

1 International Criminal Court
2 Trial Chamber I
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 Cuno Tarfusser, Judge Olga Herrera Carbuccion and
7 Judge Geoffrey Henderson
8 Hearing - Courtroom 1
9 Wednesday, 16 January 2019
10 (The hearing starts in open session at 9.58 a.m.)
11 THE COURT USHER: [9:58:45] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE TARFUSSER: [9:59:04] Good morning.
15 As said yesterday while adjourning the hearing, we are here today to listen to the
16 arguments in relation to the request on Article 21(3)(c)(i) by the Prosecutor. We are
17 all aware that the Prosecutor yesterday filed written submission in this regard, and I
18 will now give first the floor to the Office of the Prosecutor, asking if he has to add
19 something, obviously, he can.
20 And I would also wish to say to the parties do not mention in any case whatever
21 comes out States, the name of States. So just for you to know. We know what we
22 are talking, but we should not mention the name of the States.
23 So therefore I will give the floor to the Office of the Prosecutor, then to the Legal
24 Representative of Victims and then to the two Defence teams for the issue under
25 Article 81(3)(c)(i) and then we will try to give a decision today on it, later in the day of

1 course.

2 Mr Prosecutor, the floor is yours.

3 MR MACDONALD: [10:00:58] Thank you, your Honours. We have no further
4 comments than our written submissions. Thank you.

5 PRESIDING JUDGE TARFUSSER: [10:01:04] Thank you very much.

6 Therefore I will give the floor to Ms Massidda for the Legal Representative of Victims.

7 MS MASSIDDA: [10:01:15] Thank you, your Honour. Your Honours, victims have
8 expressed since yesterday great concern and deception at the news of acquittal of
9 Mr Gbagbo and Mr Blé Goudé. They consider, in their words, that their quest for
10 justice has unfortunately not been heard before this Court.

11 They know, however, that the decision of the Chamber is not final and today they
12 hope that their rights will be protected, ensuring that the detention of both defendants
13 is maintained pending appeal.

14 Indeed, it is of paramount importance for the victims that the presence of Mr Gbagbo
15 and Mr Blé Goudé is assured if the appeal would be successful and if the proceedings
16 would eventually continue.

17 It is argued by the Prosecution in its urgent request to maintain detention filed
18 yesterday evening, there are indeed exceptional circumstances in the meaning of
19 Article 81(3)(c)(i) of the Rome Statute justifying to maintain Mr Gbagbo and
20 Mr Blé Goudé in detention.

21 Before addressing these exceptional circumstances already illustrated in the request
22 by the Prosecution, I submit that the lack of a reasoned decision is, per se, an
23 exceptional circumstance, particularly because the majority has not even indicated
24 when said reasoning will be available.

25 It has never been the practice of this Court and it does seriously impact on the

1 procedure, making, in my submission, a proper evaluation of the conditions under
2 Article 81(3)(c)(i) particularly difficult.

3 I agree on the exceptional nature of the circumstances identified by the Prosecution
4 including:

5 One, a concrete risk that the defendants will not appear for the continuation of the
6 trial should the Appeals Chamber reverse the decision on acquittal. Both defendants
7 have availability of sufficient means and supporters to help them absconding as
8 clearly stated in paragraph 20 of the Prosecution written submissions of yesterday.

9 Two, the charges against the defendants are very serious and as the Chamber
10 indicated in the Ngudjolo case, it is a criteria that deserves to be taken into account.

11 Three, the probability of success in appeal. The fact that the majority has issued only
12 a succinct summary of reasoning justifying the acquittal, not even indicating when the
13 full reasoning will be available and that the decision was taken at the majority are
14 factors in my view militating for chance of success in appeal.

15 In this regard, an additional factor which should be taken into account is the fact that
16 this is the second time in the practice of the Court that a decision on a no case to
17 answer motion is issued. The lack of founding provision about this procedure in the
18 Rome Statute and the minimal jurisprudence available so far before this Court on this
19 matter makes, in my submission, the appeal inherently probable, also in light of a
20 dissenting opinion by Judge Herrera Carbuca.

21 Finally, on the exceptional circumstances, I wish to underline as another factor to
22 consider that the perspective of release of the defendants has always been a matter of
23 serious concern for the victims. Following the acquittal, they fear exacerbation of the
24 already volatile situation in Ivory Coast. Tensions are still latent in certain areas of
25 Abidjan and the defendants' release may increase said tensions.

1 In the circumstances, I submit that the continuation of the detention of Mr Gbagbo
2 and Mr Blé Goudé pending appeal is necessary at this stage of the proceedings.
3 In the alternative, should the Chamber consider that the defendants should be
4 released, said release should be granted under strict conditions. While agreeing on
5 the conditions enumerated by the Prosecution in its request at paragraph 24, I further
6 submit that in addition, conditional release should be ordered in a European country
7 geographically close to the seat of the Court and that condition number 6 in
8 paragraph 24 of the Prosecution request should include not only the imposition of not
9 contacting witnesses and interviewed persons, but also victims as provided for in
10 Rule 119(1)(c) of the Rules of Procedure and Evidence.
11 Finally, should the Chamber deny the Prosecution request, I support the Prosecution's
12 alternative request that Mr Gbagbo and Mr Blé Goudé should remain in detention
13 until the Appeals Chamber will issue its decision on the request for suspensive effect
14 that the Prosecution has already announced to make in the event of unsuccessful
15 pleading before this Chamber.
16 This concludes my submission, your Honours, on behalf of the victims participating
17 in the proceedings.
18 PRESIDING JUDGE TARFUSSER: [10:08:28] Thank you very much.
19 I give now the floor to the Defence. Maître Altit, yours the floor.
20 MR ALTIT: [10:08:35] (Interpretation) Thank you, Mr President.
21 Mr President, your Honours, I have a few brief remarks.
22 The Prosecutor and the Legal Representative of Victims have opposed the immediate
23 release arguing as follows: One, the gravity of the offences in the charges can
24 amount to a flight risk -- or, rather, flight risk second and then third, the chances of a
25 successful appeal.

1 Now, first, gravity of charges is not an acceptable condition for maintaining people in
2 detention here. In fact, the Prosecutor and the Legal Representative of Victims do
3 not provide any indication as to the meaning of gravity or what they mean by that,
4 except claiming that all crimes under the jurisdiction of the Court are serious enough
5 to justify maintaining people in detention. This does not have much meaning given
6 that under such circumstances no release would ever be possible. But that obviously
7 is not the intent of the drafters of the Rome Statute and this obviously would be
8 contrary to the fundamental rights of persons, fundamental rights and freedoms of
9 persons.

10 Now, Mr President, your Honours, let us recall that under 81(3), the Prosecutor shall
11 prove exceptional circumstances pertaining to the criteria used, exceptional
12 circumstances of gravity, exceptional circumstances relating to the alleged flight risk
13 and exceptional circumstances in the matter, particularly under appeal.

14 Now, under this Article, the Prosecutor and the Legal Representative ought to have
15 established that these are exceptionally serious circumstances, exceptional risk of
16 flight, and this they have not established.

17 When it comes to flight risk, the Prosecutor has put forth the same old arguments that
18 have been used previously against release, arguments which we have challenged
19 particularly at the hearing which was held last December.

20 When it comes to flight risk, you will note that the Prosecutor has not provided any
21 further useful information on this point, absolutely none. A fortiori, he is unable to
22 demonstrate that such exceptional circumstances exist in relation to the alleged flight
23 risk.

24 Now, when it comes to exceptional circumstances, why exceptional circumstances?
25 The circumstances have changed. We are dealing here with an acquittal. The

1 Prosecutor is using language that is pre-acquittal language. President Cotte in 2012
2 said as follows in the Ngudjolo case, after the acquittal of Mr Ngudjolo, and I quote,
3 "At that stage in the procedure, freedom must be the rule more than ever and
4 detention the exception to that rule," end of quote. Transcript T-3, 18 December 2012,
5 page 4, lines 22 and 23.

6 Mr President, your Honours, the Prosecutor and the Legal Representative of Victims
7 seemed to ignore this fundamental change which flows from your decision of
8 yesterday. Laurent Gbagbo is no longer an accused person. Laurent Gbagbo has
9 been acquitted. He therefore is no longer presumed to be innocent. He has been
10 acknowledged as being innocent, and that changes everything obviously. He was
11 acquitted of all the charges and all the accusations brought against him by the
12 Prosecutor.

13 In these circumstances, therefore, Mr President, your Honours, it is absolutely
14 meaningless to consider that Laurent Gbagbo would be a flight risk from justice or he
15 would abscond justice, justice that has acquitted him, by the way.

16 In fact, the Prosecutor continues to rely on abstract hypotheses that are not
17 substantiated. You see, the Prosecutor here ought to have established or
18 demonstrated more than ever before the concrete reality of a possible flight risk based
19 on objective facts and on the basis of exceptional circumstances. Such circumstances,
20 such exceptional circumstances being the only circumstances that would enable or
21 would allow for an acquitted person who is thus innocent to be maintained in
22 detention.

23 The Prosecutor himself in his filings acknowledges that the threshold is higher in this
24 matter, but this threshold obviously has not been met.

25 Similarly, from the time of his acquittal, we can no longer claim the condition of

1 seriousness of crime or of the crime because he, Laurent Gbagbo, has been acquitted
2 of these crimes, and that is why the drafter of the Rome Statute provided for
3 exceptional circumstances, and no one has attempted here to establish those
4 exceptional circumstances.

5 When it comes to determining whether the appeal may be successful or not, the
6 Prosecutor and the Legal Representative of Victims have not provided any evidence
7 in that regard, and they cannot rely on the absence of a written decision to allege
8 circumstances that would warrant detention.

9 Why do I say this? Because exceptional circumstances have to be proven objectively,
10 otherwise they wouldn't amount to exceptional circumstances and will therefore only
11 be hypothesis. And this is what they are presenting you with.

12 Therefore, your Honours, in the absence of any written decision, it is absolutely
13 impossible to determine which way an appeal would go. In the absence of a written
14 decision, it is absolutely impossible to determine what the content of a possible
15 appeal would be.

16 For the sake of argument, the Appeals Chamber may have to consider that the Trial
17 Chamber would have had to establish its reasoning as well as the content of the
18 appeal. If that were to be considered, this in itself does not alter the acquittal,
19 nothing, it doesn't, because here we are dealing with a matter of approach, the
20 approach of the Trial Chamber, your Chamber, which in itself does not address the
21 acquittal proper.

22 That is, finally, I am saying that the Prosecutor relies on a dissenting opinion to deal
23 with this aspect:

24 First, the existence of a dissenting opinion is a normal procedural occurrence, which
25 in itself cannot amount to an exceptional circumstance.

1 Second, the existence of a dissenting opinion does not in any way become prejudicial
2 to the possibility of an appeal, and that again does not amount to an exceptional
3 circumstance.

4 Let me revisit that point. The existence of a dissenting opinion does not provide us
5 with any information as to the outcome of a possible appeal and, therefore, does not
6 amount to an exceptional circumstance.

7 Third, a dissenting opinion basically addresses the format of your decision and in
8 itself does not provide any information that makes it possible to point out any factual
9 errors or errors in law which could ...

10 I insist, a dissenting opinion deals basically with the format of your Chamber's
11 decision and does not provide any information that makes it possible to concretely
12 identify errors in law or in fact which could ultimately be used on appeal.

13 On the specific question of the difference between the majority and the dissenting
14 judge relating to the applicable standard of proof in this procedure, today's oral
15 decision and dissenting opinion do not in any way provide any elements that point to
16 such a difference and, therefore, could enable us to come to any conclusion on how
17 viable or sustainable an appeal may be.

18 I will revisit this point. When it comes to the specific issue that the Prosecutor has
19 referred to in terms of disagreement between the majority and the dissenting judge,
20 according to the Prosecutor, disagreement based on the standard of evidence or proof
21 in this case, this is my argument:

22 Today we do not find either in the oral decision or in the dissenting opinion any
23 material or elements that can enable an understanding or an assessment of the nature
24 of the said disagreement and thereby make it possible to draw conclusions or make
25 any assessments on the possible viability or sustainability of an appeal.

1 Mr President, your Honours, let us note that the majority and the dissenting judge
2 have all indicated that the reasoned decisions will be provided subsequently, and at
3 paragraph 48 of the dissenting opinion, filing 1234, so we cannot come to any
4 conclusions on this matter.

5 To be direct, your Honours, it would seem that the Prosecutor thinks that by simply
6 arguing that an appeal can be made, that such is sufficient to keep someone in
7 detention, that such a reason could be sufficient to keep an acquitted person in
8 detention, someone who has been declared to be innocent. Such an approach, Mr
9 President, your Honours, does not meet the very clear requirements of the drafters of
10 this Statute, who required in a bid to guarantee individual freedoms and rights that
11 the exceptional circumstances criterion be met.

12 If we were to follow the reasoning of the Prosecutor and the Legal Representative of
13 Victims, it will be possible to maintain someone in detention although they have been
14 acquitted and although they are innocent as long as there is a possibility for appeal.
15 In other words, it simply means denying the reality of an acquittal.

16 Mr President, your Honours, what is important for us is that today we have noted
17 that regardless of the angle from which you tackle the question, the Prosecutor has
18 been unable to establish or justify the least exceptional circumstance that may justify,
19 your Honours, the continued detention of an innocent person.

20 PRESIDING JUDGE TARFUSSER: Thank you very much, Maître Altit.

21 I revert now to Mr Knoops for his submissions.

22 THE INTERPRETER: [10:30:09] Sorry, Mr President.

23 MR KNOOPS: [10:30:26] Good morning, your Honours.

24 Mr President, our submissions on behalf of Mr Blé Goudé will embrace certain
25 remarks about the natural right to freedom. And, secondly, we'll go into the

1 exceptional circumstances and the other elements of Article 81. These two last
2 points will be addressed by Ms Carrin. I will deal with the first part.

3 Unfortunately, the discussion today triggered by the OTP and the LRV intend to
4 focus on procedural issues.

5 At stake, Mr President, your Honours, is the natural right to freedom, the freedom of
6 mankind. This is the essence of the debate today, not procedures, the natural right
7 to freedom.

8 Mr President, in the case of Allen versus United Kingdom, decided by the European
9 Court of Human Rights on 12 July 2013, in paragraph 94, you find actually what for
10 us lawyers in this Court means what is the natural right of mankind.

11 I quote from this paragraph:

12 It's the general aim, according to the judges of the European Court, it's the general
13 aim of Article 6-2 of the Convention "... to protect individuals who have been
14 acquitted of a criminal charge, or in respect of whom criminal proceedings have been
15 discontinued, from being treated by public officials and authorities as though they are
16 in fact guilty of the offence charged."

17 And, Mr President, this is the essence of today. These two individuals are acquitted,
18 they should be given back their natural right to freedom. It's in every system
19 embraced and ventilated by the European Court.

20 "Without protection to ensure respect for the acquittal", I am still quoting paragraph
21 94 of the Allen versus UK judgment, "Without protection to ensure respect for the
22 acquittal or the discontinuation [of the trial], the fair trial guarantees of the Article 6-2
23 provision is becoming theoretical and illusory."

24 Mr President, this is my first remark.

25 My second remark is in every jurisdiction, as far as I'm aware of, a release with

1 reasons to follow, it's a logic consequence of the natural right to freedom, it is in
2 conformity with this natural right to freedom.

3 And even in the dissenting opinion of honourable Judge Ms Carbuccia you find in
4 paragraph 33 a reference to the Canadian Court of Appeal in the R versus Teskey case
5 of 2007 where the Court says it's important to deliver decisions timely. It's not to say
6 directly, that's the difference, a timely decision. And although not precluded from
7 announcing a verdict with reasons to follow, of course a trial judge should be mindful
8 of the importance that reasons are to follow.

9 But that it's not necessary, also according to this judgment, which is also in
10 conformity with United States case law and case law of Supreme Courts in the
11 European hemisphere, it's not in contravention with international law that on every
12 occasion a delay in rendering a full decision could be tantamount to a violation of the
13 appellate review.

14 We believe that setting accused person free at the moment the Court finds no reasons
15 to continue with the case, in a complex case as this whereby the judgment might be
16 rendered in its reasoning somewhat later, is in conformity with international law and
17 with national jurisdiction law.

18 Mr President, this notion, this natural right to freedom after an acquittal and freedom
19 should be given back to the accused persons is also expressed in Article 81(3)(c)(i)
20 because the Chamber, the Appeals Chamber in Ngudjolo already rendered that it is
21 the rule that an acquitted person should be released. This is the rule.

22 And this natural right to freedom is also clearly ventilated in international treaty law.
23 Article 9 of the ICCPR, Article 5-3 of the European Convention on Human Rights,
24 Article 7 of the American Convention on Human Rights and Article 6 of the African
25 Charter on Human and Peoples' Rights.

1 So the conclusion is clearly that a continued detention of an acquitted person pending
2 an appeal is in contravention to international law and is in contravention to the
3 natural state of mankind as being free, and also in contravention with the vast case
4 law of the European Court of Human Rights.

5 Now, Mr President, having said this, I also observe that other judges in this Court
6 have reflected the same view on how to interpret human rights in the context of
7 proceedings before the ICC.

8 First, the Presiding Judge Cotte in Ngudjolo clearly said that the assessment of
9 detention after acquittal should be put in the context of the acquittal. He used the
10 words "*le contexte sur de la détention*".

11 Although this term was not reproduced in the English version of the transcript, it's
12 clear that Judge Cotte meant to say that we should not reason in the abstract but in
13 the specific realm of an acquittal.

14 Also, Judge Van den Wyngaert recalled this during the status conference where the
15 parties and participants debated about the immediate release of Mr Ngudjolo.

16 I quote from the transcript, English transcript, page 7, 8 at ICC-01/04-02/12. Judge
17 Van den Wyngaert asked the Prosecution the following question, speaking about the
18 criterion of the seriousness of the charges:

19 "You did not develop, notably, the gravity of the crime and, once again, what is
20 special about this? In view of the fact that, for each individual accused before our
21 Court, the facts or events mean that ... there is a serious offence at hand." End quote.

22 Of course, Judge Van den Wyngaert was totally right. What is special about a charge
23 before an International Criminal Court, the charges are *ab initio* serious and, therefore,
24 these charges as such cannot function as an exceptional circumstance in the context of
25 Article 81.

1 Mr President, this natural right which should be given back to these two accused
2 should also extend to the core of the debate. We're not speaking longer any more
3 about interim release, we're speaking about immediate release.
4 In other words, apart from the presumption of innocence which always applies in
5 every case there is an additional dimension which features here, and this preservation
6 is the freedom of a person, the freedom of a person who has been tried and judged
7 not guilty.
8 That is the additional dimension which comes on top of the presumption of innocence.
9 And this additional presumption, the preservation of freedom of a person who has
10 been tried and judged not guilty, of course has consequences for the debate today.
11 And as a result, in our submission, the necessity of conditions to release is a
12 discussion which is moot in light of what we just observed as part of international law
13 and human rights treaty law.
14 That means that the discussion about conditions is a discussion which should not take
15 place in the context of immediate release. Apart from this, the Prosecution failed to
16 prove that such conditions are actually necessary in the present case.
17 Secondly, about the exceptional circumstance, Mr President, we believe that the
18 Prosecution makes a misinterpretation of the structure and wording of Article
19 81(3)(c)(i).
20 This, the aspect of a concrete risk of flight or the seriousness of crime are factors
21 which are separate from the exceptional circumstances. A concrete risk of flight is
22 one factor which is mentioned in this provision, but it's not to be subsumed under the
23 concept of exceptional circumstances.
24 Article 81(3)(c)(i) does not give therefore to the criterion of flight risk the status of a
25 sub-criterion of exceptional circumstances. These are two distinct and separate

1 criteria.

2 You can find this also in the text of Article 81(3)(c)(i) saying, "under exceptional
3 circumstances, and having regard ... to the concrete risk of flight."
4 So it's accumulation of factors and the factors mentioned after the words "and having
5 regard, inter alia," are therefore factors which do not define the criterion of
6 exceptional circumstances.

7 As a result, by the way, this is also the view of Judge Van den Wyngaert in the
8 Ngudjolo case where she specifically made a distinction between, on the one hand,
9 exceptional circumstances and, on the other hand, the special factors such as flight
10 risk, the seriousness of the crime and the probability of success of an appeal.

11 Having observed this, Mr President, we can conclude, therefore, that the Prosecution
12 has failed to address exceptional circumstance because the Prosecution defines the
13 alleged exceptional circumstances with the factors which are clearly separated from
14 this criterion in Article 81(3)(c)(i).

15 Finally, as part of my submission, the first specific factor not being exceptional
16 circumstance, namely, the concrete risk of flight. As the Court might recall, the
17 Defence of Mr Blé Goudé on 13 December 2018, when there was a discussion on the
18 interim release already addressed the issue of the so-called risk of flight.

19 In addition, we refer, Mr President, to an important ruling of the European Court of
20 Human Rights in the case of Becciev versus Moldova, 4 January 2006, paragraph 58,
21 where the judges of the European Court actually contemplated on the definition of a
22 danger that an accused would abscond and ruled two important, on two important
23 criteria.

24 First, the danger of an accused absconding cannot be solely determined on the basis
25 of the severity of the sentence which might be at stake. That's the first observation in

1 paragraph 58 of this ruling.

2 The second one is even more important for the discussions today. It reads as

3 follows:

4 "The expectation of [a] heavy sentence and the weight of evidence might be

5 relevant" - according to the judges, for determining a flight risk - "but is not as such

6 decisive, and the possibility of obtaining guarantees might be used to offset any risk,"

7 referring also to the case of Neumeister versus Austria, 1968.

8 Now, Mr President, for today, it means that the expectation which is still very

9 speculative that an Appeals Chamber might rule differently, again, speculative, is not

10 a decisive factor to have the accused maintaining in detention. In the words of the

11 court, the European Court, the expectation of a heavy sentence and the weight of the

12 evidence, and I would say the potential prospect of success on appeal, apart from its

13 speculative nature, might be relevant according to the judges in Becciev versus

14 Moldova, but is not decisive therefore.

15 In other words, the Court has no reason to grant the Prosecution request merely on

16 the basis that it would appeal and that it says that this appeal might have a prospect

17 apart from a speculative nature of this argument.

18 Mr President, finally, when it concerns flight risk, I believe, I sincerely believe with

19 my team that after the ruling of your Honours yesterday, there is even less reason for

20 Mr Blé Goudé to abscond. Why? You have seen that the judges have granted his

21 arguments, that they have believed in his arguments. There is reason for him even

22 more to cooperate with the Court, and his incentive to cooperate has been reinforced

23 since yesterday because he has seen that justice has been done.

24 For a defendant like Mr Blé Goudé, this is the most relevant incentive you might think

25 of. And after an acquittal, there is even reason more for a defendant to appear

1 during an appeals procedure to have this acquittal confirmed. And therefore, Mr
2 President, the Court has in itself already an assurance without any condition
3 necessary that Mr Blé Goudé will appear.

4 Finally, it's regrettable, really regrettable that the Prosecution in its filing of yesterday
5 on pages 12 and 13 unfortunately again raises the issue of the passport of
6 Mr Blé Goudé and the sanctions of the United Nations.

7 Well, we have extensively explained to the Court on 13 December last year our view
8 on the passports. Apart from this being incidents of more than five years ago, six
9 years ago, even seven years ago, apart from the fact that these passports were never
10 used by Mr Blé Goudé, the simple observation that time has passed is also an
11 observation which is important for the European Court. If the time increases after a
12 fact, there is reason less to keep someone in detention.

13 Secondly, when it concerns the UN sanctions, the Prosecution unfortunately again
14 omits our observation already put forward on 13 December that on 19 February 2016,
15 Mr Blé Goudé voluntarily cooperated with the UN commission in the detention
16 centre here in The Hague. You can find this in a UN document with the reference
17 S/2016, number 254, paragraph 178, it's a letter of the president of the commission of
18 inquiry of Ivory Coast towards the president of Security Council and also based on
19 the interview Mr Blé Goudé gave to this commission while being in detention on a
20 voluntary basis, the sanctions were ultimately lifted on 28 April 2016 by Resolution
21 2283, lifting every ban including travel ban for Mr Blé Goudé.

22 Therefore, the reference in the submissions by the Prosecution to a situation which
23 lasted until 2013 and 16 is therefore a reference which is not topical any more, apart
24 from the six years which have expired after all these so-called incidents.

25 The actual situation is such that there is no travel ban or sanction whatsoever with

1 respect to Mr Charles Blé Goudé. In other words, the Prosecution cannot deduce a
2 flight risk from these actions therefore some years ago.
3 My conclusion for this part, and then I give the floor to Ms Carrin for the last couple
4 of minutes for our presentation, Mr President, is that, first of all, there is no reason to
5 impose any conditions as a result of the Court giving back the natural right to
6 freedom to Mr Charles Blé Goudé hopefully today. And secondly, if the Court
7 would grant any conditions as the Prosecution has asked for and the LRV, these
8 conditions have nothing to do with, should not have anything to do with the alleged
9 flight risk because there is no flight risk for Mr Blé Goudé, even less so since
10 yesterday.

11 Thank you very much. I'll now pass my lectern to Ms Carrin for her last
12 submissions.

13 PRESIDING JUDGE TARFUSSER: [10:53:53] Thank you, Mr Knoops.
14 Ms Carrin, please.

15 MS CARRIN: [10:54:11] Good morning, your Honours. I will now turn to the
16 criterion of the seriousness of the offence charged, and I will be very brief.

17 It's a reality that Mr Blé Goudé has been charged with undoubtedly serious alleged
18 crimes. It's also a reality that he has been acquitted. So contrary to the
19 Prosecution's claim in paragraph 20(b) of its urgent request, our submission is that the
20 criterion of the seriousness of the charges in our case does not carry weight in the
21 Chamber's assessment of the question of whether Mr Blé Goudé should continue to be
22 detained despite his acquittal.

23 It's Trial Chamber II in the Ngudjolo case who ruled that the seriousness of the
24 offence cannot be the single criterion, cannot be the single base of a continued
25 detention for an acquitted person.

1 And I would like to briefly echo the question put to the Prosecution by Judge Van den
2 Wyngaert. She asked: What is special about the seriousness of the crimes in the
3 case at hand? Judge Van den Wyngaert pointed out that every individual who
4 comes or every individual who is tried by the ICC is charged with serious offences.
5 Every case concerns serious offences. But the Prosecution should demonstrate how
6 the particular charges and in our case how the particular charges against
7 Mr Blé Goudé are so serious, and I would add so specially serious that they tend to
8 demonstrate that the narrow exception provided for under Article 81(3)(c)(i) should
9 apply and support the continued detention under a paradigm of immediate release.
10 And to now turn to the criterion of the probability of success on appeal, it is true that
11 the judgment delivered yesterday was delivered by majority, but, however, the
12 Defence notes with respect that Judge Herrera Carbuccia's dissent is concise and
13 focused to specific issues and that these issues are not first directly related to
14 immediate release.
15 Now, if we take a look to the big picture of this trial and to the consistency of the
16 Prosecution's case, the Defence notes that the Prosecution during three years of trial
17 had every opportunity to present and to argue its case.
18 First, the Chamber heard 82 witnesses from an original list of about 135 witnesses. I
19 don't want to mislead the Chamber on the features, so I would say about 135
20 witnesses.
21 It is the Prosecution who manages its list of witnesses. It is the Prosecution who
22 decided to reduce the list of witnesses. But what we can say is that an original list of
23 more than 130 witnesses was unprecedented before the ICC.
24 Second, we also note that the Prosecution has benefited from the admissibility of
25 evidence regime as decided by the Chamber. A large part of the documentary

1 evidence, a large part of the documents it has tendered into evidence have been
2 submitted to the case record, and we are well aware that submitted does not mean
3 admitted. However, when the Defence presented its no case to answer motion, it
4 had no choice but to take into account all of the evidence that was submitted.

5 Third, the Prosecution also had the opportunity to present a trial brief at the
6 conclusion of its case and this was also unprecedented before the International
7 Criminal Court.

8 Despite all of these conditions, to present and to argue a case, the Prosecution has
9 failed to prove the charges against the accused. The Defence submits that there is no
10 reason to consider that the Appeals Chamber, in case the Prosecution proceeds with
11 lodging an appeal against the judgment, will rule differently.

12 And finally, although the majority did not provide its full reasoning yesterday, it did
13 deliver the decisive arguments for its acquittal in conformity with international law.

14 Therefore, the probability of success of an appeal appears very limited, and this is
15 opposed to what the Prosecution suggests in its request.

16 And this terminates my intervention. Thank you, your Honours.

17 PRESIDING JUDGE TARFUSSER: [11:00:38] Thank you very much.

18 MR KNOOPS: [11:00:38] Mr President, we conclude with the final observation that
19 keeping Mr Blé Goudé after today in detention, which also includes interim release
20 with conditions, which is a type of detention, would result in treating him as being
21 guilty.

22 In terms of Allen versus United Kingdom in paragraph 94, to protect individuals who
23 have been acquitted of a criminal charge from being treated by public officials or
24 authorities as though they are in fact guilty of the crime is in contravention with
25 international law. Therefore, we submit that even the request of the Prosecution as

1 ventilated in paragraph 29 of its submission to ask for measures of this Court to keep
2 the individuals who have been acquitted in detention, although the power is in the
3 hands of the Appeals Chamber, but still the Court, the Prosecution asks your
4 Chamber to take measures to keep Mr Blé Goudé in detention pending a potential
5 speedy appeal to the Appeals Chamber is even not in conformity with the law,
6 because it would mean that people who are acquitted are still being perceived and
7 treated as in fact guilty because they are in detention or measures are being taken to
8 keep them in detention.

9 So therefore we also submit that the alternative request of the Prosecution as set forth
10 in paragraph 29 should not be granted by the Chamber. Thank you very much.

11 PRESIDING JUDGE TARFUSSER: [11:02:47] Thank you very much.

12 Just to -- Mr Prosecutor.

13 MR MACDONALD: [11:02:51] Your Honours, with your permission, I feel
14 compelled to respond discretely to both Defence teams' arguments and what they've
15 mentioned because I think it would be important for the Chamber to have the
16 position of the Prosecution not being distorted. And also in order to recall past
17 decision of this Chamber and other Chambers, to arguments that have been raised or
18 the inapplicability, for instance, of the Allen decision, which has nothing to do with
19 this case.

20 So I would ask briefly a few minutes, it's going to be very short, in order to respond.

21 PRESIDING JUDGE TARFUSSER: [11:03:38] Yes, I give you the few minutes, of
22 course, but you mean now? Immediately? Yes. That means that we have to
23 return to turn again.

24 MR MACDONALD: [11:03:50] That may be the case.

25 PRESIDING JUDGE TARFUSSER: [11:03:52] Yes. Okay, so briefly, please.

1 MR MACDONALD: [11:03:54] If you'll allow me, your Honours --

2 MR ALTIT: [11:04:00] *Monsieur le Président*.

3 PRESIDING JUDGE TARFUSSER: [11:04:05] Yes, Maître Altit.

4 MR ALTIT: [11:04:06] (Interpretation) Thank you. Mr President, we object to that
5 application from the Prosecution. We have all had the opportunity to express
6 ourselves extensively and we do not understand why we should keep revisiting this
7 issue. And I think all the opinions have been expressed and I think we should stop
8 here. Thank you.

9 PRESIDING JUDGE TARFUSSER: [11:04:25] Well, I think this is a very, very delicate
10 moment of the trial, a very delicate issue, and I think that if there is something more
11 to say, the more we say the better it is. So I give the floor to the Office of the
12 Prosecutor. And please be really very focused and very brief. Thank you.

13 MR MACDONALD: [11:04:43] Thank you, your Honour.

14 PRESIDING JUDGE TARFUSSER: [11:04:45] Just a moment.

15 MR ALTIT: [11:04:46] (Interpretation) Just to add that --

16 THE INTERPRETER: [11:04:59] Mr President, we didn't understand what counsel
17 has just said, if he would kindly repeat.

18 MR MACDONALD: [11:05:04] Your Honours --

19 PRESIDING JUDGE TARFUSSER: [11:05:05] Excuse me, but the last part was
20 not -- the translators, the interpreters didn't understand what you said the last few
21 sentences. So please, can you just repeat this.

22 MR ALTIT: [11:05:22] (Interpretation) I just wanted to specify that our position is
23 that we do not understand why the Prosecutor had asked for the floor. But since
24 you have authorised such remarks, such further remarks to be made, we ask also to
25 have the opportunity to do same after the Prosecution has spoken.

1 PRESIDING JUDGE TARFUSSER: [11:05:49] This is exactly what I said to the
2 Prosecutor, that if he now speaks, we have to make the whole exercise again.

3 MR ALTIT: [11:06:02] (Interpretation) I'm sorry. Maybe there was an
4 interpretation problem, Mr President. Now, just to clarify, let me just make sure
5 that ...

6 (Counsel confer)

7 MR ALTIT: [11:06:29] (Interpretation) Let me try to clarify. What I was saying is
8 as follows. The Prosecutor has requested, initiated these hearings and submitted an
9 application. We felt that it was unnecessary for the Prosecutor to take the floor again.
10 But since your Chamber has authorised him to do so, I think you have already
11 granted that application, we also think therefore that we should be given an
12 opportunity to respond to the new remarks from the Prosecutor. Maybe there was a
13 slight translation problem. I hope things are clearer now.

14 PRESIDING JUDGE TARFUSSER: [11:07:17] Maître Altit, just for you, I said because
15 of the importance of the subject we are debating, I give exceptionally the floor back to
16 the Prosecutor for his short remarks in answer to your arguments and I said also that
17 then I will obviously give also the floor again to the Legal Representative and to the
18 Defence teams. This I said before and I repeat. Thank you very much.
19 Mr Prosecutor.

20 MR MACDONALD: [11:07:53] Thank you, your Honours.

21 So let me start with the representations made by Mr Knoops or the Blé Goudé
22 Defence team. Again, please have a look at paragraph 94, have a look at the context
23 of the Allen decision. It has nothing to do with the situation under which we are.
24 Now, we argue that Mr Blé Goudé, time lapse and so on the last five years, well, he
25 was in detention for the last five years. So of course he had to respect the only rules

1 were of a detention centre. It doesn't distract from the fact that yes, he's had
2 different passports, identity documents from three different countries that were false.
3 Third, the cooperation with the UN, go back, it doesn't say that. Go back to the
4 documents, look at them, read them. They do not say that.
5 I will now address a comment that was addressed by both Defence teams and I'll
6 quote Mr Altit. "In the absence of a written decision, it is absolutely impossible to
7 determine what the content of a possible appeal would be."
8 Now, of course, if Mr Altit is right when he's saying that, then the parties have been
9 deprived by the majority's decision to issue a verdict with reasons to follow and,
10 therefore, impacting on our right, the Prosecution's right to seek detention or release
11 in this case, like we are, pending appeal. And obviously, that cannot be the
12 majority's position.
13 So like we submit in our written submission in order to clarify that, it is in that sense
14 that it has to also be presumed, because we don't have written reasons, except
15 minimal ones, that there is a chance of success on appeal. And it is also in that sense
16 that the dissenting opinion is relevant.
17 Now, that in and of itself is by definition exceptional circumstances. That's where
18 we are. And this Chamber has before. So we are in exceptional circumstances in
19 the way the decision was delivered, I will not dwell on that. We're also in
20 exceptional circumstances into the legal issues that will be involved, and the
21 dissenting opinion in that sense is an indication.
22 So therefore this is why we're also here, and this is why the Prosecution is saying that
23 the chances on appeal are not impossible are viable. Therefore, a retrial is a real
24 possibility. Therefore, the same risks of flight that have been recognised by this
25 Chamber in, I don't know, over ten decisions still exists.

1 This is why we need to protect the record, the existing record of any influence by the
2 accused. So therefore, and this also has been recognised and maintained by majority
3 maybe in the last decisions, but still, nevertheless applicable.

4 So what we're talking about here today, we're very conscious that the accused have
5 been acquitted and now they're acquitted persons, but we also know very well and I
6 cannot comment and will not comment a decision that has not been issued for the
7 very reasons that we don't want to be seen as influencing the Chamber in any way,
8 the appearance of it.

9 So this is what we are saying today is, yes, the accused have been acquitted. There is
10 another forum that will deal with all these issues. Everybody knows that. And in
11 the meantime, because of the novelty of these legal issues, including an acquittal at a
12 no case to answer stage in which tests should be applied and how, as one ground
13 currently being identified will be decided.

14 And in the meantime we're recommending that conditions be imposed. So it's in
15 that context that yes, we are in exceptional circumstances.

16 PRESIDING JUDGE TARFUSSER: [11:13:44] Thank you very much. Is it --

17 MR MACDONALD: [11:13:48] Yes, one last point. The seriousness of the charges.
18 Of course under the Statute every crime is serious, potentially some more than others.
19 That is true. But it is still and does not detract that it is one of the criteria to be relied
20 upon.

21 There seems to be a problem with Transcend.

22 Thank you, your Honours. I'm sorry. Thank you.

23 PRESIDING JUDGE TARFUSSER: [11:14:30] Thank you.

24 Legal Representative of Victims.

25 MS MASSIDDA: [11:14:32] Thank you, your Honour. I have just one comment

1 after having heard the Prosecution, a small one touching my comments to the last
2 comment of the Prosecution in relation to the gravity of a conduct, which is of course
3 not the only factor that should be taken into account.

4 And the second point that I would like to make in relation to the quotation of the
5 Ngudjolo hearing in relation to the same issue that we are discussing today, I would
6 like to draw the attention of the Chamber on the transcript of that hearing, which
7 clearly states "The Chamber", and I quote, "The Chamber also wishes to point out that
8 this ruling" meaning the ruling on acquittal "was issued unanimously and the
9 probability of a successful appeal might be different if there had been a dissenting
10 opinion, or separate opinions, but that was not the case." End of quote.

11 Therefore, the fact, the simple fact that there is a dissenting opinion may be
12 considered as a factor in deciding on the prospective chance of appeal.

13 The reference to what I have just quoted is the transcript --

14 PRESIDING JUDGE TARFUSSER: [11:16:00] We know that.

15 MS MASSIDDA: [11:16:01] -- ICC-01/04-02/12, Transcript 3, English version at page
16 4 of the hearing of 18 December 2012. Thank you.

17 PRESIDING JUDGE TARFUSSER: [11:16:24] Thank you.

18 Maître Altit, you see.

19 MR ALTIT: [11:16:33] (Interpretation) Thank you, Mr President. Mr President, I'll
20 be very brief.

21 The Prosecutor has essentially repeated what is contained in his written submissions,
22 so I will not revisit that. But let me point out one point, which seems to be unclear.
23 Protecting the case file, what does that mean? What does that mean? The case file
24 is there, it's here. The Prosecutor has made his case, has concluded his case, so what
25 is being protected? I don't understand clearly what this vague term refers to. It

1 simply seems to me to be a smokescreen underpinned by a failure to establish or
2 demonstrate anything in relation to a man who has been found innocent and
3 acquitted.

4 Now, this is the point at which he should have been specific. That is the very crux of
5 the case, the freedom and rights of a man, of an individual. So we cannot proceed by
6 insinuations and smokescreens.

7 That's it, Mr President, your Honours.

8 PRESIDING JUDGE TARFUSSER: [11:18:06] Thank you very much, Mr Knoops.

9 MR KNOOPS: [11:18:09] Mr President, we have three remarks based on the
10 Prosecution's response. First of all, of course, the context of, the factual context of
11 Allen versus United Kingdom case was different, but the paragraph which I quoted
12 from this judgment, para 94 deals with the general principles underlying Article 6-2
13 of the convention.

14 So the Court in another context, that's true what my learned colleague told the Court,
15 the Allen case, but this paragraph deals with the parameters of how to treat a person
16 who has been found not guilty, very simple.

17 My second remark, the Prosecution says, well, Mr Blé Goudé did not cooperate with
18 the UN, although at least this is not what the document is saying. Indeed, it's not
19 literally saying Mr Blé Goudé cooperated with us. But it does say that he voluntarily,
20 he could have refused, accepted an interview during which the representative of the
21 UN asked him a lot of questions about his whereabouts, even they confronted him
22 with this passport of Mali.

23 You'll find in this document at 216-254 in paragraph 178, in paragraph 179, I have the
24 document with me, that the representatives who came to the UN detention centre to
25 speak to Mr Blé Goudé, and he consented as mentioned, asked him, "Why do you

1 have this passport of Mali?" Well, he explained it to them and he said, "I never used
2 it."

3 Based on this interview, Mr President, in 2016, the sanctions were lifted, including a
4 travel ban. So for the UN, it was not a problem that Mr Blé Goudé for some reasons
5 apparently had another passport which he never used.

6 So it's a past story, it's history, it's been dealt with, having nothing to do with
7 detention. It has to do with a defendant who voluntarily cooperates with an
8 international organisation. That's the reality of today and not what happened in
9 2013 on this issue.

10 And about flight risk, the Prosecution didn't mention but the Court knows that in the
11 case of Mr Ngudjolo, no exceptional circumstances were accepted by the Chamber,
12 even though there was an allegation that Mr Ngudjolo escaped from prison after a
13 military court order and even with allegations that he intimidated witnesses, even
14 with those allegations the Court did not find exceptional circumstances to have him
15 released.

16 For Mr Blé Goudé, these elements are far from reality.

17 Finally, Mr President, the Prosecution is actually basically saying to this Chamber we
18 have exceptional circumstances because there is a dissenting opinion.

19 With all due respect for dissenting opinions, the reality is there is an acquittal. And I
20 have read the dissenting opinion with great interest. But I also noted, and this is not
21 what the Prosecution is saying to the Court, in paragraph 37 of the dissenting opinion,
22 the Judge dissenting wrote in her opinion, "I respect the majority's decision to acquit
23 the accused. I recognise that every accused is presumed innocent until proven guilty,
24 and the right - and the right to be released immediately in case of acquittal."

25 Of course, we are all professionals, this is the natural right. So forget about the

1 discussion about dissenting opinions. That's for the appeals judge. For now, even
2 with the dissenting opinion, the right, the absolute right is immediate release.

3 So, Mr President, your Honours, give Mr Blé Goudé back his natural right which is
4 enshrined by every international instrument and that he should be released today.

5 Thank you very much.

6 PRESIDING JUDGE TARFUSSER: [11:23:17] Thank you.

7 Now I have two questions, issues to raise, one in open and one in private session in
8 order to complete all the elements necessary to decide.

9 I would ask, first of all, the Defence teams if, and already Mr Knoops has pointed it
10 out, but not as clear as we might need it, at page 19, line 22 of the transcript, at a
11 certain point you said, "And, therefore, Mr President, the Court has in itself already
12 an assurance without any condition necessary that Mr Blé Goudé will appear" in front
13 of the Court in case of appeal.

14 So I would ask the Defence teams in this much more formally if the defendants are
15 ready to sign a formal submission in this regard stating their commitment to appear
16 before the Court at any time requested and are the Defence counsel ready and willing
17 to sign for guarantee of such, to guarantee such commitment? This would be the
18 first question.

19 (Counsel confer with their clients)

20 PRESIDING JUDGE TARFUSSER: [11:25:25] Maître Altit.

21 MR ALTIT: [11:25:26] (Interpretation) Thank you, Mr President. As far as we are
22 concerned, your Honours, we are entirely willing to sign such a document, any
23 document that the Chamber would like us to sign in this regard. And when I say
24 "we," of course I'm speaking on behalf of Mr Laurent Gbagbo and myself as lead
25 counsel.

1 PRESIDING JUDGE TARFUSSER: [11:25:49] Thank you very much.

2 Mr Knoops.

3 MR KNOOPS: [11:25:51] Mr President, your Honours, the Defence team of
4 Mr Blé Goudé and specifically myself as lead counsel, we're willing to sign a
5 document that we will both appear in appeal and cooperate with the appeals
6 proceedings fully.

7 PRESIDING JUDGE TARFUSSER: [11:26:05] Thank you, thank you very much.

8 And now I ask for a private session for just a couple of minutes.

9 (Private session at 11.26 a.m.)

10 THE COURT OFFICER: [11:26:22] We are in private session, Mr President.

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

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- 1 (Redacted)
- 2 (Redacted)
- 3 (Redacted)
- 4 (Redacted)
- 5 (Redacted)
- 6 (Open session at 11.28 a.m.)
- 7 THE COURT OFFICER: [11:28:29] We are back in open session, Mr President.
- 8 PRESIDING JUDGE TARFUSSER: [11:28:33] Thank you very much.
- 9 Now the only thing that remains to do for me in this hearing is to adjourn it.
- 10 Obviously the Chamber is not in a position to give an exact hour when the decision
- 11 will be pronounced in open session on this request, Article 81, but we will do it today.
- 12 We can give a rough indication, for sure not before 3 o'clock in the afternoon. But in
- 13 any case we will be in contact with the court officer and through her give you more
- 14 indication if necessary.
- 15 But until 3 o'clock, you are free.
- 16 Thank you very much.
- 17 THE COURT USHER: [11:29:23] All rise.
- 18 (Recess taken at 11.29 a.m.)