prosecution will succeed on appeal. However, the Prosecution would not oppose release if the flight risk can be mitigated by imposing a series of conditions in relation to the release of the Accused, including that they be released to a State Party to the Rome Statute other than Côte d'Ivoire. Conditions should also be imposed to preserve the integrity of the continued proceedings.

4. Accordingly, subject to identifying a State that is willing and able to enforce the conditions imposed by the Chamber on the Accused's release, it is submitted that the Chamber may order the conditional release of the Accused pending appeal.
5. If the Chamber denies this application, the Chamber should stay the Accused's unconditional release until the Appeals Chamber decides on the suspensive effect of any appeal under article 81(3)(c)(ii) against the Chamber's decision to deny this application.⁷

Procedural Background

6. Mr Gbagbo has been detained by the Court since 30 November 2011.⁸ Mr Blé Goudé since 22 March 2014.⁹ The trial against them began on 28 January 2016.¹⁰ The last witness called by the Prosecution testified in court on 19 January 2018.¹¹ On 14 February 2018, the Defence for Mr Gbagbo filed his latest written request for interim release,¹² which the Chamber denied by Majority on 20 April 2018.¹³

⁷ The Appeals Chamber has held that it may order that an appeal under article 81(3)(c)(ii) has suspensive effect pursuant to article 82(3) and rule 156(5). This would have the effect that the person "be[...] kept in detention pending the outcome of the Prosecutor's appeal pursuant to article 81(3)(c)(ii)": ICC-01/04-02/12-12 OA, paras. 15, 17.

⁸ See ICC-02/11-01/11-656-Red, para. 3.

⁹ See ICC-02/11-02/11-186, para. 4.

¹⁰ ICC-02/11-01/15-T-9-ENG-ET.

¹¹ ICC-02/11-01/15-T-220-Red-ENG-CT.

¹² See ICC-02/11-01/15-1130-Red.

¹³ See ICC-02/11-01/15-1156-Red.

7. On 19 March 2018, upon invitation by the Chamber in its 9 February 2018 Order on the further Conduct of Proceedings,¹⁴ the Prosecution filed a Mid-Trial Brief.¹⁵ The Defence for each Accused filed observations in relation to it and the continuation of trial proceedings on 23 April 2018.¹⁶ Following the Chamber's Second Order on the further Conduct of Proceedings issued on 4 June 2018,¹⁷ the Defence for each Accused filed their motions seeking a judgment of acquittal on 23 July 2018.¹⁸ The Prosecution and the LRV responded on 10 September 2018.¹⁹ Hearings on oral submissions in relation to the Defence motions seeking a judgment of acquittal were held on 1 to 3 October and 12 to 22 November 2018.
8. On 10 December 2018, the Chamber by Majority decided to *proprio motu* review the basis for the continued detention of the Accused,²⁰ and convened a hearing for that purpose. The hearing took place in open session on 13 December 2018 with submissions from the parties, participants and Registry representatives.²¹ During that hearing the Defence for both Accused requested that they be released, with or without conditions.²²
9. Today, on 15 January 2019,²³ the Chamber by Majority orally granted the Defence motions for judgment of acquittal, indicating that it would provide its full and detailed reasoned decision as soon as possible, and deciding that the deadlines for appeal would run from the notification of the full reasoned decision. The Chamber by Majority also ordered the immediate release of both Accused pursuant to article 81(3)(c) of the Statute subject to any request by the Prosecution under article 81(3)(c)(i). It found that the Accused's pending requests for

¹⁴ ICC-02/11-01/15-1124.

¹⁵ ICC-02/11-01/15-1136.

¹⁶ ICC-02/11-01/15-1157-Conf; ICC-02/11-01/15-1158-Conf.

¹⁷ ICC-02/11-01/15-1174.

¹⁸ ICC-02/11-01/15-1198; ICC-02/11-01/15-1199.

¹⁹ ICC-02/11-01/15-1207; ICC-02/11-01/15-1206-Conf.

²⁰ ICC-02/11-01/15-1229, para. 10.

²¹ See ICC-02/11-01/15-T-231-CONF-ENG-ET and ICC-02/11-01/15-T-231-CONF-FRA-ET.

²² ICC-02/11-01/15-T-231-CONF-FRA-ET, pp. 28-47, especially pp. 45-47 (private session) and ICC-02/11-01/15-T-231-CONF-ENG-ET, pp. 47-65, especially pp. 62-63 (private session), 64-65.

²³ ICC-02/11-01/15-T-232-ENG-T-ET.

provisional release had become moot. Finally, it suspended the order to immediately release the Accused until it decides on any request by the Prosecution pursuant to article 81(3)(c)(i).

Submissions

1. Circumstances justifying continued detention or conditions on the release of an acquitted person

10. Article 81(3)(c) provides that in case of an acquittal, the accused shall be released immediately. However, the release, which is an expression of the “fundamental right to liberty of the person”,²⁴ is subject to the limitation set out in article 81(3)(c)(i), which stipulates that “under exceptional circumstances [...] the Trial Chamber [...] may maintain the detention of the person pending appeal”.
11. To preserve the acquitted person’s general right to be “released immediately”, a request under article 81(3)(c)(i) must be filed at the earliest opportunity. However, the Prosecution need not have filed its appeal under article 81(1)(a) to request to “maintain the detention of the [acquitted] person pending appeal” under article 81(3)(c)(i). An indication that the Prosecution will be appealing a decision to acquit is sufficient for the purpose of filing an article 81(3)(c)(i) request. This applies especially in circumstances, as in the present case, where the Majority of the Trial Chamber has issued the Acquittals without providing “a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions”.²⁵ Rule 150(1) provides that the Prosecution has 30 days from the date on which it is notified of the decision to file an appeal. Requiring the Prosecution to file an appeal before it can request that the detention of the acquitted person be maintained would make it impossible to reconcile the need for the acquitted person to be released immediately with the Prosecution’s right under article 81(3)(c)(i) to request the maintenance of the accused’s detention

²⁴ ICC-01/04-02/12-12 OA, para. 22.

²⁵ Article 74(5).

pending the appeal and its rights and obligations to file an appeal under article 81(1)(a), pursuant to the requirements under regulation 57, and in particular its duty to identify “the grounds of appeal, cumulatively or in the alternative, specifying the alleged errors and how they affect the appealed decision”.²⁶

12. The factors that may constitute such exceptional circumstances are not exhaustively listed under article 81(3)(c)(i). However, a “concrete risk of flight” is one such factor expressly mentioned in that provision. Indeed, in circumstances where the Court cannot be confident that an arrest warrant will be executed a second time, this test may be met. If this is the case, the Trial Chamber has discretion to release the accused, subject to conditions that mitigate the identified risk of flight.²⁷
13. While the standard of proof justifying detention under article 58 (1) is relatively low—the arrest of the person “appears necessary”,²⁸ a formula which “revolves around the possibility, not the inevitability, of a future occurrence”²⁹—the standard justifying exceptional circumstances under article 81(3)(c)(i) is somewhat higher. In fact, article 81(3)(c)(i) may be interpreted as requiring proof of a concrete risk of a future occurrence. This is consistent with the wording of article 81(3)(c)(i), which requires proof of a “concrete risk of flight”, as opposed to a mere possibility of flight.

²⁶ Regulation 57(e), amended 12 July 2017, entered into force 20 July 2017.

²⁷ ICC-01/05-01/08-1626-Red OA7, para. 55; ICC-02/11-01/11-278-Red OA, para. 77.

²⁸ Article 58(1)(b) of the Statute.

²⁹ ICC-01/04-01/07-572 OA4, para. 21; ICC-01/05-01/08-323 OA, para. 55; ICC-01/04-01/10-283 OA, para. 60; ICC-01/05-01/13-558 OA2, paras. 107, 117; ICC-01/05-01/13-560 OA4, para. 123.

2. Article 81(3)(c) includes conditional release

14. Article 81(3)(c)(i) does not expressly contemplate the possibility of conditional release. Faced with a similar request, the *Ngudjolo* Trial Chamber did not determine whether this possibility was open to it.³⁰
15. Nevertheless, the possibility of conditional release is available. This includes the power to impose conditions restricting liberty under rule 119. During pre-trial and trial proceedings, a Chamber may order conditional release where it finds that a risk that would usually justify detention, such as flight risk, can be managed by imposing conditions on release rather than solely by continuing the person's detention.³¹
16. It would be an illogical interpretation of the legal framework, and it would be contrary to the interests of an acquitted person, to remove his or her possibility to be conditionally released pending appeal, where those conditions would mitigate the identified risks that would otherwise make maintaining that person's detention necessary. Indeed, if a Chamber has the authority to impose the harshest limitation on the liberty of a person pending appeal (detention), then the same Chamber necessarily has the authority to order and implement less intrusive restrictions on the exercise of that right, such as conditional release as set out in rule 119.
17. By analogy to the Appeals Chamber's jurisprudence on conditional release under article 58, the Prosecution submits that if a Chamber finds that any (exceptional)

³⁰ See ICC-01/04-02/12-T-3-FRA-ET, p. 5 (« *Indépendamment du point de savoir si une telle possibilité lui est juridiquement ouverte au stade d'un jugement d'acquiescement, la Chambre estime, par ailleurs, qu'en l'absence de toute demande précise sur les conditions qui pourraient éventuellement assortir l'élargissement de M. Mathieu Ngudjolo, elle n'est pas en mesure de se prononcer utilement sur ce point [...] »*). See also p. 3, describing the request of the legal representative for victims for conditions pursuant to rule 119 of the Rules of Procedure and Evidence.

³¹ See e.g. ICC-01/05-01/08-1626-Red (Bemba OA 7 Judgment), para. 55. A Chamber may also order conditional release where detention is not justified but the Chamber nevertheless considers that conditions are appropriate on that person's release.

circumstances justify the continued detention, it is in that Chamber's discretion to release the accused subject to conditions that can mitigate those risks.³²

18. The practice of the ICTR supports the position that acquitted persons may be released subject to conditions. Instead of re-arresting an acquitted person pending the appeals proceedings pursuant to rule 99(B) of the Rules of Procedure and Evidence of the ICTR,³³ Trial Chambers of the ICTR have on several occasions imposed lesser restrictions, such as travel restrictions, the surrendering of travel documents and reporting requirements.³⁴ Similar to this case, with respect to two of those acquitted persons, there was a dissenting opinion.³⁵

3. The standard under article 81(3)(c)(i) is met in this case

19. As required under article 81(3)(c)(i), there are exceptional circumstances for maintaining the Accused's detention pending appeal. In particular, there is a concrete risk that the Accused will not appear for the continuation of the trial if the Prosecution's appeal against the Decision is successful. In addition, the charges against the Accused are very serious; and there is a probability that the Prosecution's appeal will succeed.

20. There are exceptional circumstances under article 81(3)(c)(i).

- a. First, if released unconditionally, there is a concrete risk that the Accused would not appear for the continuation of the trial as a result of (i) the risk of a lack of cooperation of some States to which the Accused could move to; and (ii) the availability to the Accused of sufficient means and supporters to help them avoid the Court's jurisdiction:

³² ICC-01/05-01/08-1626-Red OA7, para. 55; ICC-02/11-01/11-278-Red OA, para. 77.

³³ Rule 99(B) authorises a Chamber to issue a warrant for the arrest and further detention of an acquitted person with immediate effect if the Prosecution at the time judgment is pronounced advises the Trial Chamber in open court of its intention to file a notice of appeal.

³⁴ *The Prosecutor v. André Ntagerura et al.*, ICTR-99-46-T, 26 February 2004, *Decision Relative A La Demande Du Procureur Fondee Sur Le Paragraphe B De L'article 99 Du Reglement*; *The Prosecutor v. Ignace Baglilishema*, ICTR-95-1A-T; *Decision on the Prosecutor's Request Pursuant to rule 99 (B) (TC)*, 8 June 2001, p. 6; *see also Prosecutor v. Bagosora et al.*, ICTR-98-41-T, *Decision on Prosecution Motion to Impose Conditions on Kabiligi's Liberty*, 31 December 2008, para. 5.

³⁵ There were dissenting opinions with respect to Emmanuel Bagambiki and Igance Baglilishema.

- i. If released unconditionally, the Accused would be free to travel to States not party to the Rome Statute, which would place the Accused outside the reach of the Court as those States have no duty to co-operate under the Rome Statute.

Even if the Accused were to be released to and remain in Côte d'Ivoire—a State Party—there is a concrete risk that the Accused's further presence at the continuation of the trial could not be compelled. There is an outstanding ICC arrest warrant for Ms Simone Gbagbo and a request for her arrest and surrender which Côte d'Ivoire has yet to execute.³⁶ This is despite the fact that her case was declared admissible by Pre-Trial Chamber I and the Appeals Chamber in December 2014 and May 2015, respectively.³⁷ Notwithstanding these admissibility determinations, Côte d'Ivoire's President Alassane Ouattara stated as early as 4 February 2016, that he would not send more Ivoirians to the ICC ("*je n'enverrai plus d'Ivoiriens à la CPI*").³⁸ On 28 March 2017, Ms Simone Gbagbo was acquitted of crimes against humanity and war crimes by the Abidjan *Cour d'Assises*, which judgment was overturned on 26 July 2018 by the *Cour Suprême*, paving the way for new proceedings. President Ouattara signed an amnesty decree on 6 August 2018 granting amnesty to 800 detainees, among them Ms Simone Gbagbo.³⁹ Ms Gbagbo is now living in Abidjan and, to the Prosecution's knowledge, without any further restrictions or pending legal proceedings. Pre-Trial Chamber II has recently asked

³⁶ Pre-Trial Chamber III, "Warrant of Arrest for Simone Gbagbo", 29 February 2012, ICC-02/11-01/12-1. *See also* the Registry's request to Côte d'Ivoire to arrest and surrender Ms Simone Gbagbo, 19 March 2012, ICC-02/11-01/12-6.

³⁷ *See* ICC-02/11-01/12-84, para. 2, and references therein.

³⁸ <https://www.europe1.fr/international/alassane-ouattara-je-nenverrai-plus-divoiriens-a-la-cpi-2663075> (last accessed 15 January 2019); https://www.youtube.com/watch?v=ryVMd1_wDDo (last accessed 15 January 2019).

³⁹ <https://www.jeuneafrique.com/612201/societe/cote-divoire-alassane-ouattara-amnistie-simone-gbagbo/> (last accessed 15 January 2019).

the Registrar to request relevant information from the Côte d'Ivoire authorities that could impact on the admissibility of the case.⁴⁰

- ii. The Accused have recourse to sufficient means and supporters to help them avoid the Court's jurisdiction. Although the Acquittals have been issued, the proceedings are not terminated and the Appeals Chamber may overturn the Decision. Accordingly, there is a concrete risk that the Accused use the circumstances of the release to evade the Court's jurisdiction. Mr Gbagbo still has a well-organised network of supporters who could facilitate his travel to a country in which his presence before the Court could not be compelled. In its 25 September 2017 decision, the Chamber by Majority found that "there is sufficient information to show not only the network's existence, but also the possibility that members of the network of supporters of Mr Gbagbo could break the law for him",⁴¹ and that "there is persuasive information to suggest that if released, Mr Gbagbo and his network of supporters could possibly make all efforts to bring him back to Côte d'Ivoire and thereafter avoid justice."⁴² The Majority noted that these were "demonstrable and clear risks".⁴³ It concluded that:

Mr Gbagbo as former President of Côte d'Ivoire, as someone who still has influence and authority within his political party, and in fact is considered by his supporters as a genuine candidate for the presidential elections of 2020, is most likely to have sufficient means and supporters to help him abscond justice, not only by physically hiding from justice, but also by taking political and legal actions in other jurisdictions that could impede the continuation of trial.⁴⁴

⁴⁰ ICC-02/11-01/12-84, para. 6.

⁴¹ ICC-02/11-01/15-1038-Red, para. 22.

⁴² ICC-02/11-01/15-1038-Red, para. 32.

⁴³ ICC-02/11-01/15-1038-Red, para. 63.

⁴⁴ ICC-02/11-01/15-1038-Red, para. 65.

The Chamber by Majority concluded that these findings remained valid as of 20 April 2018, the date of its previous decision on Mr Gbagbo's interim release, as it did not have before it any information that would justify ordering the release of the Accused.⁴⁵ Mr Gbagbo recently reclaimed the presidency of his political party—the FPI—which illustrates the means and the extensive support base he continues to have at his disposal.⁴⁶ The Appeals Chamber has confirmed that the existence of a political party supporting an accused is a factor relevant to determining the necessity of continued detention to ensure the person's appearance at trial, "because such support could indeed facilitate absconding".⁴⁷ The Appeals Chamber has also confirmed that the possibility that members of a network of supporters could break the law for the accused is a relevant consideration to determine the risk of avoidance of proceedings.⁴⁸ Mr Blé Goudé, like Mr Gbagbo, has a well-organised network of supporters – who include Mr Gbagbo's supporters. The existence of this network and Mr Blé Goudé's flight risk is further demonstrated by his past conduct. Mr Blé Goudé was, from 7 February 2006 until 28 April 2016, the subject of targeted sanctions by the United Nations Security Council.⁴⁹ Essentially, he was the subject of a travel ban and the freezing of his assets. After his last rally of 26-27 March 2011 at the *Place de la*

⁴⁵ ICC-02/11-01/15-1156-Red, para. 38.

⁴⁶ With the death of Abou Dramane Sangaré, Laurent Gbagbo has reportedly reassumed the formal leadership of the FPI: "Côte d'Ivoire: Laurent Gbagbo reprend les rênes du FPI". (dated 19 November 2018) <https://www.jeuneafrique.com/mag/665402/politique/cote-divoire-laurent-ou-simone-gbagbo-qui-est-le-patron-du-fpi/> (last accessed 15 January 2019).

⁴⁷ ICC-02/11-01/11-278-Red, para. 59 (referring to a detained person).

⁴⁸ ICC-02/11-01/15-992-Red, para. 43 (referring to a detained person).

⁴⁹ See SC/8631, 7 February 2006 (Security Council Committee established pursuant to resolution 1572 (2004) approved on 7 February 2006 that Mr Blé Goudé be subject to the measures imposed by paras. 9 and 11 of S/RES/1572 (2004) and renewed by para. 1 of S/RES/1643 (2005)) and S/RES/2283 (2016), 28 April 2016, para. 1.

République in Abidjan, Mr Blé Goudé eventually fled to Ghana.⁵⁰ The UN Group of Experts on Côte d'Ivoire, in its 15 March 2013 Report (CIV-OTP-0042-0686), stated that Mr Blé Goudé had breached both his travel ban and the restriction of his assets.⁵¹ He was arrested in Ghana on 17 January 2013.⁵² He had in his possession false passports from Mali and Côte d'Ivoire,⁵³ and false identity cards also from Mali and from Benin,⁵⁴ all under false names.⁵⁵ The Government of Benin initiated investigations into the case and reported to the UN Group of Experts that two local Beninese officers had been arrested in order to assist enquiries. According to the Beninese authorities, the *Mairie* or Town Hall of Porto-Novo created an identity card under the name of Dossevi, Armand without any photograph or fingerprints. Later, fraudulently, the picture of Mr Blé Goudé was added. According to the Beninese authorities, it is clear that the authorities of Porto-Novo were complicit in the forgery.⁵⁶ As regards the Ivorian passport of Mr Blé Goudé, it was issued by a Ms Blé Bernardine Gisèle, a sub-director at the border and aviation police, who appears to be the same signing authority who issued the false passport of Commander Anselme Séka Yapo, the former *aide de camp* of Ms Simone Gbagbo.⁵⁷

⁵⁰ P-0435, ICC-02/11-01/15-T-90-Red2-FRA-CT, pp. 57-58. *See also* ICC-02/11-01/15-1136-Conf-Anx1-Corr3, para. 598.

⁵¹ UN Group of Experts Report S/2013/228, 15 March 2013, CIV-OTP-0042-0686 at 0732, para. 286.

⁵² UN Group of Experts Report S/2013/228, 15 March 2013, CIV-OTP-0042-0686 at 0732, para. 286.

⁵³ UN Group of Experts Report S/2013/228, 15 March 2013, CIV-OTP-0042-0686 at 0953 and 0954, respectively.

⁵⁴ UN Group of Experts Report S/2013/228, 15 March 2013, CIV-OTP-0042-0686 at 0955 and 0956, respectively.

⁵⁵ *See* UN Group of Experts Report S/2013/228, 15 March 2013, CIV-OTP-0042-0686 at 0958.

⁵⁶ *See* UN Group of Experts Report S/2013/228, 15 March 2013, CIV-OTP-0042-0686 at 0957 for the report of the Beninese authorities.

⁵⁷ *See* UN Group of Experts Report S/2013/228, 15 March 2013, CIV-OTP-0042-0686 at 0733, para. 290; *see also* UN Group of Experts Report S/2012/196, 16 March 2012, CIV-OTP-0021-0125 at 0370 and 0371 for the forged passport of Mr Seka Seka.

- b. Second, the charges against the Accused—crimes against humanity of murder, rape, persecution and other inhumane acts (alternatively attempted murder)—are very serious and likely to attract a high sentence. The Majority of the Chamber has previously found that “given the gravity of the charges against him and the eventual sentence if convicted, Mr Gbagbo has a clear incentive to abscond to avoid such a scenario.”⁵⁸ The Appeals Chamber has already confirmed that the charges against Mr Gbagbo are serious.⁵⁹ These findings are also applicable to Mr Blé Goudé even if the incidents underlying the charges against the two Accused are not identical.⁶⁰ The charges against Mr Blé Goudé are also very serious. The Appeals Chamber has confirmed that the possible length of sentence can be relied on as a factor that may increase the incentive to abscond.⁶¹
- c. The third exceptional circumstance under article 81(3)(c)(i) is that there is a probability that the appeal against the Decision will be successful. This test does not require the Trial Chamber to *agree* with the appeal brought by the Prosecution, nor does it require the Trial Chamber to re-assess the merits of its decision. It would be nonsensical for the standard under article 81(3)(c)(i) to require the Prosecution to convince the Trial Chamber that its decision is probably incorrect. Instead, the Trial Chamber should merely assess whether the appeal is a viable one that *could* lead to a reversal of the decision.⁶²

⁵⁸ ICC-02/11-01/15-1038-Red, para. 20, citing ICC-02/11-01/15-846, para. 17.

⁵⁹ ICC-02/11-01/15-992-Red, para. 67, referring to ICC-02/11-01/11-278-Red, para. 54 (referring to crimes against humanity of murder, rape *and other forms of sexual violence*, as well as other inhumane acts and persecution).

⁶⁰ Mr Blé Goudé is charged for the second incident (25-28 February 2011), while Mr Gbagbo is not. The Prosecution does not oppose the dismissal of the charges against Mr Blé Goudé related to the third and fourth incidents. *See* ICC-02/11-01/15-1207, para. 25.

⁶¹ ICC-02/11-01/15-992-Red, para. 54 (referring to a detained person).

⁶² This factor may be compared with the one used in some national jurisdictions when considering bail pending an appeal by convicted person. It has been liberally interpreted for instance in South Africa as follows: the appeal should be “reasonably arguable and not manifestly doomed to failure.” (*Abraham Coertzee v. State*, A25/2017, 27 February 2017, para. 14 (High Court); “the question is not whether the appeal ‘will succeed’ but on a lesser standard, whether the appeal is free from predictable failure to avoid imprisonment.” *S v Anderson* 1991 (1) SACR 525, (also cited in *Coertzee* above, para. 15); “If, for example, the view of this court should be that the appeal ... is hopeless, this Court would probably be reluctant to alter a judgment refusing bail” (*S v De Abreu*, 1980 (4) SA 94). *See further*, Botswana: “There appears to be the *faintest prospect* of success on appeal

In this case, an exceptional circumstance affecting the upcoming appeal is established by the absence of a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions.⁶³ Regardless of whether this in itself constitutes a procedural error,⁶⁴ the Trial Chamber cannot find that a reversal of the Decision by the Appeals Chamber is not a viable option when it has not yet issued a fully reasoned decision. Accordingly, in these circumstances, and for the purpose of article 81(3)(c)(i), the Trial Chamber should proceed under the assumption that there is a "probability of success on appeal".

In addition, Judge Herrera Carbuccion in her Dissenting Opinion held that in her view, "there is evidence upon which a reasonable Trial Chamber could convict the [A]ccused".⁶⁵ She will provide her fully reasoned opinion in due course.⁶⁶ However, for the purposes of article 81(3)(c)(i), already the existence of a strong Dissenting Opinion questioning the totality of the Majority's ruling⁶⁷ supports the probability of success on appeal.⁶⁸

(...). The persons assisting the appellant should be informed that in the opinion of this Court, there is no likelihood of success on appeal." *Laing v. State*, 1989 BLR (High Court). Canada: "Where the circumstances of the offence indicate little threat to public safety, an *arguable appeal* is enough to grant interim release: *Colville, supra*. It follows that where there is a moderate public interest to enforce a conviction, the strength of the appeal *must be stronger than "not frivolous", and where there is a compelling public interest the strength of the appeal should be considerably stronger*. It follows that finding that an appeal has a "good prospect of success" may be enough to overcome a moderate concern for the protection of the public, but not enough to overcome a compelling concern for public safety." (*R v. Rhyson*, 2006 ABCA 120, at para. 15, also cited in *Dennis James Oland v. The Queen*, para. 46). India: "Further, the supreme court of India in the case of *Krishnan v. The People* stated that the conditions to be satisfied in an application for bail pending a hearing of an appeal as follows: ... (v) it is not for the court to delve into the merits of each ground of appeal. But it suffices that all the grounds are examined and a conclusion is made that prima facie the prospects of success of the appeal are dim." *Jeremiah Wachira Muchiri v. Republic*, Criminal Appeal No. 35 of 2016 (High Court), citing *Krishnan v. The People*, SCZ 19 of 2011, [2011] ZMSC 17. Uganda: Factors considered include "whether the appeal is not frivolous and has a reasonable prospect of success." *Mellan Mareere v. Uganda*, Misc. App. No. 52 of 2017, also referring to *Arvind v. Uganda*, Supreme Court Criminal Appeal No. 1 of 2003 (Justice Oder).

⁶³ Article 74(5). See also Dissenting Opinion, paras. 11-26.

⁶⁴ Dissenting Opinion, para. 20, referring to a decision of the Appeals Chamber: ICC-01/05-01/08-3636, para. 49.

⁶⁵ Dissenting Opinion, paras. 1, 38, 48, 50.

⁶⁶ Dissenting Opinion, para. 48.

⁶⁷ Dissenting Opinion, para. 3.

⁶⁸ See ICC-01/04-02/12-T-3-FRA-ET, p. 4.

Finally, it appears from the reading of Judge Herrera Carbuccia's Dissenting Opinion,⁶⁹ as well from the Presiding Judge's brief comments in the Acquittals in which he referred to the "requisite standard as foreseen in article 66",⁷⁰ that there is a disagreement among the judges as to the applicable legal standard at the no case to answer stage, and how the evidence in the Prosecution case should have been approached by the Trial Chamber. Judge Herrera Carbuccia's approach is based on the standard found in the case-law of the *ad hoc* international tribunals, and in the decision to date at the ICC.⁷¹ This further shows that an appeal brought by the Prosecution would indeed be a viable one.⁷²

4. Conditions should be imposed on the Accused's release

21. While the standard under article 81(3)(c)(i) for detention pending appeal is met, conditions of release can be imposed to mitigate the flight risk identified, provided that a State to which the Accused are released is (i) geographically close to the seat of the Court, and (ii) willing (or obliged as a matter of law) to accept the Accused to be released in its territory, and willing and able to enforce the conditions imposed by the Chamber.⁷³ If no such State(s) can be found, then detention of the Accused should be maintained pending appeal. Where a Trial Chamber finds that detention is necessary to ensure a person's appearance at trial, the Chamber has the discretion to consider whether the risk of flight can be mitigated by the imposition of conditions and to order conditional release.⁷⁴ While rule 119 of the Rules of Procedure and Evidence, entitled "conditional

⁶⁹ Dissenting Opinion, paras. 39-47.

⁷⁰ See Acquittals, p. 4: "the Prosecutor has failed to satisfy the burden of proof to the requisite standard as foreseen in article 66 of the Rome Statute".

⁷¹ See generally ICC-02/11-01/15-1179 and authorities cited within (Urgent Prosecution's motion seeking clarification on the standard of a "no case to answer" motion).

⁷² See references in footnote 62 above.

⁷³ ICC-01/05-01/08-631-Red OA2, para. 104, 108-109; ICC-01/05-01/08-1626-Red OA7, paras. 1, 54-55; ICC-01/05-01/08-1722 OA8, para. 39.

⁷⁴ ICC-01/05-01/08-1626-Red, para. 55.

release” and which sets out a non-exhaustive list of conditions,⁷⁵ refers to the Pre-Trial Chamber as “set[ting] one or more conditions restricting liberty”, the rule has been understood to apply also to a Trial Chamber.⁷⁶

22. Release with conditions is necessary to ensure that the Accused appear at the continuation of the trial and to preserve the integrity of the continued proceedings, in the event that the Prosecution succeeds in appealing the Decision.
23. First, the Accused should be conditionally released to a State Party of the Rome Statute. For the reasons stated above, however, they should not be released to Côte d’Ivoire. In addition, considering that both Accused have already foreshadowed their intention to present a Defence case,⁷⁷ a State Party within the territory of Europe with close proximity to the seat of the Court would be preferable for the purpose of facilitating their continued attendance at trial.⁷⁸
24. The Chamber should only release the Accused subject to certain conditions. The Prosecution identifies below conditions it deems necessary to guarantee the continued presence of the Accused before the Court. In order to minimise the risk of flight of the Accused and to ensure their continued presence at trial, and in order to safeguard the integrity of the proceedings, the Prosecution requests that they comply with the following conditions. Each of the Accused should be ordered to:

⁷⁵ See rule 119(1) of the Rules of Procedure and Evidence (“The Pre-Trial Chamber may set one or more conditions restricting liberty, including the following [...]”).

⁷⁶ See ICC-01/05-01/13-1151, *Bemba et al.*, Decision Regarding Interim Release, issued by Trial Chamber VII on 17 August 2015 imposing conditions under rule 119 with trial scheduled to begin on 29 September 2015. See also ICC-01/05-01/13-2291, *Bemba et al.*, Decision on Mr Bemba’s Application for Release, issued by Trial Chamber VII on 12 June 2018 and imposing conditions under rule 119 while awaiting Mr Bemba’s re-sentencing following appeal. Under articles 61(11) and 64(6)(a) of the Statute, the Trial Chamber may exercise any functions of the Pre-Trial Chamber: See, referring to interim release, ICC-01/05-01/13-1151, para.12; ICC-01/05-01/13-2291, para. 7.

⁷⁷ ICC-02/11-01/15-1158-Corr-Red, paras. 4, 41, 48 (indicating this is provisional information); ICC-02/11-01/15-1157-Red, paras.169-172. See also para.162 (stating that the Defence for Mr Gbagbo is not in a position to answer in a precise and definite manner the Chamber’s questions regarding the presentation of a defence case).

⁷⁸ See also ICC-02/11-01/15-1038-Red, para. 72 (“the Chamber [by Majority] recalls that [Mr Gbagbo’s] attendance is not only his right, but also his duty. Moreover, rules 134*bis* and 134*ter* of the rules allow the exceptional absence of the accused person, but in no way establish a rule. In fact, pursuant to Rule 134*ter* of the rules, the accused’s waiver of his right to attend trial is only one of the five cumulative requirements to apply this provision.”)

- (i) Abide by all instructions and orders from the Chamber, including to be present in Court when ordered;
- (ii) Provide the address where he resides and his contact information to the Chamber and the State of residence and request authorisation from the Chamber for any change of address;
- (iii) Not travel beyond the territorial limits of the municipality of residence without the explicit authorisation of the Chamber;
- (iv) Surrender all identity documents, particularly his passport to the Registry;
- (v) Report weekly to the law enforcement authorities of the State where he is released;
- (vi) Not contact, either directly or indirectly, any Prosecution witness in this case, or any interviewed person in its ongoing investigation in Côte d'Ivoire as disclosed,⁷⁹ except through counsel authorised to represent him before this Court and in accordance with the applicable protocols;⁸⁰
- (vii) Not make any public statements, directly or indirectly, about the case or be in contact with the public or speak to the press concerning the case;
- (viii) Abide by any additional conditions imposed by the Chamber and/or the State of release.

25. The Chamber should request observations from the relevant State(s), on the possible conditional release of the Accused in their territory and the State(s)' ability to enforce the conditions described.⁸¹

⁷⁹ See ICC-02/11-01/15-T-231-CONF-ENG-ET, p. 17 (private session).

⁸⁰ See e.g. ICC-02/11-01/11-49 (Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations issued on 6 March 2012 with Annex).

⁸¹ See e.g.: rule 119(3) of the Rules of Procedure and Evidence (referring to “the views of the Prosecutor, the person concerned, any relevant State and victims that have communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a release or of conditions imposed”). See also Regulation 51 of the Regulations of the Court (referring to observations from the host State and from the State to which the person seeks to be released). See further ICC-01/05-01/08-631-Red-OA2, paras. 2, 104, 106 (before conditionally releasing an accused, the Chamber must first identify a State which is willing to accept the Accused and which can enforce the conditions that the Trial Chamber should impose).

26. In its relief and pursuant to rule 119 (4), the Chamber should also remind both Accused that any violation of the conditions set by the Chamber may result in the revocation of the interim release.

5. If the Chamber denies this application, it should stay the Accused's unconditional release until the Appeals Chamber decides under article 81(3)(c)(ii)

27. If the Chamber denies this application, the Prosecution requests that it stays the Accused's unconditional release. Under article 81(3)(c)(ii), the Prosecution will appeal the Chamber's denial of conditional release and will request that the Appeals Chamber, on an urgent basis, grant suspensive effect by virtue of that appeal.⁸² The Chamber should stay the Accused's unconditional release until the Appeals Chamber issues its decision on the Prosecution's request for suspensive effect.

28. A stay of the Accused's release, similarly to any suspensive effect granted by the Appeals Chamber, would ensure that the decision under appeal would not (a) create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant; (b) lead to consequences that would be very difficult to correct and may be irreversible; and (c) potentially defeat the purpose of the appeal.⁸³

29. The Prosecution emphasises that the Trial Chamber is not itself requested to authorise suspensive effect, which is a power confined to the Appeals Chamber. Instead, the Prosecution only requests the Trial Chamber to take the necessary measures to prevent the Appeals Chamber's exercise of its corrective powers being frustrated. The *Lubanga* Trial Chamber recognised that it had this authority, also when ordering the release of a person.⁸⁴

⁸² See e.g. ICC-01/04-02/12-12 OA, para. 17.

⁸³ See ICC-01/05-01/13-718, para. 5; ICC-01/04-02/12-12, para. 19.

⁸⁴ See ICC-01/04-01/06-T-314-ENG-ET, pp. 21-22: "The accused, therefore, shall be released unconditionally save for the following. This order shall not be enforced until the five day time limit for an appeal has expired.

30. In any event, pursuant to rule 185(1) of the Rules of Procedure and Evidence, the order releasing the Accused shall only be implemented after arrangements have been made for their transfer to a State that is willing or obliged to receive them.⁸⁵

Relief Requested

31. For the foregoing reasons, the Prosecution requests that the Chamber:

- a. find that there are exceptional circumstances to maintain the detention of the Accused, pursuant to article 81(3)(c)(i); and
- b. impose on the Accused's release the conditions identified in paragraph 24 above, provided that a State that meets the above criteria is willing to accept the Accused to be released in its territory, and willing and able to enforce the conditions imposed by the Chamber.

32. Should the Chamber deny this application, it should stay the Accused's unconditional release until the Appeals Chamber decides on the suspensive effect of the Prosecution's article 81(3)(c)(ii) appeal.



Fatou Bensouda, Prosecutor

Dated this 15th day of January 2019
At The Hague, The Netherlands

If an appeal is filed within the five day time limit against this order granting release, and if a request is made to suspend its effect, the accused shall not leave detention until the Appeals Chamber has resolved whether this order granting release is to be suspended." In the CAR Art70 case the Pre-Trial Chamber released the four suspects and rejected the Prosecution's request for a stay of the decision until the Appeals Chamber ruled on suspensive effect. However, it did so because the Prosecution filed the Notice of Appeal with request for suspensive effect at the same time when asking the Pre-Trial Chamber to stay execution of its release decision. Accordingly the Pre-Trial Chamber found that the Appeals Chamber was already seized with the matter and the request before the Pre-Trial Chamber was therefore moot: *see* ICC-01/05-01/13-711.

⁸⁵ ICC-01/04-01/06-T-314-ENG-ET, p. 22.