

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **8 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

Public

Prosecution's response to "Blé Goudé Defence Urgent Request for Postponement pursuant to Article 67 of the Statute"

Source: Office of the Prosecutor

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

Ms Fatou Bensouda, Prosecutor
 Mr James Stewart
 Ms Helen Brady

Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit
 Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
 Mr Claver N'dry

Legal Representatives of Victims

Ms Paolina Massidda

Legal Representatives of Applicants**Unrepresented Victims****Unrepresented Applicants for
Participation/Reparation****The Office of Public Counsel for Victims****The Office of Public Counsel for the
Defence****States Representatives****Amicus Curiae****REGISTRY****Registrar**

Mr Peter Lewis

Defence Support Section**Victims and Witnesses Unit****Detention Section**

Mr Paddy Craig

**Victims Participation and Reparations
Section Other**

Procedural background and 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 2020.³

2. On 17 April 2020, the Prosecution requested the Appeals Chamber to postpone or cancel the appeal hearing and to instead consider alternative means to conduct the remainder of the appeals proceedings in this case in a fair and expeditious manner. The Prosecution proposed 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. The Prosecution submitted that these steps were necessary due to the risks raised by a three-day appeal hearing in the Court in the midst of the COVID-19 pandemic in the Netherlands for the safety, health and welfare of persons who participate in that hearing.⁴ The Legal Representative of Victims (LRV)⁵ and both Mr Gbagbo⁶ and Mr Blé Goudé⁷ supported the Prosecution's request to postpone the hearing.

3. On 30 April 2020, the Appeals Chamber rescheduled the hearing to take place at a time between 27 and 29 May 2020 either "virtual or otherwise", and ordered the Registry to liaise with the Parties and the LRV as to any technical parameters with respect to the format of the hearing. The Appeals Chamber

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.

⁴ ICC-02/11-01/15-1330 ("Prosecution's 17 April 2020 Submissions").

⁵ ICC-02/11-01/15-1331.

⁶ ICC-02/11-01/15-1334.

⁷ ICC-02/11-01/15-1335.

also invited the Parties and the LRV to make written submissions in response to more than 40 questions and sub-questions set out in its decision by 22 May 2020.⁸

4. On Friday 1 May 2020 the Registrar wrote to the Parties and participants asking for their technical requirements in relation to two potential options for the hearing. The first option was a hearing wherein some members of each team (Prosecution, the two Defence teams and the Legal Representative for Victims) were to be in the premises of the Court (placed in offices and conference rooms, from where they would participate in the three-day appeal hearing virtually by video-link or other virtual technology, using social distancing, restricted hours, and other means to help reduce health risks while being in the Court building), while other members of each of the teams would participate virtually from home, including from their respective countries where they are presently complying with COVID-19 restrictions. The second option was a hearing wherein the teams of all Parties and participants would participate from outside the Court premises virtually from home (whether in the Netherlands or in their respective countries in which they are presently located).
5. From 1 May 2020 until the present time, the Parties and participants have exchanged a number of emails with the Registry raising questions about the hearing and putting forward their concerns and requirements. The Prosecution, each of the two Defence teams and the LRV have also met individually with the Registry in virtual Webex meetings to gain a better

⁸ ICC-02/11-01/15-1338 (“Re-Scheduling Order”). The Appeals Chamber in essence adopted the first part of the Prosecution’s proposal in its 17 April 2020 Submissions but not the second part. Nevertheless the Prosecution still considers that if, after considering the further written answers from the Parties and participants, the Appeals Chamber has further questions, it could ask them to provide further answers and/or schedule an oral hearing at the Court at a time when this can be safely done. See also *Prosecutor v. Mladić* (MICT-13-56-A, [Second Order Scheduling the Hearing of the Appeals](#), 1 May 2020, p.2), wherein the Residual Mechanism for the International Criminal Tribunal has recently re-scheduled the appeal hearing to dates in mid-June 2020 but that this is “subject to change should the coronavirus pandemic related restrictions inhibit the necessary travel or the holding of the hearing for other reasons.”

understanding of the options, stating their outstanding concerns and questions on the options presented, and identifying their requirements.

6. On 6 May 2020, Mr Blé Goudé filed an urgent request raising a number of issues about the options proposed and their impact on his fair trial rights. In particular he asked for the postponement of the re-scheduled hearing “until such time where Mr Blé Goudé and co-counsel Mr Claver N’Dry can both be physically present at the hearing” to fully protect Blé Goudé rights to a fair trial under article 67(1) of the Statute.⁹
7. The Prosecutor has conveyed her concerns to the Registry that in light of the COVID-19 pandemic in the Netherlands, and that the Court building in general remains closed for staff, that conducting a hearing at the premises of the Court at the scheduled time—in the manner outlined in the first option and as described by the Registry —poses risks to the safety, health and welfare of her staff.¹⁰ This concern stems from her independent duty to ensure their safety, health and welfare (including physical and mental health)
8. However, following the Appeals Chamber’s order, the Prosecution has engaged in a constructive dialogue with the Registry to explore how best to conduct the scheduled hearing virtually along the lines of the second option, taking into account operational and technical requirements.
9. In particular, whatever modalities are adopted for such a virtual hearing, it should be conducted in a way that fully protects the integrity of the appeals proceedings, the rights of Mr Gbagbo and Mr Blé Goudé, and those of the Prosecution and the LRV. From the exchanges that have taken place so far, it is clear that there remain a number of outstanding logistical uncertainties that

⁹ ICC-02/11-01/15-1340-Red (“Re-Scheduling Request”).

¹⁰ Footnote our previous filing,

must be resolved to ensure that the scheduled hearing complies with these requirements.

10. It appears to the Prosecution that it will be challenging to resolve all these outstanding matters in the 2 ½ weeks which are left before the hearing is scheduled to take place. This is also because the Court has not previously held or even tested such virtual hearings, and the discussions to address these challenges between the Registry and the Parties and the LRV have only commenced recently. All Parties and participants, in particular Mr Gbagbo and Mr Ble Goude, have raised a number of operational and technical issues. In addition, these discussions and preparations for a virtual hearing coincide with the Parties' and the LRV's preparation of written responses to more than 40 questions and sub-questions recently asked by the Appeals Chamber. The challenges in attending to all these matters are compounded by the conditions in which the Parties and participants are presently working remotely, away from their offices, and without normal access to materials and normal communication methods.
11. All that said, the Prosecution remains committed to assist in trying to resolve the challenges presented by the holding of a virtual hearing in this appeal, in collaboration with the Registry and the other Parties and participants.

Submissions

12. For the reasons set out in its 17 April 2020 Submissions, and which need not be repeated, the Prosecutor, who has an independent duty of care vis-à-vis her staff, remains concerned that, that conducting an oral hearing at the Court premises in late May 2020, poses risks to the safety, health and welfare (including physical and mental) to those counsel taking part at the hearing, whether in a regular "in-Court hearing" or by placing counsel and other staff throughout offices and conference rooms in the Court premises (in the terms

described by the Registry under the first option). She is also concerned to protect her Office and the Court from potential legal liability that could arise in case her staff members were to fall ill while carrying out their official functions.

13. Because it is uncertain how long the COVID-19 pandemic in the Netherlands will require restrictions on physical meetings, the Prosecution is not in principle opposed to holding a virtual hearing in this appeal. Consistent with the Appeals Chamber's directions,¹¹ the Prosecution has engaged in a constructive dialogue with the Registry in the past week to explore the modalities in which such a virtual hearing may be conducted. During a Webex virtual meeting held on 4 May 2020, the Prosecution informed the Registry that, subject to operational and technical requirements being satisfied, it would be able to participate in the scheduled appeals hearing virtually, meaning that Prosecution counsel would participate remotely from their homes through the software and other technical means indicated by the Registry.
14. However, any virtual hearing must be tailored to fully protect the integrity of the pending appeals proceedings, the rights of Mr Gbagbo and Mr Blé Goudé to fair proceeding under article 67(1) of the Statute, and the rights of the Prosecution and the Legal Representative for Victims. This is not only required by the Court's legal framework, but it is consistent with how domestic jurisdictions have adapted to the global COVID-19 pandemic. For instance, in the United Kingdom, to hold video or audio hearings for criminal proceedings, the court must be satisfied that "it is in the interests of justice" for persons concerned to take part in proceedings through live audio/video links and must consider *inter alia* that suitable facilities for receiving evidence through live links are available, whether participants would be able to take

¹¹ Re-Scheduling Order, para. 5.

part effectively in those proceedings and the views of those participants.¹² Similarly, in New South Wales (Australia), the court’s directions to parties, accused, or witnesses to appear by audio-visual link must be “in the interests of justice”.¹³ Parties must be heard before making the order.¹⁴ Moreover, the judge must be satisfied that a party is able to communicate confidentially with counsel.¹⁵

15. It must be borne in mind that holding virtual hearings brings with it a range of technical challenges, which do not otherwise manifest during in-court hearings in principle. Litigants, parties and judges in several domestic jurisdictions have reported difficulties when they have participated in virtual hearings.¹⁶
16. Notwithstanding the challenges presented, the Prosecution remains committed to working constructively with the Registry to ensure how best to conduct a virtual hearing in this case, so long as fundamental requirements are satisfied. As it has informed the Registry, for the Prosecution, this requires at the very least, that the Parties and the LRV have access to real-time transcripts to the extent possible; a secure and easily accessible communications or

¹² UK, [Criminal Justice Act 2003](#), section 51 (as amended by the *Coronavirus Act 2020*), accessed on 20 April 2020.

¹³ New South Wales, [Evidence \(Audio and Audio Visual Links\) Act 1998](#), section 22C(6).

¹⁴ New South Wales, [Evidence \(Audio and Audio Visual Links\) Act 1998](#), section 22C(5).

¹⁵ New South Wales, [Evidence \(Audio and Audio Visual Links\) Act 1998](#), section 22C(7).

¹⁶ In **Australia**, video hearings have experienced issues with internet speed and connectivity, and limited capacity to provide a timely and reliable transcript (Letter from the Chief Justice of the Federal Court of Australia to Presidents of the Court, re: [Federal Court of Australia – Coronavirus \(COVID-19\) – Update 10](#), 25 March 2020, accessed 15 April 2020). The **New South Wales Supreme Court** was compelled to adjourn hearings in a high profile criminal trial until 31 August 2020, after several attempts at holding video hearings were unsuccessful due to technological and other reasons that affected the integrity of the proceedings (Supreme Court of New South Wales, [R v. Macdonald, E. Obeid, M. Obeid](#) [2020] NSWSC 382, para. 29, see also paras. 1-27). In **India**, counsel have reported that in the virtual hearings they were not able to convey “even 5%” of what could have been argued in an open courtroom in normal circumstances. Parties could not hear or see judges and other participants clearly during the remote hearing. They were not able to answer the judge’s questions properly (as the judge asking the question was not visible to the parties). This affected the quality of the hearing, and in counsel’s views, resulted in adverse orders. Moreover, technical arrangements were poor (counsel did not receive links to the hearing, and needed to go to the court premises so they could be heard). There have also been issues with connectivity and confidentiality (See e.g., Debayan Roy, [“Doors of justice being closed for the poor, questions on confidentiality: Lawyers on the Supreme Court’s video conferencing hearings”](#), accessed on 7 May 2020).

messaging system among counsel during the hearing; real time “live feed” for other Prosecution staff who will not be counsel in the hearing but who nevertheless will need to follow the proceedings; and the participants being provided with the necessary additional computer hardware (where needed) and downloadable software to conduct these virtual proceedings (plus technical assistance on that front to ensure proper installation and an adequate computer framework). An adequate testing and familiarisation procedure in sufficient time before the hearing will also be essential.

17. In their separate virtual Webex meetings with the Registry, the defence teams of Mr Gbagbo and Mr Blé Goudé, as well as the LRV, have communicated their operational and technical needs to enable them to effectively participate in the appeals proceedings. Even if not all persons involved in the proceedings participate in the virtual hearing an identical way, it is important that no Party or the LRV is disadvantaged through the modalities by which they participate, so as to preserve equality of arms amongst the parties and participants.
18. Mr Blé Goudé objects to holding a virtual hearing in any form at this time, whether by way of the first option or the second option, both of which he considers to amount to a virtual hearing, and both of which will inevitably require his team to be split amongst locations and countries. He requests that the re-scheduled hearing be postponed “until such time where Mr Blé Goudé and co-counsel Mr Claver N’Dry can both be physically present at the hearing” to fully protect Mr Blé Goudé rights to a fair trial under article 67(1) of the Statute.¹⁷ According to Mr Blé Goudé, this is necessary to protect his rights to be present during the hearing;¹⁸ to communicate freely with counsel

¹⁷ Re-Scheduling Request, para. 3.

¹⁸ Re-Scheduling Request, paras. 12-23.

and to have the proper facilities to conduct his defence;¹⁹ and his right to a public hearing.²⁰

19. The Prosecution considers that holding a virtual hearing is not in principle incompatible with ensuring that these rights, insofar as they are applicable during appeals proceedings,²¹ are complied with. Ultimately, 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. However, considering the short amount of time available before the scheduled hearing (27-29 May 2020), the Prosecution is concerned as to whether, even with the best efforts of the Registry and the Parties and participants alike, it will be feasible to do so.

(a) Right to be present during the appeals hearing

20. Mr Blé Goudé submits that he has a right under article 67(1)(d) to be present during any appeal hearing,²² and invokes article 63(1),²³ rule 134*bis*,²⁴ and Court jurisprudence on these two provisions.²⁵
21. The Prosecution observes that appeals proceedings are not governed by article 63(1) and rule 134*bis*. Article 63(1) sets out the general requirement that “[t]he accused shall be present during the trial,” and rules 134*bis* to 134*quater* define the exceptions to this rule. There is no equivalent provision in the Statute requiring the mandatory presence of the accused during appeals proceedings. To the contrary, article 83(5) states that “[t]he Appeals Chamber may deliver its judgment in the absence of the person acquitted or convicted”.

¹⁹ Re-Scheduling Request, paras. 24-29.

²⁰ Re-Scheduling Request, paras. 30-35.

²¹ The Appeals Chamber has had specific regard to, and emphasises the importance of, the rights of the accused to a fair trial, as detailed in article 67 of the Statute, see ICC-01/04-01/07-3363 OA13 para. 86).

²² Re-Scheduling Request, paras. 12, 15.

²³ Re-Scheduling Request, paras. 12, 15, 19.

²⁴ Re-Scheduling Request, paras. 21-22.

²⁵ Re-Scheduling Request, para. 20.

Accordingly, Mr Blé Goudé's references to article 63(1) and rule 134*bis* and the related Court jurisprudence²⁶ are not quite on point. However, if an acquitted or convicted persons wishes to be present during an appeals hearing, he or she has a right to do so under article 67(1)(d).²⁷

22. But in the Prosecution's view, the right to be present would not be restricted to *physical* presence but could include other means whereby the persons concerned could effectively and meaningfully participate in the hearing and communicate (in private) with counsel while proceedings are ongoing.²⁸ A hearing whereby Mr Blé Goudé would be connected with the Judges of the Appeals Chamber, his defence counsel and the other Parties and participants in the hearing through video-link or other virtual technology would not in principle violate his right to be present during the hearing pursuant to article 67(1)(d).
23. However, to fully protect Mr Blé Goudé's right to be present, the Court must ensure that the video-link and/or other virtual technology will allow him to effectively participate in the proceedings.²⁹ This not only requires that Mr Blé Goudé will be able to hear and follow the proceedings,³⁰ but that he is able to intervene in the proceedings and compile notes and communicate with defence counsel.³¹ It will be up to the Court to ensure that the practical

²⁶ Re-Scheduling Request, para. 20.

²⁷ See e.g. *Prosecutor v. Seselj*, MICT -16-99-A, [Judgment](#), 11 April 2018, para. 6: The Appeals Chamber of the Residual Mechanism for the International Criminal Tribunal recognized Seselj's right to self-representation and to be present at the appeal hearing, but specified that he could waive his right to appear so long as his interests were represented by counsel.

²⁸ See e.g. *Prosecutor v. Seselj*, MICT -16-99-A, [Order in Relation to the Appeal Hearing](#), 18 September 2017: "CONSIDERING that, if Seselj is unable to travel to The Hague for the hearing, he may request, pursuant to Rule 96 of the Rules, to participate therein by way of video-conference link". See also *Prosecutor v. Stanasic and Simatovic*, IT-03-69-AR73.2, [Decision on the Course of Proceedings](#), 16 May 2008, para. 19, where the Appeals Chamber held that participation of the accused in the proceedings through video-link may be appropriate, where no other alternative is available.

²⁹ ECtHR *Murtazaliyeva v. Russia* [GC], § 91.

³⁰ ECtHR *Stanford v. the United Kingdom*, § 26.

³¹ ECtHR *Pullicino v. Malta* (dec.); ECtHR *Moiseyev v. Russia*, § 214.

arrangements are in place for the upcoming scheduled virtual appeals hearing to comply with these requirements.

(b) Rights to communicate freely with counsel of his choice and to have proper facilities to conduct his defence

24. Mr Blé Goudé also submits that to protect his rights to communicate freely with counsel of his choosing and to have proper facilities to conduct his defence, his co-counsel Mr N'Dry must be able to participate in the hearing.³² Mr N'Dry is currently in Côte d'Ivoire and due to the restrictions imposed by the COVID-19 pandemic, cannot travel to The Hague.³³
25. The right to communicate freely with counsel and the right to have proper facilities to conduct a defence are also not, in principle, incompatible with a virtual hearing. Again, it will be up to the Court to ensure that the precise measures put in place to facilitate the virtual hearing will enable Mr Blé Goudé to "instruct counsel",³⁴ and to confer "freely" and "in confidence" with him.³⁵ It may well be that such communication is only possible during breaks of the hearing,³⁶ but that does not mean that Mr Blé Goudé's rights are violated. Also, the Court must ensure that the communication takes place through secure technology that guarantees the privileged and confidential nature of Mr Blé Goudé's communication with his counsel.³⁷ Finally, so long as Mr Blé Goudé can be enabled to communicate freely and in confidence with his co-counsel Mr N'Dry through technological means, this would not appear to raise an issue of equality of arms between the defence and the Prosecution.³⁸ Prosecution counsel will face the same challenges as Mr Blé Goudé in

³² Re-Scheduling Request, paras. 24-29.

³³ Re-Scheduling Request, para. 26.

³⁴ ICC-02/11-01/11-286-Red, para. 50.

³⁵ See article 67(1)(b).

³⁶ Re-Scheduling Request, para. 27.

³⁷ Re-Scheduling Request, para. 27.

³⁸ *Contra*, Re-Scheduling Request, para. 28.

communicating with each other as they too will be connected through technological means.

(c) Right to a public hearing

26. According to Mr Blé Goudé, a virtual hearing cannot guarantee the publicity of the hearing, thereby violating his right to a public hearing.³⁹ This is an important right to be upheld; however holding a virtual hearing is not, in principle, incompatible with this right, so long as modalities are in place to ensure it. Even if the hearing is not held in a Courtroom where the public can follow proceedings from the public gallery, as long as the publicity of the hearing can nonetheless be guaranteed in other ways, -in particular by publicly broadcasting the hearing, either live or with a short delay -, this would be compatible with the Court's legal framework. Mr Blé Goudé's references to articles 64(7), 68(2), 69(2) and (5) and 72(7) are inapposite.⁴⁰ These provisions deal with exceptions to the publicity of the proceedings. However, a hearing conducted through video-link technology, and broadcast appropriately, can fulfil the requirement for publicity.


Conclusion

27. The Prosecution is committed to continuing its discussions with the Registry with a view to seeing how best to resolve the outstanding logistical challenges surrounding the holding of the virtual appeal hearing as scheduled from 27-29 May 2020, in a manner that preserves the integrity of the appeal proceedings, and fully protects the rights of Mr Gbagbo and Mr Blé Goudé, and those of the Prosecution and the Legal Representative for Victims.
28. However, in view of the numerous operational and technical challenges still outstanding 2 ½ weeks before the scheduled hearing, and considering the

³⁹ Re-Scheduling Request, paras. 30-35.

⁴⁰ Re-Scheduling Request, paras. 33.

fundamental nature of the rights at issue, the Prosecution has serious concerns as to the feasibility of holding a meaningful and efficient hearing on the scheduled dates and agrees that at this stage, postponement by the Chamber may be the best option until matters are satisfactorily and properly resolved.



Fatou Bensouda, Prosecutor

Dated this 8th day of May 2020

At The Hague, The Netherlands