

1 International Criminal Court
2 Appeals Chamber
3 Situation: Republic of Côte d'Ivoire
4 In the case of The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé
5 ICC-02/11-01/15
6 Presiding Judge Chile Eboe-Osuji, Judge Howard Morrison, Judge Piotr Hofmański,
7 Judge Luz del Carmen Ibáñez Carranza, and Judge Solomy Balungi Bossa
8 Appeals Hearing - Courtroom 1
9 Friday, 1 February 2019
10 (The hearing starts in open session at 9.32 a.m.)
11 THE COURT USHER: [9:32:11] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: [9:32:34] Thank you very much.
15 Welcome, everyone.
16 Court officer, please introduce the case.
17 THE COURT OFFICER: [9:32:44] Good morning, Mr President, your Honours.
18 Situation in the Republic of Côte d'Ivoire, in the case of The Prosecutor versus
19 Laurent Gbagbo and Charles Blé Goudé, case reference ICC-02/11-01/15.
20 And for the record, we're in open session.
21 PRESIDING JUDGE EBOE-OSUJI: [9:33:03] Thank you.
22 Appearances beginning with the Prosecution.
23 MR STEWART: [9:33:08] Good morning, Mr President, your Honours. I'm
24 appearing with Helen Brady, senior appeals counsel; Reinhold Gallmetzer, appeals
25 counsel. And from the trial team dealing with the Gbagbo and Blé Goudé case,

1 Eric MacDonald, senior trial lawyer; Elena Martin Salgado, trial lawyer; and
2 Sylvie Vidinha, case manager. And my name is James Stewart, for the record,
3 Deputy Prosecutor. Thank you.

4 PRESIDING JUDGE EBOE-OSUJI: [9:33:44] Thank you very much.

5 And the Defence team for Mr Gbagbo.

6 MR ALTIT: [9:33:52] (Interpretation) Good morning, Mr President, your Honours.

7 The Gbagbo Defence team is made up of Professor Jacobs, Jennifer Naouri, associate
8 counsel, Ms Coeuret, Ms Marguet and Ms Gantheret, and as for myself, I am lead
9 counsel, Emmanuel Altit.

10 PRESIDING JUDGE EBOE-OSUJI: [9:34:18] Thank you very much.

11 The Defence team for Mr Blé Goudé.

12 MR KNOOPS: [9:34:22] Good morning, Mr President, your Honours. I'm assisted
13 today by my co-counsel, Mr Claver N'Dry, counsel at the Bar in Abidjan; counsel
14 Madam Kadji and Mr Seri Zokou, the Bar in Brussels; and our legal assistants,
15 Ms Sara Pedroso, Marion Carrin. Thank you very much.

16 PRESIDING JUDGE EBOE-OSUJI: [9:34:54] You did not put your name on the
17 record, did you?

18 MR KNOOPS: [9:34:58] My name is Geert-Jan Alexander Knoops, sir. Thank you.

19 PRESIDING JUDGE EBOE-OSUJI: [9:35:06] Thank you very much.

20 MR KNOOPS: [9:35:07] I'm sorry.

21 PRESIDING JUDGE EBOE-OSUJI: [9:35:08] And the Legal Representative for
22 Victims.

23 MS MASSIDDA: [9:35:11] Good morning, Mr President, your Honours. Appearing
24 for victims today in courtroom at my left, Ms Ludovica Vetrucchio, legal officer; and
25 my right, Mr Alexis Larivière, a legal officer; behind me, Mr Patrick Tchidimbo, case

1 manager; Mr Pablo Allendes, intern; and I am Paolina Massidda, principal counsel.

2 PRESIDING JUDGE EBOE-OSUJI: [9:35:37] Thank you very much.

3 And the team from the Registry.

4 MR DUBUISSON: [9:35:40] (Interpretation) Mr President, your Honours, today
5 representing the Registry, we have Romina Morello, legal officer, external relations
6 and judicial cooperation; Marie Mathiaud, legal officer dealing with a number of
7 issues within the legal office of the Registry; and I am Marc Dubuisson, Director of the
8 Judicial Services Division, representing the Registrar, Mr Peter Lewis.

9 PRESIDING JUDGE EBOE-OSUJI: [9:36:15] Thank you very much.

10 In their judgment rendered on 15 January 2019, the Trial Chamber, by majority,
11 acquitted Mr Laurent Gbagbo and Mr Charles Blé Goudé of all charges in the case
12 against them before this Court. The Trial Chamber has not yet given their full
13 reasons for the acquittal. They will do so in the due course of time.

14 Ordinarily, upon an acquittal, the defendant must be released immediately, unless the
15 Trial Chamber orders, at the request of the Prosecutor, continued detention of the
16 defendant pending the appeal of the acquittal.

17 The Prosecutor made no such request in this case. However, on the day following
18 the acquittal, that is on 16 January 2019, the Prosecutor requested instead that
19 Mr Gbagbo and Mr Blé Goudé should be granted conditional release pending the
20 appeal that the Prosecutor contemplates filing against the acquittal upon the eventual
21 release of the Trial Chamber's reasons for the acquittal.

22 Once more, by a majority decision, the Trial Chamber rejected the Prosecutor's
23 request and ordered the release of Mr Gbagbo and Mr Blé Goudé unconditionally.

24 The Prosecutor then appealed the Trial Chamber's refusal to impose conditions upon
25 the release.

1 The Appeals Chamber is convened today to hear that appeal.

2 I should mention perhaps by way of footnote that pending its decision on the
3 Prosecutor's appeal on the conditional release decision, the Appeals Chamber, by
4 majority, Judge Morrison and Judge Hofmański dissenting, granted the request of the
5 Prosecutor to maintain the detention of Mr Gbagbo and Mr Blé Goudé. That
6 decision was rendered on 18 January 2019.

7 In preparation for its decision in this appeal, the Appeals Chamber requested the
8 Registrar to seek the views of the Host State and other States as to their willingness to
9 facilitate the release or conditional release of Mr Gbagbo and Mr Blé Goudé.

10 For purposes of today's hearing, the Appeals Chamber has issued an order on the
11 conduct of the proceedings. In that order, the Appeals Chamber has set out the main
12 questions on which it wishes to hear the parties and participants.

13 During our first session today, we will receive submissions from the parties and
14 participants in public session on the legal questions that the Appeals Chamber has
15 put to the parties and participants.

16 We will proceed in the following order: The Prosecutor will go first, next the
17 Legal Representatives for the victims, following them, counsel for Mr Gbagbo, and
18 then counsel for Mr Blé Goudé.

19 The counsel speaking will do so in 20 minutes a side.

20 The speakers are directed to not merely repeat arguments already made in writing in
21 their filings, but to respond as fully as they can to the questions put to them by the
22 Appeals Chamber.

23 During the second session, which will be in closed session, we will first receive the
24 observations from the Registry on potential conditions that may be imposed on
25 Mr Gbagbo and Mr Blé Goudé should the Appeals Chamber find it the appropriate

1 way of resolving this appeal.

2 After the Registry representatives have concluded their observations, the Appeals
3 Chamber will subsequently hear the submissions of the parties and participants in
4 this regard beginning with the Prosecutor and then the Legal Representatives of
5 Victims, Mr Gbagbo, and then Mr Blé Goudé's counsel.

6 The parties and participants will have 15 minutes each to submit on their part.

7 The parties and participants are requested to complete their submissions or
8 observations within the time frames set by the Appeals Chamber.

9 The court officer will monitor the time and will indicate to the party or participant
10 when it is about to expire.

11 As indicated in the scheduling order, the judges of the Appeals Chamber may pose
12 additional questions to the parties and participants in the course of their submissions
13 or afterwards.

14 We will now hear submissions on the following questions:

15 Question one: On what legal basis, if any, is it possible or competent to impose
16 conditions on the release of a person following an acquittal?

17 Two: Is it necessary to first establish the existence of exceptional circumstances for
18 continued detention within the meaning of Article 81(3)(c)(i) of the Statute prior to
19 determining whether conditions may be imposed upon release instead of continued
20 detention?

21 Three: Alternatively, must the release of an acquitted person, with conditions, be
22 considered and found inappropriate before the existence of exceptional circumstances
23 justifying continued detention under the provision referred to earlier can be
24 considered?

25 I will now give the floor to the parties for their submissions beginning with the

1 Prosecutor.

2 MS BRADY: [9:43:32] Good morning, your Honours.

3 I'll now turn directly to answer your question in paragraph 2 of the scheduling order
4 which you've just summarised now in court.

5 Firstly, you've asked on what legal basis, if any, is it possible to impose conditions on
6 the release of a person following an acquittal?

7 In its submissions on 15 and 16 January, before the Trial Chamber, the Prosecution
8 argued that the standard of "exceptional circumstances" in Article 81(3)(c)(i) was met
9 for Mr Gbagbo and Mr Blé Goudé, thereby justifying their continued detention on
10 appeal. This test being met, the Prosecution then submitted that as an alternative to
11 their detention, the Trial Chamber could order their release on conditions. In other
12 words, the Prosecution stated it did not oppose their conditional release so long as
13 this was on the conditions that we set out in our filing, which are, broadly speaking,
14 those needed to ensure their attendance at any future proceedings and the integrity of
15 such proceedings.

16 On appeal, we've argued, as you know from our brief already and our position
17 remains today, that the Trial Chamber erred in deciding that there were no
18 exceptional circumstances because of the multiple errors that they made. And they
19 are set out in our brief. In our view, the Appeals Chamber should correct those
20 errors and find that exceptional circumstances do exist justifying their detention, and
21 then having done so, instead of maintaining them in detention, the Appeals Chamber
22 could instead order their conditional release. In other words, this approach, your
23 finding that exceptional circumstances exist justifying their detention pending appeal
24 is the first step. And then, after making this determination, you may find that the
25 aim of such detention can be achieved in a less, we could call it, less liberty-intrusive

1 way and order their release on conditions.

2 What's the legal basis if you take that path? Well, we know that the express terms of
3 Article 81(3)(c)(i) only mention the continued detention of an acquitted person once
4 the Chamber is satisfied that the test of exceptionality is met. It doesn't expressly
5 provide for restrictions on liberty short of detention such as conditional release. Yet,
6 both a contextual and purposive interpretation of Article 81(3)(c) would enable the
7 Chamber to order conditional release in lieu of detention.

8 As for the contextual reading, we base this on the following: Firstly, under
9 Article 83(1), the Appeals Chamber, quote, "shall have all the powers of the
10 Trial Chamber." End of quote.

11 Second, then we need to look at what are the powers of the Trial Chamber, or the
12 Pre-Trial Chamber as the case may be, the Trial Chamber has the powers of the
13 Pre-Trial Chamber, if we take, for example, an accused person subject to an arrest
14 warrant, it's clear that under Article 60(2) and (3), if the Trial Chamber is not satisfied
15 that the conditions in Article 58, those being flight risk, obstructing of investigational
16 proceedings, et cetera, if not satisfied that they're met and thus the relevant Chamber
17 doesn't detain the person, it, quote, "shall release the person with or without
18 conditions." End of quote.

19 In other words, the Trial Chamber has the power to order conditional release.

20 And then thirdly, we know from Rule 119 that the Trial Chamber, the
21 Pre-Trial Chamber may set one or more of the conditions restricting liberty, which is
22 set out in that non-exhaustive rule.

23 As for the purposive interpretation, if the purpose of detaining an acquitted person
24 pending appeal -- and again I stress, as you've already done in your decision on
25 suspensive effect of these appeal proceedings, if it is to ensure their attendance in any

1 future proceedings should the Prosecution successfully appeal this matter, and also
2 the integrity of proceedings, if you can achieve that in a less liberty-intrusive way
3 such as ordering release on conditions, it would be, in our view, incongruous not to
4 allow it.

5 And already we see in a similar manner, this Chamber in the Bemba appeals
6 judgment, that's OA7 appeals judgment, the Appeals Chamber at paragraph 55 has
7 already held that when a Chamber -- and in this case they were talking about -- in that
8 case they were talking about a Trial Chamber or the Pre-Trial Chamber, when that
9 Chamber finds that a risk usually justifying detention, such as flight risk, can be
10 managed by conditions being imposed on release, the Chamber can order release on
11 conditions instead of detention. And, in our view, there would be no reason why
12 you could not extend this principle to the Appeals Chamber in the context of
13 Article 81(3)(c)(i).

14 Now if, on the other hand, you are not persuaded by our arguments that the
15 Trial Chamber erred and the test for exceptional circumstances under 81(3)(c)(i) is met,
16 then there would need to be another legal basis for you to do so. And to answer this
17 question as to whether there is such a legal basis, this really goes to the heart of your
18 next two questions, questions two and three, and I'll turn to those two questions now
19 and deal with them together, because we see them as flip sides of the same question.

20 In question two you've asked:

21 Is it necessary to first establish the existence of exceptional circumstances for
22 continued detention within the meaning of Article 81(3)(c)(i) before determining
23 whether conditions can be imposed instead of conditional detention?

24 Or alternatively, must the release of an acquitted person, with conditions, be
25 considered and found inappropriate, before the existence of exceptional

1 circumstances, justifying continued detention under Article 81(3)(c)(i) can be
2 considered?

3 And again to stress, in our view, the Chamber should and can in this case first
4 establish the existence of exceptional circumstances justifying the continued detention
5 of the two gentlemen within the meaning of Article 81(3)(c)(i) before deciding
6 whether to order conditional release and on what conditions. And this is, what I just
7 argued, is the basis upon which we argued the matter at trial and appeal.

8 Why? Because a decision to maintain the detention of someone who has been
9 acquitted pending appeal - or to otherwise restrict their liberty during this period,
10 such as by imposing conditions on their release - is a significant one. I mean, still
11 imposing conditions on their release is significant and it should not be taken lightly.

12 PRESIDING JUDGE EBOE-OSUJI: [9:52:00] Is there no difference between detention
13 and release?

14 MS BRADY: [9:52:04] Clearly, your Honours. And I'm -- yes, that's exactly what I
15 am about to get to.

16 We know that - and I think it can be generally said - that human rights case law from
17 the European Court of Human Rights and the Inter-American Court of Human Rights
18 takes a protective stance, to put this in very general terms, a protective stance towards
19 the liberty and freedom of persons. And it also, human rights law, takes a
20 circumspect approach to someone being kept in detention after they've been acquitted.
21 We're talking here about detention. It's got to be prescribed by law, strictly
22 necessary, and proportionate to the aim of detention.

23 But to answer now directly what your Honour has asked me, of course we see that
24 conditional release is clearly much less of a restriction on liberty than full detention.

25 PRESIDING JUDGE EBOE-OSUJI: [9:53:04] Then why are you using the same

1 circumstances, the same factors for detention as for conditional release? Is that not
2 confusing the whole thing?

3 MS BRADY: [9:53:15] No, your Honour. Well, there are similarities. Because it
4 amounts to a restriction on liberty, some of the considerations may be equally
5 apposite, though I agree with you to a lesser degree. And again, because we're
6 speaking of someone who has been acquitted, but in relation to whom a Prosecution
7 appeal is pending.

8 But again, in answer to your question, we do recognise, because of the nature of
9 release on conditions being quite a different animal than detention, a different
10 mechanism, we do recognise that if instead of detention conditional release can be
11 imposed so as to meet the underlying purpose of ensuring that the proceedings may
12 continue, namely, that the people appear and that the integrity of the proceedings is
13 ensured, then we agree with you that that approach may indeed be the most
14 proportionate and appropriate response in the circumstances.

15 This is especially bearing in mind that the Court does not have, as you know, its own
16 enforcement mechanism, but instead relies on the cooperation of States to make sure
17 that States appear before it, so it has to be balanced against that factor.

18 We see that the main question on this approach, if you were to take this approach, is
19 whether the Appeals Chamber has the legal basis or the power to do so, to order
20 conditional release in the absence or without going through the strictures of the test in
21 Article 81(3)(c)(i). In other words, separate from that.

22 And, in our submission, such a power can be found, it could derive from a reading, it
23 can derive from looking at Article 81(3), which provides that the Appeals Chamber
24 has all the powers --

25 PRESIDING JUDGE EBOE-OSUJI: [9:55:23] Before we get to the power.

1 MS BRADY: [9:55:24] Yes.

2 PRESIDING JUDGE EBOE-OSUJI: [9:55:25] Before we get to the power, the question
3 is whether you need to do the exceptional circumstances inquiry.

4 MS BRADY: [9:55:36] Yes, your Honour, I understand that, yes.

5 PRESIDING JUDGE EBOE-OSUJI: [9:55:39] Yes. Before you get to conditional
6 release.

7 MS BRADY: [9:55:42] Whether it's absolutely necessary --

8 PRESIDING JUDGE EBOE-OSUJI: [9:55:44] Yes.

9 MS BRADY: [9:55:45] -- to do that rather than good practice or should be done in
10 this case. Your question is whether it's necessary.

11 Your Honours, because we think there is an independent power to do so, then the
12 strict answer to your question is no, it wouldn't be necessary. But in this case, and
13 I'll get to it in my submissions, because we think that the exceptional circumstances
14 test can be met and should be done, because if you go through that test and find it,
15 then you've already made the findings in case you don't -- you're not able, or the two
16 men, Mr Gbagbo and Mr Blé Goudé, are not able to meet, or find a State to meet the
17 conditions of conditional release.

18 I mean, it's a matter of -- it's more practical, but it makes good sense. But whether
19 it's strictly necessary, it's not, if you accept that there is a power to do so.

20 And if I may continue with my submissions about how you have that power, it might
21 assist in understanding what our position is.

22 PRESIDING JUDGE EBOE-OSUJI: [9:56:57] Perhaps you're trying to say - I don't
23 know if this is what you are trying to say - that there may be a scenario where the
24 conditional release may not work, in which case then one defaults to perhaps
25 continued detention in that sense, or in that kind of context, you might as well take

1 care of the exceptional circumstances inquiry. Is that what you are trying to say?

2 MS BRADY: [9:57:29] That is, and that's the way we argued it at trial. We said,
3 look, they meet these conditions of exceptionality, and you, you should find it. But
4 in the alternative, so long as the conditions are met, the Prosecution is prepared to
5 accept the conditional release, which I think was, you know, a very reasonable and
6 rational approach in the particular circumstances of this case.

7 PRESIDING JUDGE EBOE-OSUJI: [9:57:55] So then that means if there is no
8 exceptional -- sorry. If one is not looking for continued detention, therefore, it may
9 not be necessary to do exceptional circumstances inquiries. Is that the argument?

10 MS BRADY: [9:58:13] Yes, at the bottom line, yes, yes.

11 In our submission, your Honour, I think it's really critical that there needs to be a
12 power to do this. And we say that this derives from Article 83(1), which provides
13 that the Appeals Chamber shall have all the powers of a Trial Chamber, read together
14 with Article 64(6)(f) and Article 60(2) and (3), which are the articles on interim release
15 and conditions for that release.

16 And, you know, in our view, the logic, trying to think about what the logic of this
17 would be, since you have all the powers of the Trial Chamber, it would be -- and the
18 Trial Chamber has all the powers of the Pre-Trial Chamber, it would be plausible, in
19 our view, to import the logic of Article 60(2) and (3) into the context we're speaking of
20 here, that is, where a person has been acquitted and an appeal is pending, because
21 those provisions enable a Chamber to order conditional release even if the conditions
22 for detention under Article 58 are not met.

23 For example, the Pre-Trial Chamber could determine that arrest is not strictly
24 necessary under Article 58, but nevertheless there are reasons militating in favour of
25 some restrictions and to decide to release on conditions.

1 So if we apply that logic mutatis mutandis to the appellate stage, the Appeals
2 Chamber could consider conditional release in situations even where you are not
3 satisfied that the exceptional circumstances test is met, but nevertheless you consider
4 that some restrictions on liberty are needed to safeguard the proceedings and ensure
5 the availability of an effective remedy at the completion of any appeal.

6 And, your Honours, I point to the Bemba appeals judgment, *OA7, paragraph 55,
7 which is also instructive because there the Appeals Chamber made this observation
8 that Chambers could impose conditional release in one of two situations: When
9 satisfied that conditions for Article 58 risks are present, or where they are not so
10 present. And you could apply the same reasoning to your own powers and the
11 present situation.

12 In this regard, your Honours, the practice at the ICTR I think is very instructive.

13 There you had Rule 99(b), as your Honours know, which is the analogous rule to the
14 one we have here, 81(3)(c)(i). We've referred to two cases in our submission before
15 the Trial Chamber, paragraph 18, these are Ntagerura and Bagilishema, and there it
16 was interesting because the Appeals Chamber was prepared to impose restrictions on
17 an acquitted person's liberty such as travel restrictions, surrendering of travel
18 documents and reporting requirements, pending appeal.

19 And in, I think it was in Bagilishema, this was done even where they were not
20 satisfied that the Prosecution had met 99(b), so nevertheless proceeded in the absence
21 of that rule.

22 So finally, your Honours, I'd like to briefly turn to your third question, assuming you
23 do have the legal basis to order conditional release, and I think you do based on the
24 arguments that I've just outlined, then in answer to that question, if you were to find
25 that conditional release is not possible or not appropriate, you would then need

1 to go back --

2 THE COURT OFFICER: [10:02:06] Counsel has two minutes.

3 MS BRADY: [10:02:08] Thank you.

4 You would then need to go back to see whether the exceptional circumstances test in
5 Article 81(3)(c)(i) is met so as to see whether continued detention is, you know,
6 justified for one or both of them.

7 And for reasons we've amply outlined in our brief, we submit you'd find the test met.

8 Now, I notice that your question is a bit different in question three to the one I've just
9 answered because you've asked the question in the imperative form. You've asked
10 whether you must find conditional release is inappropriate before considering
11 whether the test of exceptional circumstances in Article 81(3)(c)(i) is met, thereby
12 justifying continued detention.

13 Your Honours, in our view it's difficult to see why such an approach would be
14 mandated, why it's a must, why it would be mandated, because although I can see
15 that the reasoning might be that it's to ensure that the least intrusive measure is
16 chosen to try and achieve, you know, the aim before considering whether the much
17 stricter rigours of detention is met, so I can see why that would be the case, but still,
18 your Honours, we see more sense, practical sense in approaching the question in the
19 way that we've suggested, ran at the trial, continue at appeal, that in this two-step
20 way we've argued. First you look to see whether the test is met and then seeing
21 whether conditional release would address the risk just as well and then order in lieu
22 of detention conditional release, or then, using the powers and reasoning I've
23 described to order conditional release in any event. I answered, I said this already in
24 answer to your question, but a clear benefit in that approach would be that, again, if
25 Mr Gbagbo or Mr Blé Goudé are not able to meet the conditions imposed, if a State

1 that can meet all the conditions is available and willing to enforce those conditions, if
2 they can't meet those conditions, or either one were to breach, were to breach these
3 conditions --

4 THE COURT OFFICER: [10:04:45] Counsel has five minutes following the Bench's
5 questions.

6 MS BRADY: [10:04:50] Thank you. I in fact will only need about one more minute.
7 A clear benefit would be that if they were not able to meet the conditions imposed or
8 either one would breach those conditions in domestic parlance, at least common law
9 we would say breach bail, if they were to breach bail, not comply with the conditions,
10 they could be kept in detention or sent back into detention, as the case may be,
11 pending a conditional release solution being found or refound. You would have
12 already made all the findings necessary to do so. Now, that's a practical
13 consideration, of course, but those are our submissions, and that concludes my
14 answer to your questions unless you have any others on this topic.

15 PRESIDING JUDGE EBOE-OSUJI: [10:05:46] Thank you very much, Ms Brady.
16 We will now take the submissions of counsel for victims.

17 MS MASSIDDA: [10:06:03] Thank you very much, your Honour.

18 Mr President, your Honours, I wish first to reiterate the victims' position, according to
19 which in the present case there are exceptional circumstances justifying the continued
20 detention of the defendants pending the appeal against the decision on acquittal.
21 And in this regard, before I go straight to your questions, your Honour, allow me to
22 recall that the European Court Of Human Rights clearly stated in the Assanidze
23 versus Georgia case that as long as the detention of a person after acquittal is based
24 on a specific statutory provision or judicial decision is not contrary to Article 5 of the
25 Convention on Human Rights and the general principle of the rule of law.

1 And for the case record, I am referring to the Grand Chamber judgment number
2 71503/01, 8 April 2004, relevant paragraphs from 172 until 176.

3 I also wish to state that under the legal text of the Court, the Appeals Chamber has
4 the power to impose conditions on the release of the defendants. In particular,
5 turning to the question about the legal basis to impose conditions on the release of a
6 person following acquittal, as already stated by the Prosecution, in accordance with
7 Article 83 of the Statute, I quote, "for the purpose of proceedings under Article 81, the
8 Appeals Chamber shall have all the powers of the Trial Chamber" end of quote,
9 including to rule, and again I quote, "on any relevant matter," end of quote, as
10 provided for in Article 64(6)(f) of the Rome Statute.

11 In turn, Article 61(11) of the Statute provides that the Trial Chamber may exercise any
12 function of the Pre-Trial Chamber that is relevant and culpable of application in the
13 proceedings. Therefore, in my submission Rule 119 of the Rules of Procedure and
14 Evidence, providing the possibility to set conditions restricting liberty, is also
15 applicable at the appeals stage.

16 Moreover, I wish to draw the attention of the Chamber to the plain wording of
17 Article 81(3)(c) of the Statute in the part stating, and I quote, "the accused shall be
18 released" end of quote, which can be interpreted in my submission as including the
19 possibility that the defendants are released with or without conditions.

20 Conditions restricting liberty are normally justified when there is a need to ensure
21 that the person will appear before the Court until the proceedings against him or her
22 are concluded.

23 In this regard I recall that the majority of this Appeals Chamber has already indicated
24 in the decision granting suspensive effect that, and I quote, "In the circumstances of
25 the present case, there are ... strong reasons ... to exercise its jurisdiction and grant

1 suspensive effect, so as to avoid that the implementation of Impugned Decision
2 pending appeal potentially defeats the appeal's purpose because Mr Gbagbo and
3 Mr Blé Goudé might no longer be available to be tried before the Court." End of
4 quote. Reference for the record is document 1243, paragraph 22.

5 As far as the establishment of exceptional circumstances is concerned, because the
6 Prosecution has seized the Appeals Chamber of this matter, a determination should
7 be taken as to the existence of exceptional circumstances to maintain the detention of
8 both defendants pending appeal against the decision on acquittal.

9 Should the Appeals Chamber decide that said circumstances are not exceptional in
10 the terms of Article 81(3)(c)(i) and do not justify the continued detention of the
11 defendants, the Appeals Chamber, in our submission, should still find that said
12 circumstances justify the imposition of conditions restricting liberty on both
13 defendants.

14 In other words, if the Appeals Chamber concludes that exceptional circumstances
15 identified by the Prosecution and the Legal Representative are not established, it can
16 nevertheless find that the same factors justify imposing conditions to restrict the
17 liberty of a defendant, particularly in order to ensure their presence during the
18 ongoing proceedings.

19 And again, the majority of this Chamber has already found in the decision granting
20 suspensive effect that Article 81(3)(c)(i) serves one principal purpose, and I quote, "to
21 ensure that, in case of a successful appeal by the Prosecutor against the acquittal, the
22 proceedings against the person may be continued without the need for a new arrest
23 and surrender." End of quote.

24 If the Appeals Chamber finds that the exceptional circumstances are not established,
25 there must be another legal avenue to ensure that such legitimate objective and

1 purpose is not defeated, as well as the essential object and purpose of the Rome
2 Statute, which is to achieve its goal to administer justice in a fair and efficient manner.
3 In my submission, said legal avenue is the possibility to impose conditions to restrict
4 the liberty of the defendants.

5 As it has been rightly considered by the Appeals Chamber of another international
6 criminal tribunal, the Special Tribunal for Lebanon, it is only if the interpretation that
7 better enables the Court to achieve these goals does not prove to be helpful that the
8 interpretation which is more favourable to the rights of the accused can be chosen.

9 Reference, your Honour, is to the Special Tribunal of Lebanon, Interlocutory Decision
10 on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative
11 Charging, 16 February 2011, case record STL-11-01/I, page 2.

12 In this regard, allow me, your Honour, to draw an analogy, or at least to try, with the
13 situation of individuals summoned to appear and to whom the Chamber may impose
14 conditions restricting liberty in accordance with Rule 119(5) of the Rules of Procedure
15 and Evidence.

16 In that instance, the individuals are not in detention. Similarly, the Appeals
17 Chamber has the power to impose conditions restricting the liberty of both
18 defendants in this case pending the appeal, although they have not been convicted.
19 Considering the law of the international criminal tribunals, and I will do it very fast
20 since the Prosecution has already quoted it, while acknowledging that the relevant
21 provision in the Rules of Procedure and Evidence of the ICTR, namely Rule 95 is
22 essentially -- sorry, Rule 99 is essentially different from Article 81(3)(c), I wish to draw
23 the attention of the Chamber to the fact that before that jurisdiction, release with
24 conditions of acquitted persons has been ordered pending an appeal against a
25 decision on acquittal in several cases. And again, for the record, Kabiligi case,

1 decision of 31 December 2008, ICTR-98-41-T and case Ntagerura and Bagambiki, 26
2 February 2004, ICTR-99-46-T.

3 Finally, for the --

4 PRESIDING JUDGE EBOE-OSUJI: [10:17:03] Counsel.

5 MS MASSIDDA: [10:17:04] Yes, your Honour.

6 PRESIDING JUDGE EBOE-OSUJI: [10:17:05] May I suggest for you to spell the
7 names when you pronounce them so that they can, it will help the court reporters
8 immensely.

9 MS MASSIDDA: [10:17:14] Apart from the fact that my pronunciation is probably
10 wrong, your Honour, I suggest that I provide the names to the court officer so that he
11 can rightly provide it to the interpreters and court reporters. This is fine with you?

12 PRESIDING JUDGE EBOE-OSUJI: [10:17:30] That's all right. It might be easier if
13 you just spell when you pronounce.

14 MS MASSIDDA: [10:17:36] Okay. Then for the first decision, K-A-B-I-L-I-G-I,
15 Kabiligi. The second one, N-T-A-G-E-R-U-R-A, Ntagerura. And the last name, for
16 this exercise, in which I'm really not so good, B-A-G-A-M-B-I-K-I, Bagambiki.
17 With all my excuses to the gentleman concerned.

18 Finally, for the assessment of the need to impose conditions restricting liberty, I
19 submit that the Appeals Chamber should take into account in particular the concrete
20 risk of flight of both defendants, as well as the impact that a release without
21 conditions may have on the safety and well-being of victims.

22 In this regard, your Honours, victims remain very concerned about the possibility of
23 the commission of further crimes and attempts to compromise the integrity of the
24 proceedings if the defendants are released without conditions.

25 This concludes my submission, your Honour. I thank you for your attention.

1 PRESIDING JUDGE EBOE-OSUJI: [10:19:16] Thank you very much, counsel.

2 Now we will take submissions from counsel for Mr Gbagbo.

3 MR ALTIT: [10:19:26] (Interpretation) Thank you, Mr President.

4 Mr President, your Honours, when it comes to our answer to the following question,

5 and I quote, "On what legal basis, if any, is it possible to impose conditions on the

6 release of a person following an acquittal?", end of quote, the answer of the Defence is

7 clear. Our position is as follows: As a matter of principle, that is impossible. And

8 this is based on a very simple observation; freedom is an essential right which belongs

9 to all human beings.

10 Can Laurent Gbagbo be dispossessed of this right? Obviously the answer is no,

11 since he has been acquitted and acquittal means that he automatically recovers all

12 his rights.

13 Why do I say this? Because his innocence has been recognised by the judges and it is

14 impossible to limit the freedom of an innocent person.

15 *The provisions of the European Convention on Human Rights and Fundamental

16 Freedoms are clear; Article 5(1) of the convention provide cases in which a person's

17 freedom may be limited. *For example, in the situation of an accused person,

18 mindful of the crucial importance of this issue of freedom, the European Court on

19 Human Rights consistently reaffirmed in its jurisprudence that there is a list of cases

20 outlined in Article 5(1) and that such list is exhaustive.

21 The possibility to limit someone's freedom, an acquitted person's freedom, is not

22 included in the list under Article 5(1).

23 Therefore, the exhaustive character of that list makes the situation very clear, namely,

24 it is not possible to consider limiting the freedom of an acquitted person.

25 Mr President --

1 PRESIDING JUDGE EBOE-OSUJI: [10:22:58] Does that take into account -- or, rather,
2 ignore the process of appeal? When you speak about acquittal, as far as that
3 proposition goes, I think we could all agree to it, acquittal reverts a person back to
4 their status before the commencement of a criminal process; agreed.

5 But what about an appeal of the acquittal, does that not have any significance on the
6 matter of continued detention even, let alone conditional release?

7 While at it, do you have any authority or case law that says that while on appeal an
8 acquitted person may not be held in continued detention or released on condition?
9 Is there case law to that effect?

10 MR ALTIT: [10:24:03] (Interpretation) Thank you, Mr President.

11 Mr President, I'll gladly address your question -- or, should I say, the several
12 questions you have put, very dense questions.

13 First, we need to distinguish between the status of an acquitted person and
14 procedure.

15 The status of an acquitted person is simple to the extent that they revert to all their previous
16 rights, as distinguished from someone who is no longer presumed to be innocent but found
17 to have been innocent, *and as any person found to be innocent, as any innocent person, he
18 should enjoy all his rights to the fullest, and that is in relation to his status.

19 Now, in that context, and in answer to your other question, I do have some case law
20 which I will put on the record from the European human rights court along those
21 lines, and then I will also address*, in order to be comprehensive, the issue of appeal.

22 Now, case law. We have CEDH, Khlaifia et al versus Italy, and I'm going to
23 spell, K-H-L-A-I-F-I-A, et al versus Italy, 15 December 2016, number 16483/12,
24 paragraph 88.

25 Now, Mr President, with your leave, and given the very limited time I have, I will

1 quickly address the question as I proceed with my submission.

2 Now, regarding the exhaustive nature of the list, which also was part of your question,
3 that is, the list under Article 5(1) of the European Convention *on Human Rights, the
4 jurisprudence somehow -- well, in fact, *there isn't really any jurisprudence, as the
5 *provisions of the article itself, the provisions are clear and they outline a number of
6 cases where freedoms may be limited. But what has not been provided in the article
7 cannot be put under the scope of a limitation of freedom and there is no provision to
8 limit the freedom of an acquitted person under that article.

9 Let me also refer the Appeals Chamber to our written submission when we referred to the
10 *Special Chamber of the Supreme Court of Kosovo, namely, its decision of 26 April 2017,
11 which provided clearly that there are no circumstances that would justify maintaining an
12 acquitted person in detention, no circumstances which would justify maintaining an accused
13 person in detention*..." -- and here, I answer your question --, during an appeal process.

14 Now, with your leave, let me go back to my submissions and provide fuller answers
15 to your questions as I proceed.

16 It is based on this observation, namely, the existence of human rights jurisprudence,
17 which is quite clear, specifically clear on this point, it is against this background that
18 we must understand the spirit *of the Rome Statute, as Article 21(3) of the Statute
19 provides that the Statute must harmoniously combine with the framework of
20 "internationally recognised human rights," end of quote.

21 This principle of freedom is thus recognised at the international level and that fact
22 explains why no acquitted person in any international criminal court has ever been
23 maintained in detention during the appeal process relating to the acquittal judgment.

24 Now, what applies to detention also applies to other limitations on freedom.

25 Therefore, *it should be clearly stated, and in answer to your question, your Honour,

1 that our view is as follows:

2 Article 81(3)(c)(i), as well as any other * liberty-restricting measure on an acquitted
3 person is simply incompatible with human rights jurisprudence.

4 And therefore --

5 PRESIDING JUDGE EBOE-OSUJI: [10:30:09] *How far do you take that proposition,
6 no limitation whatsoever on an acquitted person during appeal is allowed, does that
7 include limitation of saying, "Okay, acquitted person, you are acquitted, but during
8 this appeal we will want you to report for hearing on that appeal"; is that also
9 excluded?

10 MR ALTIT: [10:30:36] (Interpretation) Mr President, I think I can raise two aspects to
11 answer your question.

12 First of all, quite naturally, we do not exclude the possibility of somebody having to
13 appear. And I am not going to address the things that we will be talking about
14 shortly, because you know that we have had some commitments and a number of
15 things that can be discussed. We understand that and we are entirely ready to
16 address these issues from a very practical and efficient point of view with your
17 Chamber.

18 However, when it comes to principle, limiting or restricting an acquitted person's
19 freedom, to us, does not appear to be a possibility, because there is no provision, no
20 international human rights jurisprudence that makes provision for that and it is,
21 therefore, not within the spirit of the Rome Statute. That's what I was trying to say.

22 But this, and I agree with you that it does not exclude an open and frank discussion
23 on a number of arrangements and provisions and specific measures that can be taken
24 to ensure that proceedings can *continue subsequently. We think that these are two
25 different animals, so to speak *and I want to be more specific about what I mean

1 thereby, with your leave, to be entirely exhaustive.

2 PRESIDING JUDGE EBOE-OSUJI: [10:32:31] Do I understand you correctly that it
3 may be a matter of phrases and concepts and, possibly, translation when you say
4 "limitation of freedoms"? Are we also, talking in that notion, does that include
5 placing conditions on release? Would you consider placing conditions on release as
6 limitation of freedom or not?

7 MR ALTIT: [10:33:06] (Interpretation) Mr President, if we were to address matters of
8 principle, any limitation of freedom is a negation of freedom and, therefore, *is
9 logically comparable to conditional detention *. And I think we need to make a
10 distinction between the two. You have on the one hand *continued detention and * a
11 limitation or restriction of liberty *whatever it may be – in terms of principles --- and
12 on the other hand freedom. And I think that the principle of freedom is essential
13 and speaks to the very humanity of us all. And from that point of view, freedom has
14 to be holistic, complete, otherwise there is no freedom.
15 Now, as a matter of principle --

16 PRESIDING JUDGE EBOE-OSUJI: [10:34:09] I'm sorry, Mr Altit.

17 MR ALTIT: [10:34:12] No, that's okay.

18 PRESIDING JUDGE EBOE-OSUJI: [10:34:14] *I'm not sure... I don't think you've
19 answered my question clearly. The question is whether you would consider
20 conditional release as something that amounts to equalling limitation of freedom. I
21 can see how one may take that view, others may not. If you tell me I'm supposed to
22 be reporting at a certain place at a certain time, when I'd rather be doing something
23 else, I would say you are limiting my freedom. Some may think it that way, others
24 may not. So does conditional release amount to limitation of freedom the way you
25 are arguing?

1 MR ALTIT: [10:34:59] (Interpretation) The answer, Mr President, is yes, a
2 conditional release necessarily amounts to limitation of freedom. But with your
3 leave, let me proceed, because I think we need to go to the level of addressing
4 exceptional circumstances in order to clarify our position for the Chamber. So let me
5 proceed.

6 I'll proceed and recall that for the purposes of our discussions, if we were to look at
7 the question from the Bench within the framework of the Rome Statute *one would
8 necessarily consult Article 81(3)(c)(i).* I am going fast, as I have little time left. This
9 article addresses exceptional circumstances, a concept that can and should only be
10 handled with the greatest of cautions and therefore can only also be implemented
11 exceptionally; otherwise, as we have mentioned, there will be an intolerable violation
12 of the fundamental rights of an individual because, as you expand exceptional
13 circumstances, so do you restrict the principle of freedom.

14 When one reads Article 81(3)(c)(i) it emerges from that article that where exceptional
15 circumstances do not exist, there is therefore only one possible outcome, namely the
16 immediate release of an acquitted person.

17 This enables me to provide an answer, a complete answer to your question,
18 Mr President. Therefore, where a Chamber finds that there are exceptional
19 circumstances, there and then only can it raise questions pertaining to the conditional
20 release.

21 As for us, the logic of the Rome Statute is clear, you have, first of all, to determine that
22 exceptional circumstances exist before having any discussion whatsoever on possible
23 conditions of release. And that answers your second question, the second question
24 you asked, your Honour, the second question which was raised yesterday.

25 Consequently, and I'm touching on your third question now, when your Chamber

1 asks whether conditional release can be discussed prior to the consideration of
2 exceptional circumstances, our answer is in the negative. Logically it is in the
3 negative, because for us, there is no legal basis for such an approach; that is, an
4 approach which sets aside the exceptional circumstances.

5 THE COURT OFFICER: [10:38:23] Counsel has 7 minutes, including time to respond
6 to the Bench's questions.

7 MR ALTIT: [10:38:31] (Interpretation) I therefore insist on the following, the letter of
8 Article 81(3)(c)(i) is clear, it provides explicitly that exceptional circumstances should
9 be established before any consideration on the limitation of the freedoms of an
10 acquitted person.

11 *Regarding Rule 119 of the rules of procedure dealing with, I quote, "conditional
12 release", it necessarily, your Honours, implies that there is a legal cause for detention.
13 In other words, Rule 119 cannot be understood outside of a specific context to the
14 extent that it is a rule dealing with conditions for conditional release and not one that
15 deals with the grounds for such freedom.

16 Rule 119 deals with conditional release and it therefore relates to specific
17 arrangements made for detention *under one condition or another and therefore does
18 not specifically apply to an acquitted person who, by definition, is free.

19 Rule 119 therefore is not applicable. Therefore, what other legal bases can be
20 applicable? From our point of view, there is none. Therefore, our answer to your
21 question can be specific. There is nothing that allows for an acquitted person's
22 freedom to be limited where exceptional circumstances do not exist.

23 One last point, Mr President, your Honours, in relation to these proceedings. I want
24 to recall that the Prosecution appeal was in relation to the Trial Chamber's decision.

25 Our point of view is as follows: The purpose of this appeal is not to determine the

1 legal framework in which conditional release can be organised but, rather, simply to
2 determine whether the Trial Chamber may have made one or several errors of law or
3 of fact in the application of Article 81(3)(c)(i) when it came to its decisions and found
4 that exceptional circumstances did not exist to warrant the continued detention of an
5 accused person -- of an acquitted person.

6 THE INTERPRETER: [10:41:46] Correction from the interpreter.

7 MR ALTIT: [10:41:48] (Interpretation) We are not going to delve into the content of
8 our written submissions, but clearly from our discussions, it has emerged that the
9 Prosecutor is unable to highlight any single error that the Trial Chamber would have
10 committed. How can he do this in any way, whereas it clearly emerges that the
11 Prosecutor did not demonstrate before the Trial Chamber in any way whatsoever that
12 exceptional circumstances existed?

13 If * the Appeals Chamber, rather, were to come to the determination that the Trial
14 Chamber did not err in law or in fact, the Appeals Chamber is left with no choice but
15 to confirm the Trial Chamber's decision. *And any discussions around a framework
16 in which conditional release could be organized or not would be outside the
17 framework of this specific appeal.

18 Let's put it in other words, Mr President, your Honours. In our view the Appeals
19 Chamber, your Chamber, shall necessarily have to address primarily and before
20 anything else the issue as to whether, following the analysis of any errors that may
21 have been committed, whether there is a possibility or not of the existence of
22 exceptional circumstances. That is the basis of this appeal.

23 Whatever the legal framework may be that defines the Appeal Chamber's
24 determination, it *can only be organised, designed, if I may say, around the rights of
25 Mr Laurent Gbagbo, given that Mr Laurent Gbagbo is an acquitted person, and we

1 are dealing here with freedom with or without conditions.

2 Let me repeat, with your leave, my last sentence. What I was saying is the following:

3 Regardless of the legal framework that your Chamber decides to apply, this

4 framework can only be developed around or in connection to the rights of

5 Laurent Gbagbo, who is an acquitted person. Therefore, we are talking about his

6 freedom and it is his freedom that is at the very core of these appeals hearings, and

7 that freedom, Mr President, your Honours, that freedom may or may not be

8 conditional.

9 PRESIDING JUDGE EBOE-OSUJI: [10:44:57] One question for you, Counsel. When

10 you made submissions, you cited a case law from the Kosovo special chamber, which

11 you said stands for the proposition that under no circumstances may an acquitted

12 person be kept in detention during appeal. You said that, you cited case law to that.

13 Do you also have case law to the effect that under those circumstances may an

14 acquitted person be on conditional release during an appeal? Is there any case law

15 to that effect?

16 MR ALTIT: [10:45:44] *Je vous réponds tout de suite.*

17 PRESIDING JUDGE EBOE-OSUJI: [10:46:08] As you know, that is the primary

18 request of the Prosecutor, they requested conditional release. Is there any case law

19 that *conditional release says that may not *occur in the course of an appeal?

20 MR ALTIT: [10:46:25] (Interpretation) Yes, thank you, Mr President. We have

21 developed our arguments and we have based them upon a particular principle,

22 namely, the freedom of a man. And this particular principle explains decisions such

23 as the ones you have just mentioned. But the issue is still the same: Freedom

24 versus a restriction upon freedom, no matter be it detention or another restriction.

25 As for your question, during an appeal or for any other reason, it is the same issue,

1 the problem is the same, can one restrict the rights of an acquitted person, the rights
2 that an acquitted person has regained in their entirety?

3 PRESIDING JUDGE EBOE-OSUJI: [10:47:22] Thank you very much, Counsel.

4 Now we'll take the submissions from counsel for Mr Blé Goudé.

5 MR KNOOPS: [10:47:49] Good morning, Mr President, your Honours.

6 Mr President, your Honours, your first question:

7 Is it legally possible to impose conditions on an acquitted person? When you look at
8 the question very strictly, the answer should be no, since the legal regime of an
9 acquitted person, even under the Statute of this Court, does not allow for conditions.

10 The question though I think before this Chamber:

11 Can the Chamber within the legal regime of an acquitted person transmit a system of
12 conditional release? In other words, can those systems be merged? To answer this
13 question we have to look at the system of conditional release, Mr President.

14 At the outset it should be observed, and it's I think without dispute, that immediate
15 release and conditional release are several legally and doctrinally concepts.

16 If the Chamber asks our Defence team: Can a system of conditional release be
17 imposed on the regime of an acquitted person? We say that question should be
18 answered not on a purposive interpretation of the Statute, like the Prosecution
19 suggests but, rather, on a textual interpretation.

20 Why? Article 22(2) of the Statute clearly applies also to procedural rights of the
21 accused. Therefore, in case of ambiguity, any interpretation of the Statute should be
22 in favour of the accused; in this situation, the acquitted persons.

23 You can also find this observation in the dissenting opinion of, your Honours, the
24 honourable Judge Morrison and the honourable Judge Hofmański in paragraph 5 in
25 their dissent on the suspensive effect of the immediate release.

1 Now, Mr President, your Honours, we submit that if the Court would look into the
2 system of provisional release and ask itself whether that could be imposed on an
3 acquitted person, you have to bear in mind two observations:

4 First, the system of conditional release requires a review of the detention every six
5 months. If you look at the text of that system, it does not automatically apply to an
6 immediate release, even within the ambit of Article 81(3)(c). That's my first
7 observation.

8 The second observation is that the Rules of Procedure and Evidence, predominantly
9 Rule 119 and 118, clearly apply for interim release pending pre-trial or pending trial,
10 yet we are dealing here with no trial anymore, Mr President. The trial is over.

11 The Appeals Chamber can only ask itself whether any errors of fact or law were made
12 in appeal. But the trial on the facts by the trier of fact is over and, therefore, the
13 system of the Rules of Procedure and Evidence, as such, is not automatically
14 applicable in appeal.

15 Now, why I'm saying this, Mr President, would mean that the rights of an accused
16 person, i.e., an acquitted person, under this system of reviewing interim release or
17 detention, these rights are not automatically applicable when somebody is acquitted
18 and his detention is continued in appeal based on Article 81(3)(c).

19 PRESIDING JUDGE EBOE-OSUJI: [10:53:46] Counsel, can you look at -- if you move
20 away from Rule 119 for a minute and go instead to Rule 149, Rule 149 says:

21 "Parts 5 and 6 ..." - I believe that should be of the Statute - "... and rules governing
22 proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall
23 apply *mutatis mutandis* to proceedings in the Appeals ..."

24 Now, when it says, "rules governing proceedings and the submission of evidence",
25 would that take us to Rule 119?

1 MR KNOOPS: [10:54:53] Of course.

2 PRESIDING JUDGE EBOE-OSUJI: [10:54:54] All right.

3 And parts 5 and 6 would contain certain provisions like, say, Article 57(3)(a). Can
4 you look at Article 57(3)(a), for example. It says:

5 "In addition to its other functions under this Statute, the Pre-Trial Chamber may:

6 At the request of the Prosecutor, issue such orders and warrants as may be required
7 for the purposes of an investigation ..."

8 Now, *mutatis mutandis* will replace investigations there with appeals. Does that
9 work?

10 MR KNOOPS: [10:55:53] Of course, Mr President.

11 PRESIDING JUDGE EBOE-OSUJI: [10:55:54] Right.

12 MR KNOOPS: [10:55:55] But the question is, with all due respect, whether the
13 drafters of Article 81(3)(c) did intend to have this whole regime put in place when it
14 concerns immediate release.

15 PRESIDING JUDGE EBOE-OSUJI: [10:56:13] But 81(3)(c) deals with a specific
16 regime, does it not?

17 MR KNOOPS: [10:56:19] Yes.

18 PRESIDING JUDGE EBOE-OSUJI: [10:56:20] On its face, which is detention.

19 MR KNOOPS: [10:56:22] Right.

20 PRESIDING JUDGE EBOE-OSUJI: [10:56:23] All right. If we're not contemplating
21 detention as the Prosecutor's request, primary request seems to be the case, do we
22 need to be trapped by the provisions of 81(3)(c)?

23 MR KNOOPS: [10:56:42] I understand your question, Mr President.

24 PRESIDING JUDGE EBOE-OSUJI: [10:56:44] Thank you.

25 MR KNOOPS: [10:56:45] Of course, the Prosecution proposes a less intrusive

1 interpretation, and of course provisional release is a less intrusive method than
2 detention.

3 But your first question was whether we think that there is a power, is a legal basis for
4 conditions when somebody is acquitted and found not guilty. Our answer is no, in
5 principle.

6 The second question is, is the Chamber empowered to impose a less intrusive way of
7 detention by way of conditions? For this we have to look into how these conditions
8 were applied in the past on the interpretation the Prosecution suggests.

9 Now, your question to the lead counsel of Mr Gbagbo was:

10 Is there any precedent of release before international criminal tribunals without
11 conditions? I understand this was one of your questions.

12 PRESIDING JUDGE EBOE-OSUJI: [10:58:06] No, no, no. I'm not sure that was the
13 question. The question was whether there is some judicial precedent that excludes
14 interim release during appeal. Unless I may have forgotten my question, but I
15 thought that was the question I asked.

16 MR KNOOPS: [10:58:26] Yes. I'm not familiar, Mr President, with such a precedent.
17 I can say though that at the ICTY, where 19 people as far as we know were acquitted,
18 in nine cases the Prosecution appealed, it never appealed the order of immediate
19 release. So those people were immediately released. At the ICTR, and those cases
20 were mentioned, were four precedents whereby after the acquittals, some conditions
21 were imposed. But these were quite limited in terms of change of residence,
22 passport and other limited conditions.

23 In other words, it might be so that the Chamber has the power in the alternative to
24 impose certain conditions, but our submission is that these conditions cannot be
25 based on a full regime of conditional release because that would indeed infringe the

1 principle rights of an acquitted person to regain his liberty.

2 Now, speaking about precedence, the LRV quoted the case of, I think it was
3 Assanidze versus Georgia of 2004. But if your Honours look at paragraph 173, the
4 Grand Chamber of the European Court of Human Rights clearly said that it's
5 inconceivable that a state, subject to the rule of law, in such a situation a person
6 should continue to be deprived of his liberty, despite the existence of a court order for
7 his release.

8 The Inter-American Court of Human Rights in the Tamayo case of 1997 actually
9 promulgated the same in its findings. This case related to Peruvian citizen who was
10 charged with treason during the state of emergency in Peru and after an acquittal and
11 detention order, after the acquittal by the civil court, so she was acquitted by the
12 military tribunal, but the civil court ordered a detention order for the crime of
13 terrorism. And during that time, the Inter-American Court of Human Rights
14 observed that her judicial position was that of an acquitted detainee who had neither
15 been tried nor convicted.

16 You'll find in paragraphs 54, 55 of that ruling of the Inter-American Court of Human
17 Rights that it was of the opinion that this situation amounted to a breach of the rights
18 to personal liberty and other guarantees.

19 In other words, in principle, the imposition of conditions for an acquitted person
20 seems in contravention to prevailing international human rights law.

21 PRESIDING JUDGE EBOE-OSUJI: [11:02:05] Yes, but the two instances you've cited,
22 you can see what is the difficulty with those two instances you've just cited now.

23 One was an instance where a court order said release somebody, but state authorities
24 did not do that. We're not there yet, are we, because we're still in the court? The
25 question is now whether there will be a court order at the end of these proceedings

1 that says something or the other.

2 So we're not quite in the first scenario.

3 And the second scenario just cited, where a military court acquitted somebody but a
4 civil court does something different, again, it's different because here we are in this
5 scenario of the same court still contemplating whether ultimately to say go or not.

6 MR KNOOPS: [11:03:06] That's true, Mr President. But we are dealing here with a
7 situation where the determination of guilt at this moment is something to which a
8 court in appeal didn't express itself.

9 I think there is a certain analogy, but I agree with you that the situation is not exactly
10 the same. But the underlying principle, in our submission, is, coming back to the
11 answer to your first question: No. In principle, there is no power to impose
12 conditions on a person who is acquitted. And if you look at the 19 acquittals of the
13 ICTY, whereby none of the Prosecution's appeals have been accompanied with an
14 appeal against immediate release, it's clear that those people went home without
15 conditions. That's, I think, the correct view from international law.

16 Of course, from a practical point of view, it's clear that the Prosecution suggests a less
17 intrusive way of approaching the case in case the Appeals Chamber would find it
18 possible to transpose the system of conditional release into Article 81(3)(d).

19 Now, for this situation, Mr President, we arrive at your second question, very briefly.
20 I think it's fair to say, following from the answer given on your first question, that that
21 question should be answered with yes. Three arguments:

22 It is then necessary for the Chamber, in our submission, to first establish the existence
23 of exceptional circumstances before you can determine any conditions, if possible, if
24 you arrive at the affirmative question one, to be imposed on the acquitted persons.

25 First, your Honours have, like the Defence, studied the *travaux préparatoire*, the

1 drafting history. The books of Professor Cherif Bassiouni written on the drafting
2 history of the Rome Statute, and you find no definition of what are exceptional
3 circumstances. Therefore, in case of ambiguity, it's our submission any
4 interpretation should not be purposive, but should be textual in accordance with
5 Article 22(2) of the Statute, in line with the dissenting opinion of the judges, the
6 honourable Mr Morrison, Hofmański, paragraph 5.

7 Secondly, also the precedence before this Chamber, there are three we found, also
8 dictate that in case of ambiguity of the Statute in terms of this situation, the definition
9 of exceptional circumstances; any interpretation should be in favour of the accused,
10 acquitted person.

11 That means that this legal reasoning, whether all conditions for conditional release
12 can simply be imposed on an acquitted person, should be interpreted narrowly,
13 strictly in accordance with this provision. And the rulings of this Chamber in the
14 Bemba case, Al Bashir case, and also in the Katanga Appeals Chamber case,
15 paragraph 50, where you find the way the judges applied Article 22(2) of the Statute,
16 when it concerns the position of a bench in the interpretation of any provision which
17 is not directly clear and it should not amount to a broad interpretation which goes to
18 the detriment of the accused.

19 That's the wording of the Appeals Chamber in the Katanga case, paragraph 50.

20 Now, Mr President, to conclude my submission on the second question, we submit
21 that the Chamber, if the first question is to be answered in the affirmative, should first
22 determine whether exceptional circumstances do exist before entering into the
23 discussion on conditions.

24 Needless to say, and that will be of course part of the submissions later, that

25 Mr Blé Goudé will abide by any conditions the Chamber might impose. But that's in

1 the situation where the Chamber would come to this affirmative answer on the first
2 question.

3 As to the third question, Mr President, the last one, we submit, with all due respect,
4 that this question might perhaps turn the discussion around. The immediate release
5 should be the starting point, in our view, and, therefore, we submit that only, and
6 only then, when exceptional circumstances are met in view of your Honours, a
7 discussion on conditional release and what conditions, because they have to be then, I
8 think, the least intrusive and not the full *catalogus*, as the Prosecution suggests.

9 THE COURT OFFICER: [11:09:46] Counsel has six and a half minutes.

10 MR KNOOPS: [11:09:49] Thank you.

11 And not the full *catalogus* which is normally imposed by interim release because,
12 Mr President, what is otherwise the purpose of having before this Court the concept
13 of immediate release and provisional release? In the future, there is no difference
14 anymore.

15 Yet, doctrinally, and jurisprudentially, these are very different concepts; we cannot
16 simply blur them. From a practical point of view it might be a convenient solution.
17 But from an academic point of view, Mr President, we cannot ignore the answer that
18 somebody who is acquitted cannot be detained or cannot be kept in provisional
19 release. That's the clear answer, there is no -- you ask rightly, is there precedent for
20 the contrary? Difficult to say.

21 The Prosecution rightly refers to the four cases of the ICTR. But, if you look at them,
22 indeed there were some restrictions, some conditions imposed on those four
23 individuals, but these were very limited: Change of residence, keeping in touch with
24 authorities, okay. But that should be the border.

25 Conditions such as no public speeches or not contacting death of this person, that is

1 something else. But that's maybe something for this afternoon.

2 So our submission is, principally, first question, no; in our submission, there is no
3 power to impose conditions on acquitted person. Of course we know this trial, this
4 proceeding will continue, but the status right now of these people, they're free to go.
5 They're acquitted, Mr President. They are acquitted.

6 Mr President, my last remark, the four cases the Prosecution mentioned and where
7 those conditions were imposed, be it very limited, there were dissenting opinions,
8 there were dissenting opinions. Therefore, the mere fact there is a dissenting
9 opinion in terms of acquittal is not decisive for the prospect of appeal.

10 And you rightly said, well, this case is not over yet. So the reference to the Tamayo
11 case of the international court -- Inter-American Court of Human Rights, or the other
12 case I mentioned, is maybe not directly applicable. But, on the other hand, this
13 Chamber has at this moment no information, no prospect of the outcome of the
14 appeal, none. And this Chamber knows, as we know, that even with dissenting
15 opinions, an appeals outcome is not clear, can either work both ways.

16 Therefore, the status of Mr Blé Goudé is of an acquitted person who should regain
17 liberty without conditions. That is simply the situation in the international law.

18 Of course the Chamber, with very extensive and theological interpretation, could
19 perhaps with legal creativity - we're all legal minds here - impose the system of
20 conditional release on an acquitted person. I think everyone in this Court can make
21 a reasoning to justify this.

22 But the question is, Mr President, is this fair to an acquitted person? And are we
23 then not blurring, merging two different systems in the ICC, immediate release versus
24 conditional release?

25 PRESIDING JUDGE EBOE-OSUJI: [11:14:39] Counsel, I know that you said you

1 were about to finish, and you have about 1 minute 44 seconds.

2 Perhaps, when we talk about blurring, and you invoked that concept a few times in
3 your submission, do we not have that problem with, in trying to use the concerns
4 addressed in 81(3)(c), having those concerns stand in front of another concept? And
5 the concern or the regime of 81(3)(c) says, upon acquittal, immediate release, except
6 either exceptional circumstances that would justify detention, continued detention,
7 full stop, says nothing else. Isn't that a regime of continued detention that we're
8 dealing with under 81(3)(c)?

9 In other words, are we in a regime where we're not even, when we've fallen off 81(3)(c)
10 altogether if we are talking about conditional release, in which case we need to find
11 the source of authority and applicable regime elsewhere outside of 81(3)(c). Do you
12 understand my question, Mr Knoops?

13 MR KNOOPS: [11:16:24] Yes. Yes, Mr President, I understand your question.

14 PRESIDING JUDGE EBOE-OSUJI: [11:16:26] So we're mixing things up now.

15 MR KNOOPS: [11:16:28] Yes.

16 PRESIDING JUDGE EBOE-OSUJI: [11:16:29] Conditional release and continued
17 detention, if we keep on focusing on 81(3)(c).

18 MR KNOOPS: [11:16:40] Mr President, indeed, that's a very valid question. I
19 understand also the rationale of your question.

20 My answer would be, if you interpreted the word "detention, continued detention" in
21 the way the Statute has it in mind, you could say it follows from the wording of
22 implicit continued detention that the regime of provisional release could apply.
23 The question is, is the Chamber willing to make that interpretation? I've answered
24 the question from a purely academic point of view. I understand your question from
25 a pragmatic point of view. I think academically we would conclude that as such,

1 with an acquitted person, there is no legal basis for conditions, none, within the
2 system of the ICC, because there is - apart from 99(b), the ICTY, ICTR - there is no
3 system in the world where somebody will be detained after an acquittal. So Article
4 81 is a unique provision. The drafters didn't lead us into its proper interpretation.
5 From an academic point of view I say there is no --

6 PRESIDING JUDGE EBOE-OSUJI: [11:18:14] Could it be why they require
7 exceptional circumstances?

8 MR KNOOPS: [11:18:20] As far as our knowledge goes, Mr President, we did
9 all the research we could. We didn't find any reference in a textbook or in the
10 *travaux préparatoire* what the drafters exactly meant. If you look at the Zutphen
11 drafts of 1996, it was not even foreseen. In the Zutphen draft there was no provision
12 akin to 81(3)(c). It was later implemented, but the drafter left us in the dark. Why?
13 What do we understand?

14 PRESIDING JUDGE EBOE-OSUJI: [11:18:52] It might be one way to look at it, I
15 mean here we're discussing about what could be possible rationale and why some
16 things may or may not make sense.

17 MR KNOOPS: [11:19:02] True.

18 PRESIDING JUDGE EBOE-OSUJI: [11:19:03] Could it be that in a national
19 jurisdiction where the usual, you know, precedence and authorities of criminal law
20 are derived from, you are in a national jurisdiction, the court there has complete
21 plenary authority, including over the police, an apparatus of state, so that it's a matter
22 of the court issuing an order saying: Police, go and arrest a certain person and bring
23 them before the court. And that is done.
24 Whereas in the international setting you have to, you know, go through, you know,
25 the usual things that happen, State cooperation and all kinds of requests and States

1 having to go through their legal channels and the law to respond and all those things.
2 Could it be why they may have contemplated continued detention under 81(3)(c), but
3 if there is exceptional circumstances it justifies that?

4 MR KNOOPS: [11:20:11] Yes. Thank you, Mr President. I think that might be a
5 fair reasoning, what you just pointed out, because a part of, in differentiation with
6 national jurisdictions, the law enforcement, enforcement system as such is not in place
7 at the ICC. The ICC is dependent on State cooperation. That might be why one
8 was very cautious in just releasing an acquitted person and there should be sort of a
9 stronghold for these exceptional circumstances.

10 Yet, if you look at the jurisprudence of the ICTY, they had the same problem, State
11 cooperation, as you know. Yet in all these 19 acquittals of the ICTY, there was an
12 immediate release without conditions.

13 Of course there were in some cases State guarantees. We all know this. But in the
14 Ojdanić case, the Appeals Chamber in Ojdanić of 2002 in paragraph 6, you find the
15 factors, the Appeals Chamber in Ojdanić applies in terms of release. And you will
16 see, I think there were seven or eight factors enumerated by the appeals judges or the
17 Appeals Chamber in Ojdanić and Sainović that only one factor is the enforcement.
18 In other words, if there is no clear evidence of State cooperation or any form of law
19 enforcement, that just one factor that cannot be solely and decisively decided upon.
20 In other words, maybe the drafters had in mind the dangers of the ICC system not
21 having an enforcement system as such, a police force in place. But on the other hand,
22 based on the current jurisprudence, that can be just one of the many factors.

23 In other words, we are left in the dark. We are left in your hands, Mr President.

24 We trust the answering of those important questions to you, but I hope I made myself
25 clear that I just tried to answer them from an academic point of view and I know that

1 the reality of this Court might be different.

2 And I close by saying, of course, if the Defence has to balance two evils, legal evils,
3 continued detention versus provisional release on conditions, of course the answer is
4 obvious what we would say to you, Mr President.

5 Thank you.

6 PRESIDING JUDGE EBOE-OSUJI: [11:22:59] Thank you very much, Counsel.

7 With that we will rise now for 30 minutes and then we reconvene. The Court
8 will rise.

9 THE COURT USHER: [11:23:11] All rise.

10 (Recess taken at 11.23 a.m.)

11 (Upon resuming in open session at 12.05 p.m.)

12 THE COURT USHER: [12:05:12] All rise.

13 Please be seated.

14 PRESIDING JUDGE EBOE-OSUJI: [12:05:34] Thank you very much. Welcome
15 everyone.

16 We will now go into private session. I know I earlier had said closed, but it should
17 be private, so the record should reflect that. We'll go into private session now.

18 (Private session at 12.05 p.m.)

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- 7 (The hearing ends in private session at 1.51 p.m.)