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

Date: **18 June 2020**

THE PRESIDENCY

Before:

**Judge Robert Fremr, First Vice-President
Judge Marc Perrin de Brichambaut, Second Vice-President
Judge Antoine Kesia-Mbe Mindua**

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public with two public annexes

Decision on the 'Demande de clarification de la Défense concernant la marche à suivre pour engager une procédure en déni de justice du fait du silence opposé pendant huit mois à la requête de Laurent Gbagbo datée du 7 octobre 2019 visant à ce qu'il recouvre l'intégralité de ses droits' dated 28 May 2020 (ICC-02/11-01/15-1354-Red)

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 the Defence for Mr Laurent Gbagbo
 Mr Emmanuel Altit
 Ms Agathe Bahi Baroan
 Ms Jennifer Naouri

Counsel for the Defence for Mr Charles Blé Goudé
 Mr Geert-Jan Alexander Knoops
 Ms Claver N'Dry

Legal Representatives of the Victims
 Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
 (Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
 Defence**

States' Representatives

REGISTRY

Registrar
 Mr Peter Lewis

Detention Section

Victims and Witness Unit

Other
 Appeals Chamber

**Victims Participation and Reparations
 Section**

The Presidency of the International Criminal Court ('Court') has before it the request filed by Mr Gbagbo on 28 May 2020 ('Request'), requesting that the Presidency provide an indication to the defence for Mr Gbagbo of the procedure to follow to initiate a claim of denial of justice based on the inactivity of the Appeals Chamber on the request of the defence for Mr Gbagbo of 7 October 2019.¹

I. RELEVANT PROCEDURAL HISTORY

1. On 15 January 2019, Trial Chamber I acquitted Mr Gbagbo and Mr Blé Goudé of all charges by way of an oral decision.² On the same day, the Prosecution filed a request seeking a finding that there were exceptional circumstances to continue detention pending appeal, pursuant to article 81(3)(c)(i) of the Rome Statute ('Statute'), and to impose conditions on release.³
2. On 16 January 2019, Trial Chamber I issued its oral decision rejecting the Prosecution's abovementioned request.⁴ On the same day, this decision was appealed by the Prosecution, pursuant to article 81(3)(c)(ii) of the Statute.⁵
3. On 1 February 2019, the Appeals Chamber rendered its judgment amending Trial Chamber I's oral decision of 16 January 2019 by imposing a number of conditions on the release of Mr Gbagbo and Mr Blé Goudé.⁶
4. On 7 October 2019, the defence for Mr Gbagbo filed a motion before the Appeals Chamber, requesting the reconsideration of the Judgement of 1 February 2019 and the immediate release of Mr Gbagbo without conditions.⁷ On 6 February 2020, oral

¹ Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Version publique expurgée de la « Demande de clarification de la Défense concernant la marche à suivre pour engager une procédure en déni de justice du fait du silence opposé pendant huit mois à la requête de Laurent Gbagbo datée du 7 octobre 2019 visant à ce qu'il recouvre l'intégralité de ses droits » ('Request'), 28 May 2020, ICC-02/11-01/15-1354-Red.

² Transcript of 15 January 2019, ICC-02/11-01/15-T-232-ENG, p. 1, line 15, to p. 5, line 7.

³ Office of the Prosecutor, Urgent Prosecution's request pursuant to article 81(3)(c)(i) of the Statute, ICC-02/11-01/15-1235, 15 January 2019.

⁴ Transcript of 16 January 2019, ICC-02/11-01/15-T-234-ENG, p. 1, line 14 to p. 6, line 21.

⁵ Office of the Prosecutor, Prosecution's Appeal pursuant to article 81(3)(c)(ii) of the Statute and urgent request for suspensive effect, 16 January 2019, ICC-02/11-01/15-1236.

⁶ Appeals Chamber, Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, 1 February 2019, ICC-02/11-01/15-1251-Red2 (the second public redacted version was filed on 21 February 2020). *See*, in particular, para. 60. This decision was varied by the Appeals Chamber: Decision varying a condition in the 'Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute', 28 February 2019, ICC-02/11-01/15-1254-Red.

⁷ Defence for Mr Gbagbo, Version publique expurgée de la « Requête de la Défense afin d'obtenir que la Chambre d'appel restitue à Laurent Gbagbo, acquitté de toutes les charges portées contre lui, l'intégralité de ses droits humains fondamentaux », 8 October 2019, ICC-02/11-01/15-1272-Red.

hearings were held before the Appeals Chamber,⁸ subsequent to which the defence for Mr Gbagbo, on 2 April 2020, submitted a request to the Appeals Chamber to render its decision on his request of 7 October 2019 as soon as practicable.⁹

5. On 28 May 2020, the defence for Mr Gbagbo filed the present Request before the Presidency, seeking clarification of the procedure for initiating proceedings on the denial of justice, based on the fact that the Appeals Chamber had not issued a decision on the 7 October 2019 Request.¹⁰
6. Later that same day, the Appeals Chamber issued its decision on the request of the defence for Mr Gbagbo of 7 October 2019.¹¹
7. No response to the Request was filed by any other party or participant in the proceedings.¹²
8. On 16 June 2020, Judge Eboe-Osuji submitted a request to be excused from his Presidency functions in relation to the Request, in view of a reasonable appearance of a lack of impartiality arising given his role as Presiding Judge of the Appeals Chamber in respect of the 7 October 2019 Request and his role as President in the consideration of the Request.¹³ On 17 June 2020, an *ad hoc* Presidency, formed in accordance with regulation 11(4) of the Regulations of the Court, granted this excusal request.¹⁴

II. ARGUMENTS

9. In the Request, the defence for Mr Gbagbo submits that the failure of the Appeals Chamber to issue a decision on its request of 7 October 2019, nor respond to its related request of 2 April 2020, constitutes a *de facto* denial of justice.¹⁵ Since the Statute does not provide for any clear procedure to seek such relief, the defence for

⁸ Transcript of hearing, 6 February 2020, ICC-02/11-01/15-T-237-Red-ENG.

⁹ Defence for Mr Gbagbo, Version publique expurgée de la « Requête afin que la Chambre d'appel se prononce au plus vite sur la demande de la Défense visant à ce que Laurent Gbagbo, acquitté, recouvre « l'intégralité de ses droits humains fondamentaux », déposée le 7 octobre 2019 (ICC-02/11-01/15-1272) », 2 April 2020, ICC-02/11-01/15-1322-Red.

¹⁰ Request.

¹¹ Appeals Chamber, Decision on counsel for Mr Gbagbo's request for reconsideration of the 'Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute' and on the review of the conditions on the release of Mr Gbagbo and Mr Blé Goudé, 28 May 2020, ICC-02/11-01/15-1355-Red.

¹² See regulations 24 and 34(a) of the Regulations of the Court.

¹³ Annex I.

¹⁴ Annex II.

¹⁵ Request, para. 29.

Mr Gbagbo requests the Presidency to provide guidance as to the required procedural steps in this regard.¹⁶

10. The defence for Mr Gbagbo submits that the legal basis for the Request can be found in article 38 of the Statute which recalls the Presidency's responsibility for the 'proper administration of the Court'.¹⁷ In this context, the defence for Mr Gbagbo argues that a matter of denial of justice is a question falling within this scope.¹⁸
11. In addition, the defence for Mr Gbagbo acknowledges that it could also have seized the Appeals Chamber in this regard, but it chose to address the Presidency, considering that any consideration of the matter before the Appeals Chamber must be before a differently composed Appeals Chamber in view of the evident conflict of interest on the part of those judges involved in the alleged denial of justice.¹⁹
12. The defence for Mr Gbagbo stresses the importance that the Presidency provide further guidance for initiating a procedure, averring that the lack of access to a judge on a question of such importance would constitute a denial of justice.²⁰
13. The remainder of the Request effectively addresses matters connected to the substance of the claim of the defence for Mr Gbagbo that a denial of justice has occurred. The Request submits that the continued imposition of conditions on Mr Gbagbo's release constitute an ongoing violation of his human rights and dignity,²¹ recalling also arguments made before the Appeals Chamber, as well as expressing direct or indirect concerns with a number of procedural decisions taken by that Chamber.²²

III. DETERMINATION

14. After the Request was filed before the Presidency, the Appeals Chamber rendered the decision in respect of which the Request submits that the non-rendering thereof constitutes a denial of justice. To the extent that the Request relies on the fact of the Appeals Chamber's decision being outstanding, the Request could be characterised as moot in view of this significant change of circumstance. Nonetheless, as the Request

¹⁶ Request, para. 30.

¹⁷ Pursuant to article 38(3)(a) of the Statute.

¹⁸ Request, para. 31.

¹⁹ Request, para. 32.

²⁰ Request, para. 33.

²¹ Request, paras. 34-35, 46-51, 53-54.

²² Request, paras. 36-43, 52.

has not been withdrawn and as a legal question may theoretically persist as to whether a denial of justice occurred, the Presidency will consider whether it has jurisdiction to hear the Request.

15. The Request submits that article 38(3)(a) of the Statute authorises the Presidency to grant its request for procedural guidance. Article 38(3)(a) of the Statute provides that the Presidency is responsible for the ‘proper administration of the Court, with the exception of the Office of the Prosecutor’. Article 38(3)(a) of the Statute clearly grants an *administrative* power to the Presidency. Such responsibility for the proper administration of the Court is non-judicial in nature, as is evidenced by the requirement that, in matter of mutual concern the Presidency shall coordinate with and seek concurrence of the Prosecutor, in accordance with article 38(4) of the Statute. The Presidency’s responsibility for the proper administration of the Court extends to matters involving the administration of the Court as an institution, as well as administrative aspects specific to the functioning of the judiciary including the composition of judicial chambers, the calling of judges to full-time service and the management and support of judicial resources. Article 38(3)(a) of the Statute does not confer any judicial powers on the Presidency. The Request asks the Presidency to identify a forum and procedure for raising matters concerning an alleged denial of justice. Without prejudice to any question as to whether the Statute permits the raising of such matters, questions as to the existence of and procedure to be followed for raising a legal claim which arise in connection with ongoing judicial proceedings can only be determined by a competent judicial authority. Consequently, the requested relief falls within the scope of the judicial power of the Court, not under the administrative authority of the Presidency.
16. The Presidency further finds unconvincing the Request’s implication that raising the matter before the Appeals Chamber was not practically available to the defence for Mr Gbagbo due to an evident conflict of interests.²³ The Statute, together with the Rules of Procedure and Evidence, set out clear procedures to govern situations in which the impartiality of a judge may reasonably be doubted on any ground.²⁴ If any matter is filed before any Chamber of the Court in which one or more of its Judges considers that her or his impartiality might reasonably be doubted on any ground, she or he could seek excusal, in accordance with article 41(1) of the Statute. If this does

²³ Request, para. 32.

²⁴ Article 41 of the Statute, Rules 33-35 of the Rules of Procedure and Evidence.

not occur and a party believes that an issue in respect of impartiality persists, a party may seek disqualification in accordance with article 41(2)(b) of the Statute. The perception of a party that there may be a lack of impartiality arising in respect of one or more judge does not entitle such party to seek an alternative forum to raise a judicial matter arising in the course of judicial proceedings, neither in its substantive nor procedural aspects.

THE PRESIDENCY HEREBY

DISMISSES the Request for lack of jurisdiction.

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



Judge Robert Fremr
First Vice-President

Dated this 18 June 2020

At The Hague, The Netherlands