

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 9 May 2020

THE APPEALS CHAMBER

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

SITUATION IN CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ

Confidential

CLR V Response to the "Confidential Blé Goudé Defence Urgent Request for Postponement pursuant to Article 67 of the Statute"

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Common Legal Representative acknowledges the difficulties that may arise in holding a remote virtual hearing and the fact that the hearing scheduled before the Appeals Chamber between 27 and 29 May 2020 will be the first one to be held remotely. However, she opposes the arguments put forward by the Defence according to which the arrangements currently proposed by the Registry for the hearing would violate Mr Blé Goudé's "*fundamental right to be present*".

2. Said right is not absolute, does not foresee the physical presence of the defendant in all circumstances, and in any case the proposed arrangements adequately cater for the "presence" of the defendant at the hearing and preserve his rights to privileged communication with his lawyers. Therefore, if the Registry can ensure that the proposed arrangements – after proper testing - are feasible, the rights of the defendant will be granted, as well as the fairness and integrity of the proceedings.

3. The proposed arrangements also guarantee the holding of the proceedings in public and the possibility for the public to follow them.

4. Finally, the Common Legal Representative recalls that Victims expect the appellate proceedings to proceed expeditiously and stress that the administration of justice cannot come to a total standstill whatsoever the circumstances, particularly in instances, such the current one, in which there is uncertainty on when proceedings could resume as before the COVID-19 pandemic.

II. PROCEDURAL BACKGROUND

5. On 20 March 2020, the Appeals Chamber issued an Order scheduling, *inter alia*, a hearing between 11 and 13 May 2020 to receive submissions in the present appeal.¹

6. On 17 April 2020, the Prosecution filed an application to postpone or cancel the scheduled hearing in light of the current situation linked to the COVID-19 pandemic in The Netherlands and its impact, *inter alia*, on the possibility to properly prepare for the hearing.² On 20 April 2020, the Common Legal Representative of the Victims authorised to participate in the appeal (the "CLR")³ filed her response.⁴ On 21 April 2020 both Defence teams filed their responses.⁵

7. On 30 April 2020, the Appeals Chamber filed the "Decision rescheduling, and directions on, the hearing before the Appeals Chamber" (the "Decision"), postponing the hearing at date(s) to be confirmed between 27 and 29 May 2020, and instructing the parties and participants to file submissions on questions identified in the Decision by 22 May 2020.⁶

¹ See the "Order scheduling a hearing before the Appeals Chamber and setting a time limit for any request for leave to reply" (Appeals Chamber), [No. ICC-02/11-01/15-1318 A](#), 20 March 2020.

² See the "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", [No. ICC-02/11-01/15-1330 A](#), dated 17 April 2020 and notified on 20 April 2020 (the "Prosecution's Application").

³ See the "Decision on victim participation" (Appeals Chamber), [No. ICC-02/11-01/15-1290 A](#), 26 November 2019.

⁴ See the "CLR Response to the "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", [No. ICC-02/11-01/15-1331 A](#), 20 April 2020.

⁵ See the "Réponse de la Défense à la « 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 (ICC-02/11-01/15-1330)" [No. ICC-02/11-01/15-1334 A](#), 21 April 2020; and the "Blé Goudé Defence Response to the "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" (ICC-02/11-01/15-1330)", [No. ICC-02/11-01/15-1335 A](#), 21 April 2020.

⁶ See the "Decision rescheduling, and directions on, the hearing before the Appeals Chamber" (Appeals Chamber), [No. ICC-02/11-01/15-1338 A](#), 30 April 2020.

8. On 6 May 2020, the Defence for Mr Blé Goudé filed an Urgent Request for Postponement pursuant to Article 67 of the Statute (the "Defence Request").⁷ On 8 May 2020, the Prosecution filed its response to the Defence Request.⁸

9. The CLRV files hereby her response to the Defence Request.

III. CONFIDENTIALITY

10. In accordance with regulation 23bis(2) of the Regulations of the Court, the present submission is filed confidential following the classification chosen by the Defence. However, the CLRV indicates that it does not contain confidential information and can be reclassified as public.

IV. SUBMISSIONS

11. The Common Legal Representative opposes the Defence's arguments according to which the arrangements currently proposed by the Registry for the hearing to be held between 27 and 29 May 2020 would violate Mr Blé Goudé's "*fundamental right to be present at the hearing and to have his co-counsel physical presence for the purpose of the hearing*".⁹

12. As far as the argument related to the requirement that the defendant has to be physically present is concerned, the CLRV recalls that the Appeals Chamber has already found that article 63(1) of the Statute does not operate as an absolute bar in

⁷ See the "Confidential Blé Goudé Defence Urgent Request for Postponement pursuant to Article 67 of the Statute", [No. ICC-02/11-01/15-1340-Conf A + Conf-Anxl](#), 6 May 2020. A public redacted version was files simultaneously. See [No. ICC-02/11-01/15-1340 Red A](#). A (the "Defence Request").

⁸ See the "Prosecution's response to "Blé Goudé Defence Urgent Request for Postponement pursuant to Article 67 of the Statute", [No. ICC-02/11-01/15-1341](#), 8 May 2020.

⁹ *Idem*, para. 2 *in fine*.

all circumstances to the continuation of the proceedings in the absence of the defendant.¹⁰

13. In particular, the Chamber held that “[it] is not persuaded by the Prosecutor’s argument that a literal, contextual and teleological interpretation of article 63 of the Statute shows that the removal of a disruptive accused is the only exception to the requirement that the accused shall be present during the trial. In view of the rationale for article 63 of the Statute as elaborated upon further below, and given the complex nature of trials of international crimes, the interpretation of article 63 (1) of the Statute advanced by the Prosecutor would prove to be unduly rigid. During the course of prolonged criminal proceedings, unforeseen circumstances may arise, necessitating the absence of the accused person on a temporary basis.”¹¹

14. Therefore, the CLRV considers that the interests of justice “would not be best served”¹² if the proceedings had to be automatically adjourned in all instances in which the physical presence of the defendant in courtroom cannot be secured. Indeed, “[a] measure of flexibility in the management of proceedings [...] accords with the duty of the Trial Chamber to ensure that a trial is “fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses” under article 64 (2) of the Statute and helps to ensure [...] “justice in each individual case”.¹³

15. The practice of the *ad hoc* tribunals also shows that the defendant’s right to be tried in his or her presence (in courtroom) is “not absolute” and that a derogation from said right is possible where it is reasonable under certain circumstances, including trial disruptions that are unintentional in nature on part of the defendant.¹⁴

¹⁰ See the “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’” (Appeals Chamber), [No. ICC-01/09-01/11-1066 OA5](#), 25 October 2013, para. 50.

¹¹ *Ibid.* (emphasis added).

¹² *Ibid.* (emphasis added).

¹³ *Ibid.*

In particular, derogation is possible “*when appropriate reasonable alternatives exist*”.¹⁵ In the *Stanisic and Simatovic* case, the ICTY Appeals Chamber found that a video-conference link was a reasonable alternative allowing the defendant to “*fully exercise his right to be present at trial*”.¹⁶

16. Therefore, the CLRV posits 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 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.

17. In this regard, the CLRV - having been consulted by the Registry in relation to the technical parameters for the foreseen hearing - understands that the arrangements guarantee 1) the possibility to take effectively part in the hearing from the ICC building, or from home (hear and see the proceedings; intervene); 2) the possibility to establish a confidential connection between lawyer and client and therefore to ensure full privileged communication and full communication between team members; 3) the possibility to access live transcripts and CITRIX; 4) the possibility to have interpretation in the language fully understood by the defendant; 5) the possibility to show evidence/material during the hearing; 6) technical assistance from the Registry in installing the necessary software and/or equipment necessary. The CLRV also understands – and this is also one of her requests – that Counsel from Abidjan will be able to fully follow the proceedings and that a secure confidential line of communication can be established by separate means than the one used for the hearing to grant full and confidential communication between

¹⁴ See ICTY, *Prosecutor v. Jovica Stanisic and Franko Simatovic*, Case No. IT-03-69-AR73.2, “[Public Decision on Defence Appeal of the Decision on Future Course of Proceedings](#)” (Appeals Chamber), 16 May 2008, paras. 6 and 15.

¹⁵ *Idem*, para. 19.

¹⁶ *Ibid.*, (emphasis added).

counsel throughout the hearing. This option seems therefore also possible between counsel and client.¹⁷

18. The CLRV also foresees that certain flexibility will be allowed by the Chamber considering the specific circumstances (*i.e.* additional breaks for consultation between team members or between counsel and client).

19. In relation to proceedings held remotely, the European Court of Human Rights (the "ECtHR") has held that it must be ensured that the defendant is able to follow the proceedings and to be heard without technical impediments and that effective and confidential communication with a lawyer is provided for.¹⁸ The CLRV submits that all these requirements seem fulfilled in the arrangements proposed by the Registry.

20. Moreover, the CLRV notes that the ECtHR has held that the appearance of a defendant does not have the same crucial significance for an appeal hearing as it does for the trial. In particular, it held that proceedings involving questions of law – as the current one – may comply with the requirements of article 6 of the Convention *even though* the defendant was not given an opportunity of being heard in person by the appeal or cassation court, provided that there has been a public hearing at first instance.¹⁹ A hypothesis which will not rise in the current proceedings.

¹⁷ The Field Counsel in the CLRV's team who was supposed to be present in The Hague for the appellate hearing is in Abidjan where restrictions due to COVID-19 pandemic are in place. He will therefore be unable to travel to The Netherlands. The CLRV has indicated to the Registry that it is for her essential that the Field Counsel is able to fully participate in the hearing and to have a secure/confidential connection between counsel throughout the entire hearing. The Registry has indicated in this regard that apart from the software which will be used for the hearing, another separate line of communication is also possible (*i.e.* use of WebEx).

¹⁸ Incidentally, the CLRV notes that the ECtHR jurisprudence quoted by the Defence is not on the point and refers instead to *e.g.*, ECtHR, *Marcello Viola v. Italy*, Application no. 45106/04, [Judgment](#), 5 October 2006, paras. 50- 53 (referring to other relevant jurisprudence), 67. See also, ECtHR, *Golubev v. Russia*, [Decision as to the Admissibility of Application no. 26260/02](#), 9 November 2006, pp. 7-8.

¹⁹ See *e.g.*, ECtHR, *Marcello Viola v. Italy*, Application no. 45106/04, [Judgment](#), 5 October 2006, paras. 54-55 and 67, *Bivolaru v. Romania*, Application no. 66580/12, [Judgement](#), 2 October 2018, para. 138; and *Sakhnovski v. Russia*, Application no. 21272/03, [Judgment](#), 2 November 2010, para. 98.

21. In relation to the publicity of the hearing, the CLRV indicates that it is as well in the interests of the Victims she represents that appellate proceedings are held in public. On this issue again, the CLRV - having been consulted by the Registry in relation to the technical parameters for the foreseen hearing - has been assured that it is possible that the proceedings are fully transmitted, therefore granting their direct (or with 30-minutes delay) accessibility to the public.

22. In this regard, the CLRV notes that the ECtHR has held on several occasions that, as regards the use of video-link, this form of participation in the proceedings is not, as such, incompatible with the notion of a fair and public hearing.²⁰

23. Consequently, the CLRV posits that, if the Registry can ensure that the proposed arrangements are feasible – after proper testing –, it could be concluded that said arrangements take fully into account the rights of the defendants (and of all participants involved), as well as the fairness and integrity of the proceedings.

24. Finally, the CLRV reiterates that Victims consider that appellate proceedings should proceed expeditiously and that it is in the interests of all parties and participants that the matter is adjudicated without undue delay. The current proposed arrangements for the hearing seem to take duly into account the rights of all parties and participants, as well as the need for continuing the proceedings as expeditiously as possible taking into account the current exceptional circumstances. Indeed, the administration of justice cannot come to a total standstill whatsoever the circumstances, particularly in instances, such as the current one, in which there is uncertainty on when proceedings could resume as before the COVID-19 pandemic.

²⁰ See, ECtHR, *Marcello Viola v. Italy*, Application no. 45106/04, [Judgment](#), 5 October 2006, para. 56; and ECtHR, *Golubev v. Russia*, [Decision as to the Admissibility of Application no. 26260/02](#), 9 November 2006, para. 98.

Respectfully submitted.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 9th day of May 2020

At The Hague, The Netherlands