

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No: MICT-13-56-A

Date: 19 June 2020

Original: English

IN THE APPEALS CHAMBER

Before: Judge Prisca Matimba Nyambe, Presiding
Judge Aminatta Lois Runeni N’gum
Judge Gberdao Gustave Kam
Judge Seymour Panton
Judge Elizabeth Ibanda-Nahamya

Registrar: Mr. Olufemi Elias

THE PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC with CONFIDENTIAL ANNEX

**PROSECUTION URGENT MOTION FOR SCHEDULING OF
APPEAL HEARING**

The Office of the Prosecutor:

Laurel Baig
Barbara Goy

Counsel for Ratko Mladić:

Branko Lukić
Dragan Ivetić

1. The Appeal Hearing in this case should be rescheduled for the week of 20 July 2020.¹ Remote or partly remote proceedings are feasible and consistent with fair trial rights.

2. Notwithstanding the pandemic, the Mechanism has an obligation to ensure expeditious proceedings. The Appeal Hearing cannot be postponed until the pandemic is over. Rather, it should be held promptly, while the public health situation in the Netherlands is relatively stable.

3. The Mechanism's Rules provide for sufficient flexibility to hold proceedings remotely via video-conferencing technology and/or in the absence of a Judge.² Scheduling the Appeal Hearing now for late July will allow sufficient time for the Registry to make the necessary arrangements for remote video participation for those who cannot attend in person because of travel restrictions or other COVID-19-related reasons. It would also allow the Registry sufficient time to make the courtroom as safe as possible for those who can attend in person.

A. The Appeals Chamber must ensure an expeditious completion of the appeal

4. The Appeals Chamber has an obligation to ensure expeditious completion of the appeal proceedings as enshrined in Articles 18(1) and 19(4)(c) of the Mechanism Statute. Mechanism Rule 135 explicitly requires the Pre-Appeal Judge to take measures to avoid undue delay and ensure an expeditious hearing. Even during the COVID-19 pandemic, proceedings must continue as expeditiously as possible. This is not only a fair trial right, it is also in the interests of justice, the victims and the international community.³

5. The International Criminal Court ("ICC") Appeals Chamber has acknowledged that although this pandemic constitutes *force majeure*, "it is evident that measures must be taken, in relation to [the appeals] hearing which has been scheduled, to allow these appeal proceedings to proceed expeditiously, whilst also ensuring that the applicable rights of all [...] are not unduly affected."⁴

¹ This Motion is filed as "urgent" to allow time for all necessary arrangements for a hearing in later July.

² See e.g. Rules 19, 55, 96.

³ See *Prosecutor v. Prlić et al.*, Case No.IT-04-74-T, Decision on Adoption of New Measures to Bring the Trial to an End within a Reasonable Time, 13 November 2006, para.14; *Prosecutor v. Šainović et al.*, Case No.IT-05-87-A, Judgement, 23 January 2014, para.100; *Prosecutor v. Šešelj*, Case No.MICT-16-99-A, Order in Relation to the Appeal Hearing, 18 September 2017 ("Šešelj Order"), p.2; *Prosecutor v. Norman*, Case No.SCSL-2003-08-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003, para.8.

⁴ *Prosecutor v. Gbagbo and Blé Goudé*, Decision vacating the hearing before the Appeals Chamber, Case No.ICC-02/11-01/15 A, 22 May 2020 ("Gbagbo Decision Vacating Appeal Hearing"), para.8.

B. (Partly) remote proceedings are feasible

6. The Rules explicitly allow for proceedings to be conducted remotely through video-conferencing. Under Rule 96, a Judge or a Chamber may, at the request of a Party or *proprio motu*, order proceedings be conducted by way of a video-conference link, as long as such an order is consistent with the interests of justice. The Appeals Chamber has recognised that Rule 96 allows for the remote participation by video-conference of an accused in an appeal hearing.⁵ Moreover, the Appeals Chamber has broad powers to act under Rule 55 to ensure that this case can be brought to a timely completion despite the extraordinary situation of the pandemic.

7. Participation through secure, web-based video-conferencing platforms (such as WebEx, Microsoft Teams or those used by the United Nations Security Council and other courts)⁶ is a viable option.⁷ If no solution for a video-conferencing platform can be found, a telephone conference is also an option allowing for oral submissions and judicial questioning.

8. The fact that web-based video-conferencing and telephones are already being used across the Mechanism to discuss the same confidential matters as will arise in court is strong evidence that their security is also acceptable for the Appeal Hearing itself. If any matters are deemed too sensitive for discussion during a remotely-held hearing, these could be identified in advance and submissions could be made in writing.

1. (Partly) remote proceedings are being used by courts around the world

9. Virtual proceedings, with some or all participants participating remotely, have become the “new normal” in many jurisdictions to ensure that cases can advance during the pandemic. The United Nations Rapporteur on Independence of Judges and Lawyers recently emphasised the importance of preventing the paralysis of justice systems, encouraging “creative steps” and confirming that “innovation and online working is essential”.⁸

10. The ICC has started holding hearings with remote participation. On 15 June 2020 Ali Muhammad Ali Abd-Al-Rahman made his initial appearance via video-link.⁹ From 22 to 24

⁵ Šešelj Order.

⁶ For example, the ICC Registry has selected a multi-channel video-conferencing software “Interactio” (www.interactio.io), which facilitates interpretation. See e.g. *Prosecutor v. Al Hassan*, Case No. ICC-01/12-1/18, Registry’s Observations on methods of work to minimize the impact of COVID-19 and related measures on the conduct of proceedings, 20 May 2020 (“*Al Hassan* Registry Observations”), para.13.

⁷ See Confidential Annex.

⁸ See statement of 22 April 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25816&LangID=E>.

⁹ See ICC, press release, 15 June 2020, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1528>.

June 2020, the ICC Appeals Chamber will hold a partially virtual appeal hearing in the *Gbagbo and Blé Goudé* case.¹⁰

11. Many other international courts and adjudicative bodies have also adapted to the pandemic by holding virtual court proceedings. The International Court of Justice will use video-conference technology to conduct public hearings, with some court members physically present in the courtroom and others participating remotely.¹¹ At the European Court of Human Rights hearings have continued throughout the pandemic, with oral submissions made by video-conference.¹² Virtual sessions have also been held at the Inter American Court of Human Rights¹³ and the African Court on Human and Peoples' Rights.¹⁴ The Permanent Court of Arbitration recently scheduled public hearings to be held virtually,¹⁵ and other arbitral bodies are launching protocols and guidance materials to encourage the use of virtual hearings.¹⁶ The East African Court of Justice,¹⁷ the ECOWAS Court of Justice¹⁸ and the Caribbean Court of Justice¹⁹ are holding virtual court sessions.

12. Similarly, domestic courts in many jurisdictions are holding virtual hearings, including in criminal cases and at the highest courts. For example:

- In Argentina, the Chamber of Criminal Cassation started recommending virtual hearings and modified courtroom arrangements as early as March 2020;²⁰

¹⁰ *Prosecutor v. Gbagbo and Blé Goudé*, Case No. ICC-02/11-01/15 A, Decision rescheduling the hearing before the Appeals Chamber, 17 June 2020 (“*Gbagbo* Rescheduling Decision”).

¹¹ See International Court of Justice, press release No.2020/15, 29 May 2020, available at <https://www.icj-cij.org/files/case-related/171/171-20200529-PRE-01-00-EN.pdf>.

¹² See European Court of Human Rights, Hearings, Calendar of hearings, available at <https://echr.coe.int/Pages/home.aspx?p=hearings/calendar&c=>.

¹³ See Inter-American Court of Human Rights, press release, 12 June 2020, available at http://www.corteidh.or.cr/docs/comunicados/cp_46_2020.pdf.

¹⁴ See African Court on Human and Peoples' Rights, press release, 28 May 2020, available at <https://en.african-court.org/index.php/news/press-releases/item/350-the-african-court-on-human-and-peoples-rights-will-begin-its-57th-ordinary-session-on-1-june-2020>.

¹⁵ See Permanent Court of Arbitration, press release, 8 June 2020, available at <https://pca-cpa.org/en/news/pca-case-no-2019-46-47-public-hearing-on-bifurcation-and-preliminary-objections/>.

¹⁶ See American Arbitration Association resources, available at <https://go.adr.org/covid-19-virtual-hearings.html>; Chartered Institute of Arbitrators resources, available at <https://www.ciarb.org/news/ciarb-a-founding-supporter-of-new-virtual-arbitrations-online-resource/>; African Arbitration Academy protocol available at <https://www.africaarbitrationacademy.org/protocol-virtual-hearings/>.

¹⁷ See East African Court of Justice, press release, 15 May 2020, available at <https://www.eacj.org/?news=court-set-for-virtual-hearings-starting-next-week-with-the-appellate-division>.

¹⁸ See ECOWAS Court of Justice, press release, 24 May 2020, available at <http://prod.courtecowas.org/2020/05/24/3571/>.

¹⁹ See Caribbean Court of Justice, press release, 6 April 2020, available at <https://www.ccj.org/ccj-issues-covid-19-emergency-directions/>.

²⁰ See “Coronavirus: Casacion Penal pidió priorizar las videoconferencias en los juicios,” *Télam*, 11 March 2020, available at <https://www.telam.com.ar/notas/202003/439821-coronavirus-camara-federal-videoconferencia-justicia.html>.

- In Australia, the Federal Court has been holding online hearings using Microsoft Teams;²¹
- In Brazil, the Federal Supreme Court started implementing video-conferencing sessions in April;²²
- In Canada, the Supreme Court began holding appeals by Zoom video-conference in June;²³
- In India, the Supreme Court has been holding virtual hearings since March;²⁴
- In Ireland, entirely remote hearings have taken place before the Supreme Court and Court of Appeal through a virtual meeting room that allows remote parties to connect via Skype, Zoom, WebEx and Microsoft Teams;²⁵
- In South Africa, the Supreme Court of Appeal allows the court and parties to choose the appropriate telephone or web-based video-conferencing platform (including Microsoft Teams, Zoom or WebEx), noting that however daunting the challenges may be, remote hearings are “preferable to the business of the court being suspended indefinitely”;²⁶
- In the United Kingdom, measures have been taken to allow the use of video and audio links in criminal proceedings,²⁷ and the Supreme Court has been holding virtual hearings via video-conferencing facilities;²⁸

²¹ See Federal Court of Australia, Videoconferencing, available at <https://www.fedcourt.gov.au/going-to-court/videoconferencing-guide>.

²² See Brazilian Federal Supreme Court, press release, 8 April 2020, available at http://www2.stf.jus.br/portalStfInternacional/cms/destaquesClipping.php?sigla=portalStfDestaque_en_us&idConteudo=441036.

²³ See Supreme Court of Canada, News Releases, news release dated 29 May 2020, available at <https://decisions.scc-csc.ca/scc-csc/news/en/item/6871/index.do?q=covid>.

²⁴ See “Coronavirus impact: Supreme Court to conduct hearings via video conferencing from today,” *The Economic Times*, 23 March 2020, available at <https://economictimes.indiatimes.com/news/politics-and-nation/sc-to-conduct-hearings-via-video-conferencing-from-today/articleshow/74764793.cms>.

²⁵ See Courts Service, Announcements, Statement by Chief Justice Mr Justice Frank Clarke, 20 April 2020, available at <https://beta.courts.ie/content/virtual-remote-courts-piloted-ireland-morning>.

²⁶ See Letter dated 21 April 2020 from M. M. Maya, President of the Supreme Court of Appeal, to stakeholders, available at https://www.tech4law.co.za/news-in-brief/local/supreme-court-of-appeal-letter-to-stakeholders-on-21st-april-2020/?awt_a=A8_i&awt_l=7_rF7&awt_m=3dVdz0pOq6RIP; Practice Directions on Video or Audio Hearings During COVID-19 Pandemic, available at <https://www.supremecourtsofappeal.org.za/index.php/2-uncategorised/46-practice-directions>.

²⁷ Section 53-57 and Schedules 23-27 of the Coronavirus Act 2020 c. 7, available at <http://www.legislation.gov.uk/ukpga/2020/7/contents>.

- In the United States of America, the Supreme Court has been holding oral arguments by telephone conference.²⁹

2. Feasibility does not require physical presence of (all) Judges

13. While preferable, there is no requirement that all Judges are physically present in The Hague for the Appeal Hearing. If it is not possible for all Judges to travel to The Hague because of the pandemic, other arrangements should be made to ensure their participation in the hearing through technological means.

14. Rule 19 even allows for hearings to continue in the absence of a Judge. Therefore, if remote participation is not possible for a particular Judge, this Judge could be given the opportunity to ask questions in advance, watch the video and read the transcripts of the hearing afterwards, and pose any additional questions to the Parties in writing.³⁰

3. Feasibility does not require physical presence of the parties

15. The Appeals Hearing can go forward with Mladić participating via video-link from the United Nations Detention Unit.³¹ If Defence or Prosecution counsel cannot participate in person because of travel restrictions or other COVID-related reasons, they can also participate remotely. The parties can work collaboratively with the Registry to ensure that there are sufficient technological means to communicate with other team members and, for the Defence, to have a privileged communication line with Mladić.³²

4. Safe participation in the courtroom is possible

16. The courtroom can be set up to protect the safety of those who participate in person. The proposed dates allow sufficient time for the Registry to arrange the courtroom to observe health and safety requirements.

²⁸ See Supreme Court of the United Kingdom, Arrangements during the Coronavirus Pandemic, 21 May 2020, available at <https://www.supremecourt.uk/docs/practice-note-on-arrangements-during%20the-coronavirus-pandemic.pdf>.

²⁹ See Supreme Court of the United States, News Media, Press Releases, Press Releases dated 28 April 2020 and 30 April 2020, available at https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-28-20 and https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-30-20.

³⁰ See *Prosecutor v. Karadžić*, Case No.MICT-13-55-A, Appeal Judgement, 20 March 2019, paras.855-863.

³¹ See e.g. *Prosecutor v. Hadžić*, Case No.IT-04-75-AR73.1, Decision on Prosecution’s Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 4 March 2016 (“*Hadžić* Appeal Decision”), para.23; *Prosecutor v. Karemera et al.*, Case No.ICTR-98-44-AR73.10, Decision on Nzirorera’s Interlocutory Appeal Concerning his Right to be Present at Trial, 5 October 2007, para.11; *Prosecutor v. Zigiranyirazo*, Case No.ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para.14.

³² See below paras.20-21.

17. Measures that could be taken to ensure the courtroom is as safe as possible include:
- limiting the number of people in the courtroom;
 - measuring and marking distances between participants to facilitate physical distancing;
 - requiring all participants to wear masks when not speaking;
 - planning for additional cleaning during breaks;
 - installing plexiglass or other separation measures; and
 - requiring health screening for participants.

18. In addition, the Appeals Chamber should consider spreading the hearing over more days to allow for shorter sessions. The ICC has limited its hearings to one hour per session with a 45-minute break, with a maximum of three sessions per day.³³ This would facilitate the needs of the interpreters, allow for additional cleaning and permit the courtroom to be aired out between sessions in order to minimize the risk of aerosol transmission.³⁴

C. (Partly) remote proceedings are consistent with fair trial rights

19. The right of the accused (and other participants) to attend the appeal hearing in person is not absolute. The accused's right to be physically present during the hearing may be limited when the restrictions imposed are proportionate to other protected interests, including the right to expeditious proceedings.³⁵ In the extraordinary situation of this global pandemic, a (partly) remote appeal hearing is the solution that best respects fair trial rights.

20. The Appeals Chamber cannot postpone the hearing until the pandemic is over because Mladić has known risk factors for COVID-19 infection.³⁶ Conducting the Appeal Hearing with Mladić participating through technological means is the best way to protect his rights to

³³ See *Gbagbo* Rescheduling Decision, para. 22; *Al Hassan* Registry Observations, paras.16-18; *Prosecutor v. Al Hassan*, Case No.ICC-01/12-01/18, Order Scheduling a Status Conference, 3 June 2020, para.6; *Prosecutor v. Yekatom and Ngaißsona*, Case No.ICC-01/14-01/18, Second Order Scheduling First Status Conference, 4 June 2020, para.6.

³⁴ See e.g. G. Aernout Somsen *et al.*, "Comment: Small Droplet Aerosols in Poorly Ventilated Spaces and SARS-CoV-2 Transmission," *The Lancet*, 27 May 2020, available at <https://www.thelancet.com/action/showPdf?pii=S2213-2600%2820%2930245-9>.

³⁵ *Prosecutor v. Stanišić and Simatović*, Case No.IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008 ("*Stanišić and Simatović* Appeal Decision"), paras.18-19; *Hadžić* Appeal Decision, paras.6, 23-25; *Gbagbo* Rescheduling Decision, paras.16-17. See also *Prosecutor v. S.Milošević*, Case No.IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 ("*Milošević* Appeal Decision"), paras.13-14, 17; *Šešelj* Order, p.2.

³⁶ See *Milošević* Appeal Decision, paras.13-14. See also ECCC Internal Rules ("ECCC Rules"), Rule 81(5); *Gbagbo* Rescheduling Decision, para.16.

a fair and expeditious appeal.³⁷ Given the nature of an appeal hearing, the presence of Mladić in the courtroom is less important than it was at trial.³⁸ Provided that the Registry can ensure that Mladić is able to hear and follow proceedings³⁹ and effectively and confidentially communicate with counsel during the course of the hearing,⁴⁰ participation by video-link would be sufficient to respect Mladić's rights.

21. A secure and confidential communication channel is sufficient to ensure privileged communication between Mladić and counsel.⁴¹ There is no requirement that an appellant be able to communicate with Defence Counsel in person or in the same room.⁴² By adding further breaks to the hearing schedule, Appeals Chamber could allow for additional opportunities to consult remotely with counsel.⁴³

D. Conclusion

22. To ensure that this case proceeds expeditiously, the Appeals Chamber should:

1. Schedule the Appeal Hearing for the week of 20 July 2020;
2. Instruct the Registry to provide the appropriate technology to conduct (partly) remote proceedings;
3. Instruct the Registry to arrange the courtroom to observe health and safety requirements; and

³⁷ See *Stanišić and Simatović* Appeal Decision, paras.18-19 (accepting that the use of video-link may be a "reasonable alternative" to physical presence); ECtHR, *Golubev v. Russia*, App. No. 26260/02, 9 November 2006, pp.7-8; ECtHR, *Viola v. Italy*, App. No. 45106/04, 5 October 2006 ("*Viola*"), paras.65-66; ECtHR, *Murtazaliyeva v. Russia*, App. No. 36658/05, 18 December 2018, para.91. See e.g. *Šešelj* Order (providing for Appeal Hearing to proceed without presence of self-represented Accused provided certain protections are in place); *Prosecutor v. Bangura et al.*, Case No.SCSL-2011-02-T, Judgement in Contempt Proceedings, 25 September 2012, para.10 (entire trial conducted with accused present via video-link from different states); *Prosecutor v. Čermak and Markač*, Case No.IT-03-73-PT, Scheduling Order, 7 December 2005.

The rules of many international tribunals, specifically envision video presence by accused. See e.g. ICC Rules of Procedure and Evidence ("ICC Rules"), Rule 134*bis* (titled "*Presence* through the use of video technology" provides for video participation of accused) (emphasis added); STL Rules of Procedure and Evidence, Rules 104-105 (appearance "by video-conference" does not constitute proceeding *in absentia*); ECCC Rules, Rule 81(5). See also ICC Rules, Rules 134*ter-quarter*, 224(1); KSC Rules of Procedure and Evidence, Rules 68(2), 68(6).

³⁸ *Gbagbo* Decision Vacating Appeal Hearing, para.9 citing *Viola*, paras.56, 63-67; ECtHR, *Sakhnovskiy v. Russia*, App. No. 21272/03, 2 November 2010 ("*Sakhnovskiy*"), para.98. See also, ECtHR, *Kamasinski v. Austria*, App. No. 9783/82, 19 December 1989, para.106 ("Personal attendance of the defendant does not take on the same crucial significance in an appeal hearing as it does for the trial hearing."). See e.g. *Šešelj* Order.

³⁹ See e.g. ECtHR, *Stanford v. UK*, App. No. 16757/90, 23 February 1994, para.26.

⁴⁰ See e.g. *Sakhnovskiy*, para.98; *Viola*, para.41, 73-75; ECtHR, *Moiseyev v. Russia*, App. No. 62936/00, 9 October 2008 ("*Moiseyev*"), para.214.

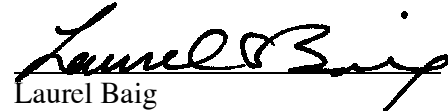
⁴¹ See *Gbagbo* Rescheduling Decision, para.17; *Viola*, paras.41, 73-75; *Moiseyev*, para.214.

⁴² *Gbagbo* Rescheduling Decision, para.17; The Appeals Chamber noted that "the parties have had ample time for the preparation of their submissions [...], including time for counsel to discuss the case with Mladić and time for the parties to prepare their oral arguments". See Order Regarding the Hearing of the Appeals, 28 May 2020, p.4.

⁴³ See above, para.18.

4. Set an expedited schedule for any response and reply in light of the urgency of scheduling this hearing.

Word Count: 2,927 (including Annex)


Laurel Baig
Senior Appeals Counsel

Dated this 19th day of June 2020
At The Hague, The Netherlands



I - FILING INFORMATION / INFORMATIONS GÉNÉRALES

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