


# A Framework for detention or conditions for release pending appeal of acquitted accuseds

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By: James Hendry

On May 28, 2020, the Appeals Chamber of the International Criminal Court varied conditions that it had earlier placed on the release of Laurent Gbagbo and Charles Blé Goudé  on appeal from a decision by the Trial Chamber that they were entitled to immediate release after their January 15, 2019 acquittal at trial on charges of crimes against humanity in the Ivory Coast. This article will consider the two decisions rendered by the Appeals Chamber creating a framework for dealing with the issue of continued detention or conditional release of an acquitted accused before appeal after briefly reviewing the Trial Chamber proceedings.

**The Trial Chamber decision**

On the day of the acquittal, the Prosecutor filed a request that the Trial Chamber impose conditions on the accuseds' release under article 83(3)(c)(i) if a state could be found to enforce them, with detention as the default ruling. The Prosecutor argued that if the Chamber had the power to order detention, then it should have the authority to order less liberty-infringing conditions on release (request, para. 16).

A majority of the Trial Chamber orally rejected a request by the Prosecutor to find that there were exceptional circumstances to maintain the detention of Gbagbo and Blé Goudé after their acquittal. Interestingly, it did not refer to the principal request to release them on conditions unless no state could be found that would enforce them (p.1, ll. 14-6).

The Prosecutor had argued that there were exceptional circumstances to maintain the detention of Gbagbo and Blé Goudé relying on article 81(3)(c)(i) of the Rome Statute which reads:

"In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;
(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence."

A majority of the Trial Chamber noted that 'exceptional circumstances' included considering a concrete risk of flight, the seriousness of the offences charged and the probability of success on appeal. The majority noted that article 21 required the Court to interpret and apply the Rome Statute consistently with international human rights. It emphasized the exceptional nature of the request for detention after acquittal in light of the presumption of innocence. While the majority accepted that the charges were serious, as were all charges before the Court, it noted that these accused had been acquitted. The majority accepted that Gbagbo and Blé Goudé had recognized the Court's jurisdiction and had undertaken to return if their presence was required. There was no reason to doubt the genuineness of their assurances. It recognized that the fact that the acquittal was pronounced even before the Defence called evidence demonstrated the weakness of the case against them. It was unpersuaded that the oral dismissal of the case without hearing the defence evidence increased the likelihood that the trial decision would be overturned on appeal. The majority found no other exceptional circumstances, and ordered the release of Gbagbo and Blé Goudé, directing only that they give assurances to return if their presence before the Court was needed again. The Prosecutor appealed this decision.

**The February 2020 Appeals Chamber set conditions for release**

The Appeals Chamber expressed its concern about how serious an infringement of liberty is created by ordering an accused be detained after acquittal and that the 'extraordinary circumstances' that would justify it turned on the importance of ensuring that proceedings would continue if the Prosecutor were successful in the appeal (para. 49).

It turned to international human rights cases to interpret the scope of the extraordinary 'exceptional circumstances' incursion into the liberty of the acquitted accused as a source of law authorized by article 21.

The Appeal Chamber first noted that the hybrid Specialist Chamber of the Constitutional Court of Kosovo had held that a draft rule based on this exception for the Kosovo Specialist Chambers was contrary to the Constitution of Kosovo and article 5(1) of the European Convention on Human Rights (see globaljustice.queenslaw.ca/news/analysis-the-specialist-chambers-and-specialist-prosecutor-in-kosovo). Second, the European Court of Human Rights (ECtHR) held at para. 170-1 in the organized crime case of Labita that exceptions to the principle guaranteed by the article 5 right to liberty that detention ceases to be justified 'on the day on which the charge is determined' must be interpreted restrictively. The ECtHR came to the same conclusion in Assanidz where the court said at para. 173 that "…it is inconceivable that in a State subject to the rule of law a person should continue to be deprived of his liberty despite the existence of a court order for his release."

The Appeals Chamber also referred to the law and practice of other international tribunals. Rule 99 of the International Criminal Tribunal for the Former Yugoslavia provides that an acquitted accused shall be released immediately unless the Prosecutor immediately advises the Trial Chamber of an appeal which confers a discretionary power to order continued detention of the accused.
The Appeals Chamber reviewed cases under Rule 99 of the International Criminal Tribunal for Rwanda (ICTR) similar to article 81(3)(c). In Bagilishema, the Trial Chamber considered the article for the first time, noting that the Prosecutor had to prove the need for an order by showing a risk of absconding or interfering with witnesses. While it found no evidence of the latter, it did note the difference between international and domestic tribunals on the issue of flight that had to be balanced with the fundamental right of liberty (Bagilishema, para. 10). Applying the principle of proportionality to its exercise of its discretion, the Trial Chamber noted the explanation of the accused's avoidance of arrest, his cooperation at trial, the dissenting opinion on acquittal, the offer of the Prosecutor of conditions instead of detention and the defence acceptance of some of them (para. 11). The Trial Chamber held that the conditions should balance the acquitted accused's liberty interest with the court's concern with an absconding party before the appeal proceedings. The accused was ordered to provide sureties for attendance, as well as his address, to report regularly to the police, to stay in the country and to hand over his travel documents. The order also noted that article 29 of the Tribunal's statute put states under obligation to cooperate with the Tribunal (presumably in case of absconding). In Ntagerura, on acquittal of the accused who had been in detention for some time and the Prosecutor's oral notice of appeal, the Trial Chamber of the ICTR ordered the immediate release the accused on similar terms to Bagilishema. In Bagosora, the Trial Chamber allowed the Prosecutor to

make a request for conditions even though the appeal was not announced at the hearing when the accused was acquitted. The Trial Chamber noted in devising conditions for release that the accused's passport was already part of the evidential record and would remain so until the end of the appeal and that he lived in a safe house in Arusha and so he was already under travel restrictions, but additionally ordered him to advise the Tribunal of his whereabouts if they changed.

The Appeals Chamber noted that in respect of Gbagbo and Blé Goudé, the Prosecutor had asked for release on conditions. It found the power to impose conditions to be incidental to the power to order detention in article 81(3)(c)(i) and because of the Trial Chamber's need to retain jurisdiction over the accused in the event of an appeal if the Prosecutor could show the exceptional circumstances that made it necessary. It was a power that logically was transferred to the Appeals Chamber to control its own process (para. 53).

The Appeals Chamber decided to revise the burden of proof in situations where conditional release would be sufficient to ensure the presence of the accused at future proceedings. Starting from the premise that 'exceptional circumstances' had to be shown for a detention order under article 81, the Appeals Chamber held that only 'compelling reasons' needed to be shown to impose conditions on release. It advised the Trial Chamber to also consider whether a flight risk might be mitigated by imposing less stringent conditions based on the general principle that conditions must be proportional to the threat posed by the risks identified (para. 54).

Thus, the Trial Chamber had misdirected itself in this case because it assessed 'exceptional circumstances' rather than the 'compelling reasons' required for the conditional order sought by the Prosecutor (para. 55). Detention is a last resort. This was an error of law and one that materially affected the Impugned Decision.

The Appeal Chamber then decided that it should deal with the issue quickly because Gbagbo and Blé Goudé were still in custody and an appeal was pending. The Prosecutor had shown that there was a flight risk. The Appeals Chamber held that the seriousness of the charges was relevant to the flight risk (considering the number of earlier decisions in this case that had considered seriousness as an element in detention)as was the potential high sentence, a network of supporters and the means to escape (para. 59).

However, the Appeals Chamber held that the flight risk might be mitigated by conditions on release pending appeal. There were compelling reasons to impose conditions. Both Gbagbo and Blé Goudé were willing to accept conditions and Belgium had agreed to accept and enforce them:

(i) To sign an undertaking that they will abide by all instructions and orders from the Court, including to be present at the Court when ordered, and accepting that the proceedings before the Appeals Chamber may proceed in their absence, should they fail to appear before the Court when ordered to do so;
(ii) To provide the address in the receiving State and contact information to the Court and the

receiving State and request authorisation from the Court for any change of address;
(iii) Not to travel beyond the territorial limits of the municipality of the receiving State without the explicit and prior authorisation of the Court;
(iv) To surrender all identity documents, particularly their passports, to the Registry;
(v) To report weekly to the law enforcement authorities of the receiving State or the Registry;
(vi) Not to contact, either directly or through any other party, any Prosecution witness in this case, or any interviewed person in the ongoing investigation in the Côte d'Ivoire as disclosed, except through counsel authorised to represent them before this Court and in accordance with the applicable protocols;
(vii) Not to make any public statements, directly or through any other person, about the case or be in contact with the public or speak to the press concerning the case; and
(viii) To abide by any additional reasonable conditions imposed by the State of release.

In a separate decision, condition (iii) was varied to "region" by the Appeals Chamber at the request of Belgium.

**The May 2020 Appeals Chamber decision amending the earlier conditions**

Gbagbo requested a reconsideration of the conditions and for simple release. He argued that the Appeals Chamber in its first decision had not clearly explained how it arrived at its new framework for a 'compelling reasons' test. He also repeated arguments about the compatibility of the restrictions on his internationally recognized right to liberty after acquittal and about the lack of compelling reasons for his release conditions and sought a review of the conditions.

The Appeals Chamber refused to find an error in its reasoning that it had jurisdiction over an accused subject to an appeal or that its jurisdiction had been exercised in error. It echoed the Trial Chamber in the ICTR that noted an international court's limited ability to bring a party to an appeal before it after he absconded (para. 58) Gbagbo did not show that the conditions were not proportional to the flight risk he presented.

However, the Appeals Chamber was willing to use its discretion to review the conditions to see if any merited change because of new circumstances. The facts showed that Gbagbo and Blé Goudé had complied with the Court's orders and had not attempted to leave Belgium. Thus, it held that it was appropriate to revoke conditions (iii), (iv), (v) and (viii) above.

The Appeals Chamber took this opportunity to address a concern that would arise if the accused did not return for further proceedings before the Court. It emphasized that Gbagbo and Blé Goudé must obey the orders of the Court, including any requiring them to appear for a new trial if this was the result of the appeal. Because they had already physically appeared before the Court pursuant to article 60, it had effective jurisdiction and they could be tried in absentia (para. 68). It distinguished the requirement in article 63 that an accused be present for his trial because it was based on an accused wanting to appear in good faith and not the situation of knowing, deliberate absence (para. 69). The

Appeals Chamber of the ICTR held in Nahimana that a trial may proceed in the absence of an accused who knowingly refuses to be present. The ECtHR had also held that trials could proceed in the absence of accused who knowingly refused to appear provided the accused's fair trial rights were respected. The ECtHR held in such cases as Sejdovic that an accused has waived his right to a trial in person by absconding. The Appeals Chamber expressly did not wish to tie the hands of a future Trial Chamber to continue proceedings in the wilful absence of an accused, so left specific cases to be decided on their circumstances.

**Conclusion**

In this case, the Appeals Chamber established a framework for protecting the liberty rights of an accused who is acquitted, but whose case has been appealed based on article 81(3)(c)(i). It has balanced them with the needs of an international court which will potentially have a harder time securing the return of an acquitted accused who leaves after the acquittal. It also developed two burdens of proof based on whether the Court agreed with the request of the Prosecutor for release pending appeal with conditions or for detention as a last resort.

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**About the author**

James HendryJames Hendry is a Co-Editor-in-Chief of the PKI Global Justice Journal. He served as counsel to the Canadian Human Rights Commission before joining the Department of Justice in 1989. He was General Counsel in the Human Rights Law Section at the DOJ until retirement in 2011, working in civil Charter social policy review, specializing in equality rights, human rights legislation, and human rights act design. He has also published extensively on Canadian and comparative constitutional issues and has lectured in Canada, Spain, South Africa, the United States and Hong Kong.