



**Original: English**

**No. ICC-02/11-01/15 A**

**Date: 22 May 2020**

**THE APPEALS CHAMBER**

**Before:**

**Judge Chile Eboe-Osuji, Presiding  
Judge Howard Morrison  
Judge Piotr Hofmański  
Judge Luz del Carmen Ibáñez Carranza  
Judge Solomy Balungi Bossa**

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE**

**IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO AND  
CHARLES BLÉ GOUDÉ**

**URGENT**

**Public**

**Decision vacating the hearing before the  
Appeals Chamber**

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

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor  
Ms Helen Brady

**Counsel for Laurent Gbagbo**  
Mr Emmanuel Altit  
Ms Agathe Bahi Baroan

**Legal Representative of Victims**  
Ms Paolina Massidda

**Counsel for Charles Blé Goudé**  
Mr Geert-Jan Alexander Knoops  
Mr Claver N'dry

**REGISTRY**

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**Registrar**  
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber I of 15 January 2019 (ICC-02/11-01/15-T-232-ENG), with reasons issued on 16 July 2019 (ICC-02/11-01/15-1263 and its annexes),

Noting the ‘Decision rescheduling, and directions on, the hearing before the Appeals Chamber’ of 30 April 2020 (ICC-02/11-01/15-1338),

Having also before it the ‘Blé Goudé Defence Urgent Request for Postponement pursuant to Article 67 of the Statute’ of 6 May 2020 (ICC-02/11-01/15-1340-Conf),

Issues the following

## DECISION

1. Counsel for Mr Blé Goudé’s request of 6 May 2020 (ICC-02/11-01/15-1340-Conf), to cancel the hearing currently scheduled to take place at a time between 27 May 2020 and 29 May 2020, and to schedule an oral hearing at a date on which all relevant persons may be physically present, is rejected.
2. The hearing in this appeal, currently scheduled to take place at a time between 27 and 29 May 2020, is vacated.
3. The Registrar is ordered to continue to liaise with the parties and the OPCV with a view to identifying and finalising any technical parameters with respect to the form of any future hearing to be scheduled.

## REASONS

### A. Background and summary of the submissions

1. On 30 April 2020, the Appeals Chamber issued the ‘Decision rescheduling, and directions on, the hearing before the Appeals Chamber’.<sup>1</sup> The Appeals Chamber requested written submissions on questions set out in that decision, and rescheduled the hearing, to take place at a time between 27 and 29 May 2020.<sup>2</sup> It stated that it would ‘communicate the exact date(s) and form of this hearing, whether virtual or otherwise, in due course, including a precise schedule for the hearing (during which any necessary elaborations of and/or replies to the written submissions will be heard)’.<sup>3</sup> The Appeals Chamber ordered the Registrar ‘to liaise with the parties and the victims as to any technical parameters with respect to the form of the hearing’.<sup>4</sup>

2. The parties indicated that the Registry initiated and entered into discussions with them, on this issue, on 1 May 2020.<sup>5</sup>

3. On 6 May 2020, counsel for Mr Blé Goudé filed an urgent request for postponement,<sup>6</sup> requesting that the Appeals Chamber postpone the hearing until such time as the parties and participants could be physically present at the hearing, specifically pointing to Mr Blé Goudé and one co-counsel.<sup>7</sup> He argues, *inter alia*, that a virtual hearing violates Mr Blé Goudé’s right to be present, pursuant to articles 63(1) and 67(1)(d) of the Statute.<sup>8</sup> He argues also that co-counsel for Mr Blé Goudé, who is currently in the Côte d’Ivoire, will be unable to travel to The Hague to attend

<sup>1</sup> [Decision rescheduling, and directions on, the hearing before the Appeals Chamber](#), 30 April 2020, ICC-02/11-01/15-1338 (‘Appeals Chamber’s Decision of 30 April 2020’).

<sup>2</sup> [Appeals Chamber’s Decision of 30 April 2020](#), p. 4.

<sup>3</sup> [Appeals Chamber’s Decision of 30 April 2020](#), p. 4.

<sup>4</sup> [Appeals Chamber’s Decision of 30 April 2020](#), p. 4.

<sup>5</sup> [Blé Goudé Defence Urgent Request for Postponement pursuant to Article 67 of the Statute](#), 6 May 2020, ICC-02/11-01/15-1340-Conf; a public redacted version was filed on the same day (‘Mr Blé Goudé’s Request for Postponement’), para. 10; [Prosecution’s response to “Blé Goudé Defence Urgent Request for Postponement pursuant to Article 67 of the Statute”](#), 8 May 2020, ICC-02/11-01/15-1341 (‘Prosecutor’s Response to Mr Blé Goudé’s Request for Postponement’), para. 4; Réponse de la Défense à la « Blé Goudé Defence Urgent Request for Postponement pursuant to Article 67 of the Statute » (ICC-02/11-01/15-1340-Conf), 12 May 2020, ICC-02/11-01/15-1346-Conf, (‘Mr Gbagbo’s Response to Mr Blé Goudé’s Request for Postponement’), para. 2; *see also* CLRV Response to the “Confidential Blé Goudé Defence Urgent Request for Postponement pursuant to Article 67 of the Statute”, 9 May 2020, ICC-02/11-01/15-1342-Conf (‘OPCV’s Response to Mr Blé Goudé’s Request for Postponement’), paras 17, 21.

<sup>6</sup> [Mr Blé Goudé’s Request for Postponement](#).

<sup>7</sup> [Mr Blé Goudé’s Request for Postponement](#), para. 3.

<sup>8</sup> [Mr Blé Goudé’s Request for Postponement](#), para. 3. *See also* paras 12-23.

the hearing due to the COVID-19 pandemic, and that his attendance via video-link will be inadequate to allow Mr Blé Goudé to confer with him meaningfully and confidentially, and to give instructions, with the result that Mr Blé Goudé will be prevented from communicating freely and in confidence with co-counsel of his choosing during the hearing in violation of article 67(1)(b) of the Statute.<sup>9</sup> Conversely, and contrary to the principle of equality of arms enshrined in article 67(1) of the Statute, he states that the Prosecutor will be able to select whomsoever she chooses for her team for the hearing, as staff of the Court are required to remain at the Duty Station in The Hague and are not similarly affected by travel restrictions.<sup>10</sup>

4. The Prosecutor concurs with the request to postpone the hearing,<sup>11</sup> and states that she is not, in principle, opposed to holding a virtual hearing so long as ‘fundamental requirements’ are satisfied.<sup>12</sup> The Prosecutor maintains that a virtual hearing is not in principle incompatible with Mr Blé Goudé’s rights under article 67(1) of the Statute, including the right to be present (which is not restricted to physical presence),<sup>13</sup> the right to communicate freely with counsel and to have the proper facilities to conduct his defence.<sup>14</sup> She submits that ‘[u]ltimately, it will depend on the modalities and the practical arrangements that are put in place, so as to ensure that Mr Blé Goudé (and indeed Mr Gbagbo) will be able to fully exercise their rights, while participating in the hearing remotely and through virtual technology.’<sup>15</sup>

5. Counsel for Mr Gbagbo submits, *inter alia*, that whilst virtual hearings would not, as such, pose a health risk in view of the COVID-19 pandemic, the situation curtails the capacity of the his team to prepare for the hearing.<sup>16</sup> As to participation by the defence team at the hearing, counsel for Mr Gbagbo argues that each member of the team needs to be present, so that the team can fully participate as necessary, bearing in mind the different essential roles of each team member.<sup>17</sup> The Appeals Chamber is requested to wait until it has more information on how the software will

<sup>9</sup> [Mr Blé Goudé’s Request for Postponement](#), para. 3. *See also* paras 24-29.

<sup>10</sup> [Mr Blé Goudé’s Request for Postponement](#), para. 28.

<sup>11</sup> [Prosecutor’s Response to Mr Blé Goudé’s Request for Postponement](#).

<sup>12</sup> [Prosecutor’s Response to Mr Blé Goudé’s Request for Postponement](#), para. 16.

<sup>13</sup> [Prosecutor’s Response to Mr Blé Goudé’s Request for Postponement](#), para. 22.

<sup>14</sup> [Prosecutor’s Response to Mr Blé Goudé’s Request for Postponement](#), para. 19.

<sup>15</sup> [Prosecutor’s Response to Mr Blé Goudé’s Request for Postponement](#), para. 19.

<sup>16</sup> Mr Gbagbo’s Response to Mr Blé Goudé’s Request for Postponement, paras 21-22.

<sup>17</sup> Mr Gbagbo’s Response to Mr Blé Goudé’s Request for Postponement, paras 24-28.

lend itself to a dynamic hearing that will preserve its adversarial character before determining whether the rights of Mr Gbagbo can be ensured through such virtual hearing.<sup>18</sup> Counsel for Mr Gbagbo concurs with the Prosecutor's concerns as to the timing of, and preparedness for, the virtual hearing and adds that the necessary time required for familiarisation with the relevant equipment and software will further reduce the time available for the team to prepare for the hearing.<sup>19</sup>

6. The OPCV disputes counsel for Mr Blé Goudé's argument that the proposed hearing would violate Mr Blé Goudé's right to be present, arguing that article 63(1) of the Statute, as found previously by the Appeals Chamber, does not operate as an absolute bar to the continuation of the proceedings in the absence of the defendant.<sup>20</sup> It relies, *inter alia*, on a decision of the International Criminal Tribunal for the former Yugoslavia to demonstrate that the right to be present is not absolute,<sup>21</sup> and argues that 'the question to be answered is whether the arrangements currently proposed by the Registry can be considered as a reasonable alternative to the presence of the defendant in [the] courtroom in the specific exceptional circumstances linked to the COVID-19 pandemic *and* whether said arrangements are able to grant the fairness and integrity of the proceedings *and* to secure the rights of the defendant'.<sup>22</sup> It also argues that jurisprudence from the European Court of Human Rights demonstrates that the appearance of a person at the appellate stage (in particular on questions of law) does not have the same significance as it does at the trial stage.<sup>23</sup>

## **B. Merits**

7. This decision relates to the holding of a hearing on the merits of the Prosecutor's pending appeal against acquittal, notwithstanding the interruptions caused by the Covid-19 pandemic, and having received a request by Mr Blé Goudé to postpone the hearing. It addresses the argument as to the right of Mr Blé Goudé and his co-counsel to be physically present in the courtroom for the purposes of this

<sup>18</sup> Mr Gbagbo's Response to Mr Blé Goudé's Request for Postponement, paras 29-32.

<sup>19</sup> Mr Gbagbo's Response to Mr Blé Goudé's Request for Postponement, paras 55-57.

<sup>20</sup> OPCV's Response to Mr Blé Goudé's Request for Postponement, para. 12.

<sup>21</sup> OPCV's Response to Mr Blé Goudé's Request for Postponement, para. 15.

<sup>22</sup> OPCV's Response to Mr Blé Goudé's Request for Postponement, para. 16.

<sup>23</sup> OPCV's Response to Mr Blé Goudé's Request for Postponement, para. 20.

appeal hearing. Other issues raised in this request and related filings, which are not summarised in this decision, will be addressed in a later decision.

8. In order to afford a further opportunity to counsel to answer any additional questions that the Judges may have, the Appeals Chamber considered it helpful to exercise its discretion and convene a hearing. Having done so, the Appeals Chamber is now faced with what is clearly a *force majeure*; it is evident that measures must be taken, in relation to this hearing which has been scheduled, to allow these appeal proceedings to proceed expeditiously, whilst also ensuring that the applicable rights of all, including the acquitted persons, are not unduly affected.

9. The Appeals Chamber notes that this decision is limited to the situation it is currently facing, the Covid-19 pandemic and the particular nature of the appeals proceedings scheduled in this case; it is not making a determination on this issue in general. The Appeals Chamber notes in this regard, as also submitted by the OPCV, that decisions from the European Court of Human Rights illustrate that participation by video link, in the context of appeals proceedings, is not per se contrary to the notion of a fair hearing.<sup>24</sup> It is also the case that, in mitigation of the effects of the pandemic, courts around the world have managed to conduct proceedings by means of information technology.<sup>25</sup> The precise modalities of holding a virtual hearing that adequately meets due process rights are still being explored with the parties, the OPCV and the Appeals Chamber, and details, taking into account concerns expressed, will be communicated in due course. The broad arguments made by counsel for Mr Blé Goudé with respect to the necessity of Mr Blé Goudé's physical presence at the hearing are thus rejected.

10. The Appeals Chamber also rejects counsel for Mr Blé Goudé's argument that Mr Blé Goudé's right to counsel is violated if one of his counsel is not physically present at the Court. Care must be taken to avoid the situation where the plurality of counsel for any party has the effect of interfering with the expeditiousness of proceedings. It is noted here that the practice of the Court is to have a minimum of

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<sup>24</sup> See ECtHR, *Marcello Viola v. Italy*, Application no. 45106/04, [Judgment](#), 5 October 2006, paras 56, 63-67; *Sakhnovskiy v. Russia*, Application no. 21272/03, Judgment, 2 November 2010, para 98.

<sup>25</sup> See the UK Supreme Court (<https://www.supremecourt.uk/news/arrangements-during-the-coronavirus-pandemic.html>) and the US Supreme Court (<https://www.supremecourt.gov/publicinfo/press/pressreleases.aspx>).

two counsel for a defendant. The objective is to enable proceedings to be conducted without interruption. That is to say, at least one counsel should be available to continue with the proceedings, where the other is unavoidably absent. It should not then be the case that the inability of one counsel to participate in the proceedings must bring the entire proceedings to a halt. In any case, it is envisaged that co-counsel for Mr Blé Goudé, if he is not able to come to The Hague, will be able to participate in any hearing virtually.

11. As to the timing of this hearing, for the following reasons, the Appeals Chamber has decided to postpone the hearing; such postponement already having been communicated informally to the parties. In the Appeals Chamber's Decision of 30 April 2020, when it scheduled this hearing, the Appeals Chamber ordered the Registrar 'to liaise with the parties and the victims as to any technical parameters with respect to the form of the hearing.' The Registry has made great strides in exploring the possibilities for this hearing, liaising with the Appeals Chamber, the parties and the OPCV, as well as internally with the various relevant sections of the Registry. It has become clear, however, that further time would allow for outstanding technical preparations for this hearing to be finalised. In addition, on 15 May 2020, the Court decided to partially open the headquarters premises as of 1 June 2020. Taking into account all of these circumstances, the Appeals Chamber considers it reasonable to postpone the Appeals Chamber's hearing in this appeal and is exploring with the Registry the possibility of holding the hearing on 10-12 June 2020, dates which will be confirmed in due course. The parties and the OPCV are requested to cooperate to the extent possible with the Registry to ensure that preparations for the hearing can be completed.



12. Although the Appeals Chamber makes reference to confidential filings in this decision, nothing contained herein is considered confidential.

Done in both English and French, the English version being authoritative.



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**Judge Chile Eboe-Osuji**  
**Presiding**

Dated this 22<sup>nd</sup> day of May 2020

At The Hague, The Netherlands