

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **6 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 COTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ

**Public
With confidential Annex 1**

**Public Redacted Version of “Blé Goudé Defence Urgent Request for Postponement
pursuant to Article 67 of the Statute”, 6 May 2020**

Source: Defence of Mr Charles Blé Goudé

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

The Office of the Prosecutor

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Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

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Detention Section

Victims Participation and Reparations Section

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I. INTRODUCTION

1. On 1 May 2020, pursuant to the Appeals Chamber's "Decision rescheduling, and directions on, the hearing before the Appeals Chamber,"¹ the Registry liaised with the Parties and participants, including the Defence for Charles Blé Goudé ("the Defence") in order to establish the technical parameters with respect to the form of the court hearing on the Prosecution's appeal² against Trial Chamber I's acquittals of Mr Gbagbo and Mr Blé Goudé ("the hearing").³
2. The technical parameters established by the Registry raise several substantive questions as to the fairness of the proceedings, which the Defence respectfully requests the Appeals Chamber to resolve. Pursuant to Article 67 of the Rome Statute ("the Statute"), Mr Blé Goudé has a fundamental right to be present at the hearing, and to have his co-counsel's physical presence secured for the purposes of the hearing.
3. Therefore, pursuant to Article 67 of the Statute, the Defence respectfully requests the Appeals Chamber to postpone the hearing currently scheduled for 27-29 May 2020, until such time where Mr Blé Goudé and co-counsel, Mr Claver N'Dry can both be physically present at the hearing for the following three reasons. *First*, the Defence submits that any oral hearing held virtually would violate Mr Blé Goudé's right to be present at the Hearing. *Second*, the Defence submits that a virtual hearing would prevent co-counsel, Mr N'Dry from communicating freely and in confidence with Mr Blé Goudé, which would constitute a violation of Mr Blé Goudé's right under Article 67(1)(b) of the Statute. *Third*, the Defence submits that a virtual hearing would prevent the public from following the proceedings, thus constituting a violation of Mr Blé Goudé's right under Article 67(1) of the Statute.

¹ ICC-02/11-01/15-1338, page 4.

² ICC-02/11-01/15-1277-Red.

³ 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").

The Defence files the present request urgently since the appeals hearing is scheduled to take place in two weeks and the protocol to be adopted as to the form of the hearing is imminent.

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis* (2) of the Regulations of the Court (“Regulations”), the Defence files its request as “confidential” and will file a public redacted version simultaneously.

III. PROCEDURAL HISTORY

5. On 20 March 2020, the Appeals Chamber scheduled a court hearing for 11-13 May 2020⁴ in the Prosecution’s appeal⁵ against Trial Chamber I’s acquittals of Mr Gbagbo and Mr Blé Goudé.⁶
6. On 17 April 2020, the Prosecution submitted its “Application to postpone or cancel the appeal hearing scheduled for 11-13 May 2020 and to consider alternative proposals to expedite the appeal” (“Prosecution’s Application”).⁷
7. On 20 April 2020, the Common Legal Representative of the Victims submitted her response to the Prosecution’s Application, agreeing with the suggestions made by the Prosecution regarding the proposed course of the proceedings.⁸
8. On 21 April 2020, the Defence submitted its response to the Prosecution’s Application, informing the Appeals Chamber that it agreed in part with providing written submissions to the Appeals Chamber’s questions according to the modalities detailed by the Prosecution. However, the Defence respectfully submitted that the circumstances of this case militate in favour of holding an oral

⁴ ICC-02/11-01/15-1318, para. 1.

⁵ ICC-02/11-01/15-1277-Red.

⁶ 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”).

⁷ ICC-02/11-01/15-1330.

⁸ ICC-02/11-01/15-1331.

hearing on the issues on appeal because of the importance of the issues in addition to their novelty and complexity. Therefore, recourse to a teleconference hearing or any other substitute should not be considered.⁹

9. On 30 April 2020, the Appeals Chamber issued its “Decision rescheduling, and directions on, the hearing before the Appeals Chamber”, rescheduling the 11-13 May 2020 hearing at a time between 27 May 2020 and 29 May 2020. According to the said decision, “[t]he Appeals Chamber shall communicate the exact date(s) and form of this hearing, whether virtual or otherwise, in due course”.¹⁰
10. On 1 May 2020, the Registry contacted the Defence seeking its views as to any technical parameters with respect to the form of the hearing, virtually or otherwise.¹¹ [REDACTED]. [REDACTED].
11. On 4 May 2020, the Defence conveyed its response via email to the Registry,¹² stating that [REDACTED]. The Defence noted [REDACTED], does not guarantee the presence of Mr Blé Goudé. Furthermore, Mr Blé Goudé’s co-counsel, Mr Claver N’Dry, would not be able to travel to the hearing. Even were the Registry to seek to obtain Mr N’Dry’s presence through video-link this would be an insufficient measure to comply with Mr Blé Goudé’s under Article 67(1)(b) of the Statute to communicate freely with a counsel of his choosing.

IV. SUBMISSIONS

- a. *The Defence submits that holding a virtual hearing based on the proposed parameters would violate Mr Blé Goudé’s rights under Articles 63(1) and 67(1)(d) of the Statute*

⁹ ICC-02/11-01/15-1335.

¹⁰ ICC-02/11-01/15-1338, page 4.

¹¹ Confidential Annex 1.

¹² *Ibid.*

12. The Defence submits that holding a virtual hearing on 27-29 May 2020 based on the proposed parameters would constitute a violation of Mr Blé Goudé's right to be present at the trial under Articles 63(1) and 67(1)(d) of the Statute.
13. Despite the Appeals Chamber's discretionary power to hold a hearing during the appeals stage,¹³ the Defence argued in its response to the Prosecution's Application that the number of complex and novel issues raised in the appeal require an oral hearing which will allow the parties to clarify such issues and will facilitate the Appeals Chamber in its decision-making process.¹⁴
14. Mindful of that argument, the Appeals Chamber decided to postpone the 11-13 May 2020 hearing instead of cancelling it, as was proposed by the Prosecution, thereby recognizing the necessity of holding a hearing in the present case. Nevertheless, once the necessity of such hearing is established, an oral hearing must comply with the Court's statutory framework and respect the rights of the accused, or in the present case, the rights of the acquitted person.¹⁵
15. [REDACTED]. The Defence submits that Mr Blé Goudé has a right to be present at the hearing under Articles 63(1) and 67(1)(d) of the Statute.¹⁶ In its appeal, the

¹³ *Prosecutor v. Ngudjolo*, Scheduling order for a hearing before the Appeals Chamber, 18 September 2014, ICC-01/04-02/12-199 OA, para. 13; *Prosecutor v. Bemba et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red, para. 47; *Prosecutor v. Ruto and Sang*, Decision on the "Request for an Oral Hearing Pursuant to Rule 156(3)", 17 August 2011, ICC-01/09-01/11-271, para. 12.

¹⁴ ICC-02/11-01/15-1335, para. 11.

¹⁵ In the *Situation in the Democratic Republic of the Congo*, the Pre-Trial Chamber, citing the the *Baena Ricardo et al.* judgment of the Inter-American Court on Human Rights, affirmed that the right to a fair trial is applicable to all stages of the proceedings, see *Situation in the Democratic Republic of the Congo*, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006, ICC-01/04-135-tEN, para. 34.

¹⁶ The right to be present at trial is also affirmed in Article 14(3)(d) of the International Covenant on Civil and Political Rights. This right is not set out explicitly in the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter of Human and Peoples' Rights. Nevertheless, the European Court of Human Rights has affirmed that the object and purpose of Article 6 taken as a whole show that a person charged with a criminal offence is entitled to take part in the hearing, see ECHR, *Colozza v. Italy*, Application No 9024/80, 12 February 1985, para. 27; *Brozicek v. Italy*, Series A No. 167, 19 December 1989, para. 45; *Stoichkov v. Bulgaria*, Application No. 9808/02, 24 March 2005, para. 56, confirmed by the Grand Chamber in *Sejdovic v. Italy* [GC], Application No. 56581/00, 1 March 2006, para. 84.

Prosecution requests the declaration of a mistrial and the subsequent reinstatement of its prosecution against Mr Blé Goudé, which entails the possibility of Mr Blé Goudé losing his liberty, after he has already spent almost five years detained at the Seat of the Court. The importance of this hearing to Mr Blé Goudé's fundamental right to liberty necessitates his presence, therefore the Defence respectfully requests that an oral hearing not be held virtually.

16. [REDACTED].

17. [REDACTED].

18. Moreover, in response to the above proposals by the Registry, the Defence wishes to clarify certain points.

19. *First*, according to the Appeals Chamber, "part of the rationale for including article 63(1) of the Statute was to reinforce the right of the accused to be present at his or her trial and, in particular, to preclude any interpretation of article 67(1)(d) of the Statute that would allow for a finding that the accused had implicitly waived his or her right to be present by absconding or failing to appear for trial".¹⁷ In several instances the Court has reiterated that the defendant's presence is the rule and constitutes not only a right, but also a duty of the accused.¹⁸

20. *Second*, the accused's absence from the trial can only be accepted in exceptional circumstances and only when the accused has voluntarily waived his /her right to be present, as also held by the European Court of Human Rights.¹⁹ Based on the

¹⁷ *Prosecutor v. Ruto et al.*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', 25 October 2013, ICC-01/09-01/11-1066, para. 54.

¹⁸ *Prosecutor v. Gbagbo*, Decision on Mr Gbagbo's Detention, 25 September 2017, ICC-02/11-01/15-1038-Red, par. 72. See also *Prosecutor v. Gbagbo*, Decision on the schedule for the confirmation of charges hearing, 12 February 2013, ICC-02/11-01/11-397, para. 9; *Prosecutor v. Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, ICC-01/09-02/11-863, para. 16.

¹⁹ *Prosecutor v. Ruto et al.*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', 25

Court's own jurisprudence, "the Chamber may exercise its discretion under Article 64(6)(f) of the Statute to excuse an accused, on a case-by-case basis, from continuous presence at trial. The exceptional circumstances that would make such excusal reasonable would include situations in which an accused person has important functions of an extraordinary dimension to perform".²⁰ Interestingly, in both the *Ruto* and *Kenyatta* decisions regarding requests for excusal from continuous presence at trial, the Trial Chamber set a list of criteria/conditions of the grant of excusal.²¹ Such conditions, however, are not met in the present case.

21. *Third*, with respect to the use of video technology, rule 134*bis* of the Rules of Procedure and Evidence ("Rules") requires the submission of a written request on behalf of the accused so that he/she may be allowed to be present through the use of video technology during part or parts of his or her trial.²² According to Judge Ozaki, the drafters "incorporated only one specific exception to ongoing physical presence of the accused at trial, namely that codified in Article 63(2)".²³ Furthermore, "the Chamber retains a limited discretionary power to permit an accused to participate by means of video-link where this is specifically justified by the circumstances. However, where such discretion is exercised it represents an exception to the general requirement of physical presence and any such determination should again be made on a case-by case basis".²⁴

October 2013, ICC-01/09-01/11-1066, para. 37 citing *Nahimana et al. v. Prosecutor*, Judgment, ICTR-99-52-A, 28 November 2007, para. 107 as well as ECHR, *Dembukov v Bulgaria*, Application No 68020/01, 28 February 2008, para 45; *Sejdovic v. Italy*, Application No 56581/00, 1 March 2006, paras 82 and 83; *Somogyi v. Italy*, Application No 67972/01, 18 May 2004, para 66; *Medenica v. Switzerland*, Application No 20491/92, 14 June 2001, paras 55-59; *Krombach v. France*, Application No 29731/96, 13 February 2001, para 85; *Poitrimol v France* (1993) 18 EHRR 130, paras 30 and 31; *Colozza v. Italy*, Application No 9024/80, 12 February 1985, paras 28 and 29; *Ensslin v. Germany* (1978) 14 DR 64, pp 115-11.

²⁰ *Prosecutor v. Ruto and Sang*, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, 18 June 2013, ICC-01/09-01/11-777, para. 49.

²¹ *Prosecutor v. Ruto and Sang*, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, 18 June 2013, ICC-01/09-01/11-777, para. 3; *Prosecutor v. Kenyatta*, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, 18 October 2013, ICC-01/09-02/11-830, para. 5.

²² In *Prosecutor v. Gbagbo*, Pre-Trial Chamber I stated that Mr Gbagbo may follow the proceedings via video-link if he so wishes, see *Prosecutor v. Gbagbo*, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, ICC-02/11-01/11-286-Red, para. 102.

²³ *Prosecutor v. Kenyatta*, Partially Dissenting Opinion of Judge Ozaki, 18 October 2013, ICC-01/09-02/11-830-Anx2, para. 15.

²⁴ *Ibid*, para. 20.

22. Assuming that rule 134*bis* of the Rules is applicable, *mutatis mutandis*, in the appeals proceedings, the Defence wishes to clarify that in the past five years Mr Blé Goudé never requested to attend the hearing through the use of video technology and is not willing to do so at such crucial stage of the proceedings. Consequently, Mr Blé Goudé maintains his right to participate physically in the proceedings. In any case, should the Appeals Chamber decide that rule 134*bis* of the Rules be applicable in the present case, despite Mr Blé Goudé not submitting such a request, the Defence wishes to emphasize that the Rules of Procedure and Evidence and the Elements of Crimes are subordinate to the Statute. Article 52(5) of the Statute stipulates that in the event of conflict with the Rules of Procedure and Evidence, the Statute shall prevail. Consequently, the Appeals Chamber is not in a position to disregard them or declare them inoperative in such cases.²⁵

23. Finally, the Defence would like to stress that contrary to the position of the Prosecution, it carries out the duty to defend a human being of flesh and blood, whose liberty is at stake, which makes the assessment of the viability of the video-link hearing or any other form of virtual hearing quite distinct from assessing the viability of such a form of trial from the perspective of the Judges or the Prosecution.

b. The Defence submits that holding a virtual hearing based on the proposed parameters would violate Mr Blé Goudé's right under Article 67(1)(b) of the Statute

24. The Defence submits that holding a virtual hearing, on 27-29 May 2020 based on the proposed parameters would constitute a violation of Mr Blé Goudé's right to communicate freely with a counsel of his choosing as well as his right to have proper facilities to conduct his defence under Article 67(1)(b) ICC Statute.

²⁵ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed., Oxford University Press, 2016), page 1021.

25. In response to the Registry's proposal to hold a virtual hearing, the Defence has expressed its objections specifically on the matter of Mr Claver N'Dry's participation, Mr Blé Goudé's co-counsel who has been representing him for the past ten years, both in the current ICC proceedings, and as his lawyer in Côte d'Ivoire. The Defence respectfully recalls that its team members are not staff of the Court, and thus it is not a requirement for the Defence to be based at the Seat of the Court. As a result, Mr N'Dry is currently in Côte d'Ivoire and travels to The Hague to participate in the proceedings.
26. [REDACTED]. Due to the current COVID-19 pandemic, Mr N'Dry cannot travel to the Seat of the Court to participate in the hearing, and thus will not be able to represent Mr Blé Goudé in such a manner that complies with Article 67(1)(b) of the Statute.
27. Moreover, even if the Registry obtains Mr N'Dry's presence through video-link this would be an insufficient measure to comply with Mr Blé Goudé's rights under Article 67(1)(b) ICC Statute. According to Pre-Trial Chamber I "from the catalogue of fair trial rights, contained in article 67(1) of the Statute, a number of relevant capacities can be discerned which are necessary for the meaningful exercise of these rights", including, *inter alia*, the accused's ability to instruct counsel.²⁶ In the present case, even when a visual presence of Mr N'Dry could be secured, Mr Blé Goudé would not be able to confer meaningfully with his co-counsel and instruct him during the hearing. Such communication would only be feasible during the breaks of the hearing, and only through the phone where the confidentiality of conversations cannot be assured. Notably, the addition of the words "freely" and "in confidence" in Article 67(1)(b) underscore the privileged nature of the communication and the fact that it must be undertaken in secure premises not

²⁶ *Prosecutor v. Gbagbo*, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, ICC-02/11-01/11-286-Red, para. 50.

subject to eavesdropping.²⁷ [REDACTED]. The Defence submits that such means of communication are not secure and therefore the confidentiality of the communications and the security of the proceedings as a whole will be severely compromised.

28. Additionally, the Defence submits that it would be contrary to the equality of arms, as the principle is enshrined in Article 67(1) of the Statute, if the Prosecution were able to have present the team members of its choice, but due to travel restrictions, the Defence were not able to secure the presence of co-counsel. According to Pre-Trial Chamber II “[f]airness is closely linked to the concept of ‘equality of arms’, or of balance between the parties during the proceedings. As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour”.²⁸ The absence of Mr N'Dry from a hearing which will determine Mr Blé Goudé's future will severely deprive the latter of adequately making his case such as to persuade the Appeals Chamber of his potential arguments.

29. In light of the above, the Defence requests that an oral hearing only takes place if Mr N'Dry's physical presence can be secured.

c. The Defence submits that holding a virtual hearing based on the proposed parameters would violate Mr Blé Goudé's right under Article 67(1) of the Statute

30. The Defence submits that a virtual hearing taking place on 27-29 May 2020 cannot guarantee the publicity of the hearing, amounting to a violation of Mr Blé Goudé's right under Article 67(1) of the Statute.

²⁷ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed., Oxford University Press, 2016), page 1034.

²⁸ *Situation in Uganda*, Decision on Prosecutor's Application for leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20-US-Exp, para. 30. See also *Prosecutor v. Lubanga*, Decision on the Defence request for leave to appeal regarding the transmission of applications for victim participation, 6 November 2006, ICC-01/04-01/06-672-tEN, page 7.

31. [REDACTED].
32. [REDACTED]. In conformity with the Dutch government's directions regarding the measures to fight the COVID-19 pandemic, the Court has understandably closed its headquarters and banned any visitors from entering its premises to minimise the risk of contamination.
33. Despite the unprecedented circumstances in which the whole world lives in, a potential deviation from Article 67(1) of the Statute and Regulation 20 of the Regulations finds no justification in the Court's Statutory framework. To the extent that there is a residual power to derogate from the norm of a public hearing, it is found in Articles 64(7), 68(2), 69(2) and (5) and 72(7) ICC Statute, which mainly refer to the protection of witnesses, victims or the accused through *in camera* proceedings. Nevertheless, the publicity of the proceedings remains the general principle, as derived from Articles 67(1) and 64(7) ICC Statute, whereas the protective measures in favour of witnesses and victims "shall be considered to be an exception to this principle".²⁹ Given that none of the exceptional circumstance described in the aforementioned provisions is present in the case at hand, there is no justification for excluding the publicity of the hearing, which will be inevitable if that is held virtually.
34. The importance of public hearings is evident by the fact that it extends beyond the courtroom and the audience attending the hearing in the courtroom gallery. Regulation 21 of the Regulations provides for the broadcasting of the hearing, with a 30-minute delay in order to protect sensitive information. Pursuant to regulation 21(3), (4) and (5) of the Regulations, witnesses and participants may object to the broadcasting of the hearing and the Chamber will rule on that objection. However,

²⁹ *Prosecutor v. Ruto and Sang*, ICC T. Ch. V(A), Decision on the Conduct of Trial Proceedings (General Directions), 9 August 2013, ICC-01/09-01/11-847, para. 30; *Prosecutor v. Katanga and Ngudjolo Chui*, Order on protective measures for certain witnesses called by the Prosecutor and the Chamber (Rules 87 and 88 of the Rules of Procedure and Evidence), 9 December 2009, ICC-01/04-01/07-1667-Red-tENG, para. 9.

such objections have never been voiced in the present case, therefore the prohibition of the hearing's broadcasting is unfounded. Although broadcasting would be technically possible for the 27-29 May 2020 virtual hearing, smooth and uninterrupted communication cannot be guaranteed. The amount of people working remotely for the past month has burdened the Court's IT systems and has showcased a plethora of technical issues which have already slowed down the teams' performance. Holding an oral hearing virtually, without having the time to establish protocols that will not only allow the participation and communication of the parties and participants, but also the participation of the public, will inevitably lower the quality of the proceedings, making them inefficient and time-consuming.

35. In light of the importance of public hearings and the absence of any circumstances justifying exceptions to Article 67(1), the Defence respectfully submits that a virtual hearing should not take place on 27-29 May 2020.

36. RELIEF SOUGHT

37. The Defence thereby respectfully requests the Appeals Chamber to:

- a. **CANCEL** the 27-29 May 2020 virtual hearing;
- b. **SCHEDULE** an oral hearing at a date on which the Court, the Parties and the participants may all be physically present.

Respectfully submitted,

A rectangular box containing a handwritten signature in black ink. The signature is written in a cursive style and appears to read 'Mr. Knops'. There are some horizontal lines above and below the signature, possibly indicating the start and end of the signature.

Mr Knops, Lead Counsel and Mr N'Dry, Co-Counsel

Dated this 6 May 2020

At The Hague, the Netherlands