

**Cour
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**International
Criminal
Court**

Original: **English**

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

Date: **17 April 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

Public

Prosecution's application to postpone or cancel the appeal hearing scheduled for 11-13 May 2020 and to consider alternative proposals to expedite the appeal

Source: Office of the Prosecutor

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

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Introduction

1. On 20 March 2020, the Appeals Chamber scheduled a court hearing in the Prosecutor's appeal¹ against Trial Chamber I's acquittals of Mr Gbagbo and Mr Blé Goudé² for 11-13 May 2020 ("Scheduling Order").³
2. The Prosecution respectfully requests the Appeals Chamber to postpone or cancel the appeal hearing presently scheduled for 11-13 May 2020 and to instead consider alternative means to conduct the remainder of the appeals proceedings in this case in a fair and expeditious manner. This application is made because of ongoing concerns about holding a three-day appeal hearing at the Court in the midst of the current COVID-19 pandemic in the Netherlands.
3. The Prosecution has a well-founded concern, based on the relevant information available in the public domain on the known contagiousness of COVID-19 and given the high and ever-increasing rate of COVID-19 infections in the Netherlands, that holding the court hearing at this time will endanger the health and lives of persons who participate in the three-day hearing. This includes the Judges, Prosecution Counsel, Defence Counsel, OPCV Counsel, other staff from Chambers, Registry and the Prosecution, and Mr Gbagbo and Mr Blé Goudé. In the Prosecution's view, this is a risk that should not be taken, especially when other equally viable means of expeditiously conducting the appeals proceedings are available, as outlined below.
4. In light of these exceptional circumstances, the Prosecution respectfully requests the Appeals Chamber to postpone or cancel the scheduled hearing and to instead apply alternative procedures that will best ensure that the

¹ ICC-02/11-01/15-1277-Red.

² ICC-02/11-01/15-T-232-ENG ("Acquittals") and ICC-02/11-01/15-1263; ICC-02/11-01/15-1263-Anx1; ICC-02/11-01/15-1263-Anx2; ICC-02/11-01/15-1263-Anx3 ("Reasons").

³ ICC-02/11-01/15-1318, para. 1.

appeals proceedings in this case will be heard in a fair and expeditious manner for all Parties and participants, and conducted fully respecting the need to protect Judges, staff, Defence counsel and the acquitted persons.

5. As outlined below, the Prosecution proposes that *in lieu* of the scheduled hearing, the Parties and participants could be ordered to respond in writing to any questions that the Appeals Chamber may have on the Prosecution's appeal. This could include the possibility for any further questions to be answered in written replies or, if the Chamber deems it necessary, at an oral hearing scheduled when it is safe to return to the Court.
6. The Court owes a duty of care to people at risk on account of the activities of the Court.⁴ Holding a hearing in May 2020 in these circumstances carries unnecessary and avoidable risks. In particular, since the Appeals Chamber has already held a hearing on Mr Gbagbo's and Mr Blé Goudé's conditional release in February 2020, there is no immediate need to hold a three-day appeals hearing on the merits of the appeal at this stage.
7. The merits of the appeal do not affect their liberty, and they remain on conditional release during the appeal proceedings. The matter can be fairly advanced through written submissions, in order to progress the judgment.

Submissions

(i) *Timing of these submissions*

8. On 14 April 2020, the Defence of Mr Blé Goudé requested the Chamber—*via* email submitted to the Chamber's Legal Officers—to clarify whether “the oral hearing [dates] are confirmed in light of the continuing development of the COVID-19 situation, affecting, *inter alia*, the functioning of the Court”; and

⁴ See article 83(1), read in conjunction with article 64(2).

whether “the Defence [can] expect to be provided with a list of questions in advance of the hearing and if so, how much in advance”.⁵

9. On the same day, the Prosecution informed the Chamber that it was prepared to make written observations on these issues and that the preferred timing for making these submissions would be after 21 April 2020, when the Government of the Netherlands is expected to make its next announcement on whether and/or to what extent the present COVID-19 restrictions will be extended or lifted, and the Court’s decision on this matter following that announcement.⁶ The OPCV⁷ and the Defence of Mr Gbagbo⁸ also expressed their intention to file written observations on the matter.

10. Although the Prosecution had indicated that it would file its submissions only after the Government’s announcement on 21 April 2020 (and the Court’s decision after that), it has since determined that earlier and more timely submissions from the Prosecution (and indeed, the other Parties and participants) would better assist the Appeals Chamber. This is because the health situation in the Netherlands is continuously evolving and the appeal hearing is currently scheduled to commence in only three weeks’ (14 working days’) time.

11. This leaves the Parties and participants with only a very short time to prepare for the hearing, which is particularly challenging in the current circumstances given the difficulties that they are currently facing in working remotely, while handling other urgent health and family related issues.⁹

⁵ Email sent by Lauriane Vandeler, on behalf of Mr Knoops, Counsel for Mr. Ble Goude, on 14 April 2020, at 09:31 hours.

⁶ Email sent by Helen Brady, OTP, on 14 April 2020, at 18:51 hours.

⁷ Email sent by Paolina Massidda, OPCV, on 14 April 2020, at 20:19 hours.

⁸ Email sent by Emmanuel Altit, Counsel for Mr. Gbagbo, on 15 April 2020, at 15:37 hours.

⁹ See Prosecution’s submissions in ICC-02/11-01/15-1317, para. 6. On 23 March 2020, the Staff Union Council launched a survey to assess how staff members are feeling during this period of remote working. During this survey, to which 246 colleagues responded, a significant amount of staff members expressed the following concerns: (a) concern for their family members in other countries, some of whom are sick or vulnerable; (b) the

(ii) *A court hearing from 11-13 May 2020 will expose the Judges, staff, Defence counsel and the acquitted persons to significant risks to their health and lives*

12. The Prosecution is not in a position to assess the situation from a medical standpoint (and OHU may be consulted on matters of specific medical expertise, if needed). However, information presently and consistently available in the public domain (including news sources and information from the Dutch government and the Court itself) shows that the global COVID-19 pandemic is having extremely serious effects on the health and lives of many people living in the Netherlands. The Prosecution relies on this information to convey its understanding of the situation.
13. According to the Dutch *Rijksinstituut voor Volksgezondheid en Milieu* (National Institute for Public Health and the Environment, or “RIVM”), at the time of filing these submissions, 29,214 people have tested positive to COVID-19, 9,309 have been admitted to hospital, and 3,315 have died.¹⁰
14. As the RIVM makes clear on its website, the figure for COVID-19 infections is highly conservative because testing for infections in the Netherlands is currently only being done on a limited number of people, largely confined to healthcare workers and those actually admitted to hospital.
15. The true rate of infection is likely to be much higher,¹¹ indeed, estimated to be in the range of a few hundred thousand people.¹² Likewise, as their reports

difficulties of juggling childcare with work; (c) work pressures, with expectations continuing at the same level; (d) perceived flaws in management and leadership exhibited at this time; (e) technical problems; (f) generalised feelings of nervousness and anxiety, difficulties concentrating, mood swings or lack of self-motivation. *See* email from Staff Council Union to all ICC of 6 April 2020, at 11:42 hours.

¹⁰ *See* website of the [RIVM](#) (last consulted on 17 April 2020).

¹¹ RIVM, [Current information about COVID-19 \(novel coronavirus\)](#) (last consulted on 17 April 2020).

¹² NOS in English Live Blog, 10:15am, 16 April 2020 (“Immunity tests by Dutch blood bank Sanquin show that 3 percent of Dutch blood donors have antibodies against COVID-19, the disease caused by the Coronavirus. Says RIVM director Jaap van Dissel in the House of Representatives (Tweede Kamer). If this is representative, it means that a few hundred thousand Dutch people have already had the coronavirus to a greater or lesser extent.”). *See also* NOS, [Mogelijk 3 procent van Nederlanders heft coronavirus gehad](#), 16 April 2020 (last consulted on 17 April 2020); DutchNews.nl, [Half a million people may have developed coronavirus antibodies: RIVM](#), 16 April 2020 (last consulted on 17 April 2020).

make clear, the RIVM death rate only includes those people who have died while in hospital and not those who have died at home or in nursing homes.

16. It is estimated that the true figure for deaths from the virus is likely to be double the present RIVM one.¹³ And even on the official death rate alone, the Netherlands has the 10th highest number of deaths in the world (a case fatality rate of 11.3% of those diagnosed with the infection) and has the 6th highest *per capita* COVID-19 mortality rate in the world (19.31 deaths per hundred thousand population).¹⁴
17. The result of this situation is the imposition of various physical distancing measures, which the Chamber is fully aware of, which have been recently extended.¹⁵ A further extension of the measures past 28 April 2020 is not unlikely (for instance, the United Kingdom extended the lockdown today for an additional three weeks).¹⁶ The measures, it is worth recalling, include an obligation to maintain a 1.5 metre distance from other people, not gathering in groups larger than three persons in public,¹⁷ and not receiving more than three visitors at a given time.¹⁸ In addition, all public gatherings requiring permits are banned until 1 June 2020, and other types of gatherings are currently banned until 28 April 2020, save for a few exceptions.¹⁹
18. Even if some of these restrictions are lifted at some point, it is unlikely that physical distancing requirements will be abandoned altogether. On the

¹³ See website of the [RIVM](#): Excess mortality caused by the novel coronavirus (COVID-19) (last consulted on 17 April 2020).

¹⁴ See [WorldOMeter](#) COVID-19, Coronavirus Pandemic (last consulted on 17 April 2020). [Johns Hopkins University Medicine Coronavirus resource center](#) (last consulted 17 April 2020).

¹⁵ See website of the [Government of The Netherlands](#) (last consulted on 17 April 2020).

¹⁶ BBC, [Coronavirus: UK lockdown extended for 'at least' three weeks](#), 16 April 2020 (last consulted on 17 April 2020).

¹⁷ Reuters, [Dutch gov't bans public gatherings until June 1 due to coronavirus](#), 23March 2020; Dutch News, [Coronavirus in the Netherlands: all you need to know](#), 14 April 2020.

¹⁸ See website of the [Government of The Netherlands](#) (last consulted on 17 April 2020): "Have as few visitors as possible (no more than 3)". The [ICC Medical Unit](#) recommends maintaining a 2 meters distance from other people.

¹⁹ See website of the [Government of The Netherlands](#) (last consulted on 17 April 2020).

contrary, experts are currently of the view that a level of physical distancing measures in order to prevent the contagion from recurring will continue to be required for a prolonged period of time.²⁰

19. As a result of these measures taken so far, the figures for new infections over the last few days show that the spread of COVID-19 has slowed.²¹ However, the absolute number of COVID-19 infections in the Netherlands is higher than it has ever been before and keeps growing.²² RIVM estimates are that a peak in the capacity of hospital intensive care departments in the Netherlands is expected in early May 2020.²³
20. When the Appeals Chamber scheduled the court hearing on 20 March 2020, the public health situation in the Netherlands was quite different. Less was known around the world about the scale and gravity of the public health situation and its real consequences, including on those working at the Court.
21. Further, at that relatively early stage of the COVID-19 pandemic in the Netherlands, fewer than 4,000 people had tested positive to COVID-19 (compared to 29,214 as of today's date), 581 had been admitted to hospital (compared to 9,309 today), and 106 had died due to COVID-19 (compared to 3,314 today).²⁴ And again, the Prosecution stresses that the infection rate and death rates are, as the RIVM itself admits, highly conservative.
22. The World Health Organization ("WHO") has warned that one in every five people who develop COVID-19 will need hospital treatment.²⁵ This risk exists

²⁰ Forbes, [Researchers Say Social Distancing to Prevent Coronavirus May Need to Continue Until 2022](#), 14 April 2020 (last consulted on 17 April 2020).

²¹ See website of the [National Institute for Public Health and the Environment](#) (RIVM) last consulted on 17 April 2020).

²² See visual analysis of statistical information, [2020 Coronavirus Pandemic in the Netherlands](#), Wikipedia (last consulted on 17 April 2020).

²³ RIVM, [How calculations contribute to controlling the virus](#) (last consulted on 17 April 2020).

²⁴ See visual analysis of statistical information, [2020 Coronavirus Pandemic in the Netherlands](#), Wikipedia (last consulted on 17 April 2020)

²⁵ WHO, [Getting your workplace ready for COVID-19, How COVID-19 spreads](#), 19 March 2020, Section 2.

for people of all ages and gender, but is especially concerning for the 20% or so of the population who fall into the “high-risk” category, being those aged 65 years and over and those with underlying health conditions. The WHO has accordingly issued guidelines on what organisers of meetings should consider prior to, during and after a meeting, to manage potential risks from COVID-19.²⁶

23. It is difficult to see how the measures proposed by the WHO, or indeed those currently in place in the Netherlands regarding physical distancing and prohibitions on gatherings could be effectively implemented or properly respected during the three-day court hearing scheduled for 11-13 May. This would be the case even if participants did their best to engage in physical distancing while in the courtroom and in the shared facilities such as in lifts, corridors, badge access areas, and other office spaces on their entry and exit from Court.
24. Given that COVID-19 may be transmitted in various ways, hearing participants may well be at a risk of contagion, no matter how they may be situated in the courtroom, due to the intensity of engagement required between individuals participating in a hearing, over three consecutive days.

²⁶ WHO, [Getting your workplace ready for COVID-19. How COVID-19 spreads](#), 19 March 2020, Section 2. Requirements prior to a meeting include the following: (a) Check the advice from the authorities in the community where you plan to hold the meeting or event. Follow their advice; (b) Develop and agree a preparedness plan to prevent infection at your meeting or event; (c) Develop and agree a response plan in case someone at the meeting becomes ill with symptoms of COVID-19 (dry cough, fever, malaise). Requirements during a meeting include the following: (a) Provide information or a briefing, preferably both orally and in writing, on COVID-19 and the measures that organizers are taking to make this event safe for participants; (b) Display dispensers of alcohol-based hand rub prominently around the venue; (c) If there is space, arrange seats so that participants are at least 1 meter apart; (d) Open windows and doors whenever possible to make sure the venue is well ventilated; (e) If anyone who starts to feel unwell, follow your preparedness plan or call your hotline. Requirements after a meeting include the following: (a) Retain the names and contact details of all participants for at least one month. This will help public health authorities trace people who may have been exposed to COVID-19 if one or more participants become ill shortly after the event; (b) If someone at the meeting or event was isolated as a suspected COVID-19 case, the organizer should inform participants. They should be advised to monitor themselves for symptoms for 14 days and take their temperature twice a day; (c) If they develop even a mild cough or low-grade fever (i.e. a temperature of 37.3 C or more) they should stay at home and self-isolate. This means avoiding close contact (less than 1 meter) with other people, including family members. They should also call their health care provider or the local public health department, giving them details of their recent travel and symptoms.

Likewise, counsel would need to consult each other during the hearing; physical distancing measures would make this impossible.

25. The current situation also impedes the effective preparation for the hearing in May 2020. The case record is extensive: the Prosecution's case lasted from 28 January 2016 to 19 January 2018.²⁷ The Trial Chamber issued 172 decisions, many of which are relevant to the appeal. The case record consists of 237 transcripts. The Mid-trial Brief was over 500 pages long. The NCTA submissions run to over 1,871 pages, and the NCTA hearing lasted 10 days, with over 865 pages of French and English transcript. The Judgment is approximately 1,300 pages long.
26. Counsel, working remotely, are simply not equipped to properly access this record. Although some documents can be accessed through CITRIX, the process is slow (preventing access to multiple documents at the same time) and heavily interrupted by technical challenges, including frequent and sometimes severe interruptions to access. Further, confidential documents and transcripts cannot, as per the existing information security protocols, be printed or held by staff members at home.
27. Therefore, in order to properly prepare for the hearing, so as to best assist the Appeals Chamber, and to properly discharge their professional responsibilities owed to the Court, counsel would need to access their offices for significant periods of time (likely most of the remaining working days and weekends), so as to make proper and efficient use of the little time remaining before the hearing. This could create unnecessary risks for counsel's health and well-being.
28. In this context, the Prosecution respectfully submits that holding a court hearing—likely involving a “pared back” minimum of 20-25 participants—

²⁷ ICC-02/11-01/15-1263 (“Reasons for Oral Decision of 15 January 2019”), paras. 20, 27.

from 11-13 May 2020 is neither feasible nor desirable. Maintaining the hearing could even lead to a situation where the Court effectively disregards the mandatory rules imposed by the Dutch authorities and create a situation of risk to the Judges, Prosecution Counsel, Defence Counsel, OPCV Counsel, and staff from Chambers, Registry and the Prosecution, and Mr Gbagbo and Mr Blé Goudé. This risk can also have a “ripple” effect on the family and household members of each of these people. In light of the virulence of the COVID-19 virus and its mortality rate, this is simply a risk that the Court cannot, and should not take. The Court has a duty of care to its staff and other persons working for it. This duty applies to the situation at hand.²⁸

29. Moreover, in addition to the physical risks of COVID-19, as the staff survey demonstrates, many staff have reported issues of worry and stress arising from concerns for family, whether here or overseas and the overall circumstances they find themselves in. The Court must continue to look out for its staff in these exceptional times, and alleviate unnecessary burdens.²⁹
30. Much less should these risks be taken considering that there is an equally effective and expeditious way to progress these appeal proceedings in the coming months which does not expose the Judges, Parties, participants and other staff to such risks by attending a court hearing, as proposed below.

(iii) Proposed alternative way to proceed in this appeal

31. Given the serious risks posed by the COVID-19 pandemic, and in line with the Appeals Chamber’s duty to ensure that the proceedings in this case are fair and expeditious and conducted with due regard for the protection of persons at risk on account of the activities of the Court, including the Court’s overall duty of care to staff and others working at the Court, the Prosecution

²⁸ See e.g., ICC-01/04-01/07-475 OA, para. 1; ICC-01/04-01/07-521 OA5, para. 33.

²⁹ See email from Staff Council Union to all ICC of 6 April 2020, at 11:42 hours and email from the President to all ICC, 31 March 2020, at 15:28 hours.

respectfully requests that the currently scheduled court hearing be postponed or cancelled.

32. This would be consistent with the decision recently taken by the International Court of Justice that, due to the COVID-19 pandemic, no hearing will be held at the ICJ at least until 31 May 2020.³⁰ It would also be in line with the decision by the International Residual Mechanism for Criminal Tribunals, postponing any court hearings at The Hague branch until June 2020 at the earliest, as part of its COVID-19 response.³¹
33. The Prosecution is fully aware that the Appeals Chamber is required to progress these appeal proceedings as expeditiously as possible, and shares that aim.
34. In its Scheduling Order, the Appeals Chamber expressed that it was “mindful of the fact that the situation in the Host State and other States as regards to public health concerns are fast evolving” and called upon all Parties and participants to “ensure that the impact of this situation on the expeditious conduct of the proceedings be kept to a minimum [...]”.³² For this reason, the Prosecution proposes an alternative way to proceed in this appeal, which would dispense of the need to hold the scheduled court hearing.
35. The Prosecution notes that while as a general rule, the Appeals Chamber should hold oral hearings in final appeals under article 81, there is no legal requirement to do so. The Appeals Chamber has previously held, in the *Ngudjolo* appeal that “the decision to hold an oral hearing in appeal proceedings against final judgments is discretionary and made on a case-by-case basis. Such decisions should be based primarily on the potential utility of

³⁰ ICJ Press Release No. 2020/10, [The ICJ extends the period during which no hearings will be held](#), 7 April 2020.

³¹ IRMCT Press Release, [Statement on Operations During COVID-19](#), 31 March 2020.

³² Scheduling Order, para. 7.

an oral hearing, namely whether it would assist the Appeals Chamber in clarifying and resolving the issues raised in the appeal.”³³ In the *Bemba et al.* case, an oral appeal hearing was not held; instead the Appeals Chamber proceeded to issue its final Judgement based on the written briefs filed by the Parties.

36. Bearing in mind the advanced stage of the proceedings, in which the matter is almost completely fully briefed,³⁴ the following steps would equally assist the Appeals Chamber in clarifying and resolving the issues raised in this appeal:

- The Appeals Chamber could direct the Parties and participants to respond to any questions it may have in writing. In recent oral appeal hearings, the Appeals Chamber has issued a set of questions prior to the appeal hearing which the Parties and participants have answered in the hearing. The difference in the proposed approach is that rather than presenting answers to the Appeals Chamber’s questions orally, Parties and participants would provide their answers in writing.
- If this procedure were adopted the Prosecution would respectfully ask the Chamber to issue their questions at least 21 working days in advance of the deadline for their submissions. The Parties and participants face particular challenges in the circumstances in which they are currently operating while working remotely. This includes a myriad of different issues which affect work productivity.

³³ ICC-01/04-02/12-199 OA, para. 13. *See also* ICC-01/09-01/11-271 OA, para. 12: “Assuming that the Appeals Chamber had ‘questions and concerns’, an oral hearing would not necessarily be the only procedural option the Chamber would employ to solicit and receive answers to those ‘questions and concerns’. The Appeals Chamber could also avail itself of regulation 28 of the Regulations of the Court to ‘clarify’, ‘provide additional details’ or ‘address specific issues’ by way of written submissions.”

³⁴ The Prosecution has filed its Document in support of the Appeal and both Defence teams have responded and the OPCV has filed its observations on the appeal. The Prosecution has informed the Chamber that it does not wish to seek to file a written reply to the Defence Response Briefs nor to the Observations filed by the OPCV. The only outstanding briefs are the observations by the Defence to the Victims’ Observations, which are currently due on 11 May 2020 (although the Defence has sought an extension until after it receives the French translation of the Victims’ Observations).

- In addition to the issues outlined above,³⁵ these include matters such as: working while also simultaneously home-schooling children and attending to other family care responsibilities; challenges stemming from counsel not being able to have in-person meetings and to consult other team members quickly and with the same degree of ease as in the office; working on small laptops with small screens; diminished access to research books and materials; diminished access to trial transcripts and exhibits; and difficulties in printing documents from home.
- If having received the Parties and participants' written submissions to the Appeals Chamber's questions, the Appeals Chamber has further questions or requires more assistance in clarifying or resolving issues raised in the appeal, it could then either direct the Parties and participants to file further written replies, or it could decide to hold an oral hearing (potentially a shorter one) at a later stage in the year when the public health situation in the Netherlands has improved.

37. Conducting the remainder of the appeals proceedings in this manner would not only be fair and expeditious, it would also ensure that all Judges, Parties and other participants in this appeal are not unduly (and unnecessarily) exposed to risks to their health and lives due to the COVID-19 pandemic that is currently raging in the Netherlands.

38. If the Appeals Chamber envisages any other alternative course to conduct the remainder of the appeals proceedings in this case, then the Prosecution respectfully requests the opportunity to make written submissions on any such proposed alternative.

³⁵ See paras. 11 and 25-29 above.

Conclusion

39. For the reasons set out above, the Appeals Chamber is respectfully requested to postpone or cancel the hearing in this appeal presently scheduled for 11-13 May 2020 and to apply the alternative procedure outlined by the Prosecution in this filing, as a means to ensure that the appeals proceedings in this case progress in a fair and expeditious manner and are conducted with due regard for the protection of all participants.



Fatou Bensouda, Prosecutor

Dated this 17th day of April 2020

At The Hague, The Netherlands