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

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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

**With confidential and *EX PARTE* Annex A - only available to the Chamber,
Prosecution and VWU**

**Public redacted version of corrected "Prosecution's application for Witness
[REDACTED] to give testimony by means of video technology and for protective
measures", 23 May 2016, ICC-02/11-01-15-494-Conf-Corr**

Source: Office of the Prosecutor

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

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Introduction

1. Whilst the Prosecution's preference is to have Witness [REDACTED] testify in person, [REDACTED]. Consequently, the Prosecution requests, under article 69(2) of the Rome Statute ("Statute") and rule 67(1) of the Rules of Procedure and Evidence ("Rules"), that the testimony of [REDACTED] be provided *via* video-link from [REDACTED].
2. In light of the importance of the anticipated evidence of Witness [REDACTED] and in order to safeguard the interests of justice, including the Prosecution's burden to prove its case beyond a reasonable doubt, the Prosecution additionally requests under articles 64(2), 64(3)(a) and 64(8)(b) of the Statute and regulation 43 of the Regulations of the Court ("Regulations"), [REDACTED].
3. Finally, the Prosecution requests under articles 68(1) and (2) of the Statute and rule 87 of the Rules, that Witness [REDACTED] be granted in-court protective measures.
4. Witness [REDACTED] is presently expected to testify [REDACTED].¹
5. Video-link testimony is both necessary and justified because of the personal and exceptional circumstances applying in relation to Witness [REDACTED]. The Chamber may, through the Registry, make appropriate arrangements to ensure that the venue chosen for this Witness' testimony by video-link is conducive to the giving of truthful and open testimony.
6. The Prosecution also requests, in the circumstances of this [REDACTED].
7. These measures are not prejudicial to, or inconsistent with the rights of the accused since video-link testimony has been accepted and previously ordered in this case and other cases before this Court. [REDACTED].

¹ See, for the sequence of witnesses, ICC-02/11-01/15-294-Conf-AnxA.

8. As indicated in oral submissions at the Status Conference on 26 April 2016,² this application is made following a suggestion by the Registry that the Registry both (i) establish a video-link for the provision of this Witness' *viva voce* testimony [REDACTED]. However, it has always been the Prosecution's preference that this Witness testifies in The Hague. [REDACTED].
9. The Prosecution also seeks in-court protective measures for Witness [REDACTED] in the form of (i) the continued in-court use of a pseudonym; (ii) image and voice distortion, and (iii) recourse to *in camera* proceedings for identifying portions of the Witness' testimony. These measures are necessary and justified to protect the safety of this Witness, [REDACTED]. The requested measures are intended to prevent the public disclosure at trial of the identity – but not the substantive evidence – of the Witness, who is at-risk. The suggested measures are the least intrusive steps that will balance the interests of the public, the Parties and participants, and the Witness, and are not prejudicial to or inconsistent with the rights of the accused right to a fair, impartial and public trial.
10. All of these measures – the provision of video-link, [REDACTED], and in-court protective measures – will facilitate the testimony of Witness [REDACTED]. Facilitating the testimony of witnesses falls squarely within the ambit of the Chamber's core judicial duty to establish the truth,³ and will ensure that the best evidence that the witness can give is placed before the Chamber.⁴
11. The Prosecution attaches, at Confidential and *ex parte* Annex A, an investigator's report related to [REDACTED].

Confidentiality

12. The Prosecution files this submission as confidential pursuant to regulation 23bis(2) of the Regulations, as it contains information related to the identity of a

² ICC-02/11-01/15-T-34-ENG-RT, 26 April 2016, p.60, ln.9 – p.62, ln.1.

³ Article 64(2) of the Statute; *See also*, ICC-01/04-02/12-271-AnxA, para. 5.

⁴ ICC-02/11-01/15-355-Anx1, para. 14.

Prosecution witness. Annex A is filed both confidentially and *ex parte* only available to the Prosecution, Chamber and VWU because it relates to issues of witness security and protection. This also conforms with the guidance provided by the Chamber that applications under rule 87 of the Rules should be filed confidentially but not *ex parte*, and may include an *ex parte* annex.⁵

Applicable Law

Video-link testimony

13. Pursuant to article 69(2) of the Statute, the Court may permit the giving of *viva voce* testimony by means of video or audio technology, as long as these measures are not prejudicial to or inconsistent with the rights of the accused.
14. Under rule 67(1) of the Rules, a Chamber may allow a witness to give *viva voce* testimony by means of audio or video technology, provided that such technology permits the witness to be examined by the Parties and the Chamber. Rule 67(3) further states that the Chamber, with the assistance of the Registry, shall ensure that the venue chosen for video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.⁶
15. Rule 67 of the Rules is framed in a way that leaves the Chamber with a broad discretion to permit evidence to be given *viva voce* by means of video or audio technology.⁷ One of the relevant criteria to be considered in determining whether or not a witness should be allowed to give testimony *via* video-link is the witness' personal circumstances. Personal circumstances have been linked to the well-being of a witness,⁸ but the Chamber is not confined by the Statute in considering other types of personal circumstances which might justify a witness testifying by

⁵ ICC-02/11-01/15-205, para. 63.

⁶ See also article 68(1) of the Statute: "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses."

⁷ ICC-01/04-01/06-2285-Red, para. 15.

⁸ See, for e.g., ICC-01/04-01/06-2285-Red, paras. 15-16.

means of audio or video technology⁹ - such as logistical difficulties in arranging a witness's travel to testify at the seat of the Court in The Hague, which would seriously impact upon the expeditious conduct of the proceedings.¹⁰

In-court protective measures

16. In principle, trials before the Court are to be conducted in public in accordance with article 67(1) of the Statute and regulation 20 of the Regulations.

17. Exceptions to the principle of publicity are provided for in article 68(1) and (2) of the Statute, read in conjunction with articles 64(2) and (6)(e) of the Statute and rules 87 and 88 of the Rules.¹¹

18. Article 68(1) specifically requires the Chamber to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”. Article 68(2) of the Statute allows Chambers to “conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means” in order to “protect victims and witnesses or an accused”.¹² These measures, however, must not be inconsistent with the rights of the accused to a fair and impartial trial.¹³

19. Rule 87 of the Rules allows the Court to take measures to protect the identity or location of a victim or witness (or another person at risk) from the public or media. Protective measures should be granted only on an exceptional basis, following a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk, and are proportionate to the rights of the accused.¹⁴ Factors such as the security situation in a particular territory may be pertinent when considered in relation to the circumstances of a particular witness.¹⁵ Further, evidence of direct threats to a witness or his or her family are not

⁹ ICC-01/05-01/08-947-Red, para. 13.

¹⁰ ICC-01/05-01/08-2525-Red, para. 7; ICC-01/05-01/08-2608-Red, paras. 9-10; ICC-01/05-01/08-2580-Red, para. 9.

¹¹ ICC-01/04-02/06-824-Red, para. 5.

¹² Article 68(2) of the Statute.

¹³ ICC-01/04-02/06-824-Red, para. 5.

¹⁴ ICC-01/09-01/11-902-Red2, para. 13 (internal citations omitted); ICC-01/04-02/06-824-Red, para. 6 (internal citations omitted). *See also* ICC-02/11-01/15-T-12-CONF-ENG ET, p.82, lns. 19-22.

¹⁵ ICC-01/09-01/11-902-Red2, para. 14.

required in order to determine that they face an objectively justifiable risk supporting the necessity for protective measures.¹⁶

Submissions

Video link, [REDACTED]

20. The Prosecution requests, first, under article 69(2) of the Statute and rule 67(1) of the Rules, that the testimony of [REDACTED] be provided *via* video-link from [REDACTED]; [REDACTED].¹⁷
21. [REDACTED]. As indicated in the attached Confidential and *ex parte* Annex A, and during oral submissions at the Status Conference on 26 April 2016,¹⁸ [REDACTED].
22. The Prosecution's preference [REDACTED] has been for the Witness to testify in person. [REDACTED].
23. [REDACTED].
24. [REDACTED].¹⁹ [REDACTED].²⁰ [REDACTED].
25. [REDACTED].
26. [REDACTED].
27. The provision of this Witness' testimony *via* video-link is not prejudicial to or inconsistent with the rights of the accused. [REDACTED].

Protective Measures

28. The Prosecution seeks in-court protective measures for Witness [REDACTED], under rule 87(3)(c), (d) and (e) of the Rules, in the form of image and voice

¹⁶ ICC-01/09-01/11-902-Red2, para. 14.

¹⁷ [REDACTED].

¹⁸ See, for the Prosecution's oral submissions, ICC-02/11-01/15-T-34-ENG-RT, 26 April 2016, pp. 59-62.

¹⁹ See his witness summary at ICC-02/11-01/15-114-Conf-AnxB-Corr, pp.168-173.

²⁰ The Prosecution further notes, in this regard, the submissions of the Defence for Mr Gbagbo in ICC-02/11-01/15-490-Conf, at para. 20.

distortion, continued use of a pseudonym, and limited *in camera* proceedings. These measures are necessary because publicly revealing this Witness' identity will risk compromising his safety, privacy and physical and psychological well-being within the meaning of article 68(1).

29. There is an objectively justifiable risk to Witness [REDACTED] safety if his identity becomes known to the public. As such, protective measures in the form of a pseudonym and image and voice distortion are necessary to mitigate the risk of public exposure of his status as a Prosecution witness. Voice distortion will be necessary for the additional reason that [REDACTED]. Therefore his testimony will be transmitted without interpretation.
30. The Prosecution also requests that identifying portions of [REDACTED] testimony are conducted *in camera* under rule 87(3)(e) of the Rules. The Prosecution is not seeking full *in camera* testimony for [REDACTED]. Rather it is anticipated that portions of the Witness' evidence, which can identify him, will need to be heard in private session in accordance with rules 87(3)(e) of the Rules and as envisaged by the Directions.²¹
31. With the requested measures in place, the Defence will be able to examine this Witness in open session, except on matters that may reveal his identity.
32. As stated in the Prosecution's previous requests for protective and special measures,²² the Trial Chamber, in considering this request, should take into account two generally applicable background factors: first, that Côte d'Ivoire continues to be a polarised society; and second, that coverage of this trial in Côte d'Ivoire will likely include the public dissemination of audio/video recordings of the proceedings beyond the available material made public on the ICC website and dedicated ICC YouTube Channel.²³ These two factors combined increase the security risk to Prosecution witnesses generally.²⁴ The Prosecution further refers

²¹ ICC-02/11-01/15-205, para. 64.

²² ICC-02/11-01/15-360-Conf ; ICC-02/11-01/15-398-Conf .

²³ ICC-02/11-01/15-360-Conf, paras. 14-17.

²⁴ ICC-02/11-01/15-398-Conf , para. 11.

to and relies upon its submissions on its application for protective measures for [REDACTED].²⁵

33. The security risks presented by these background factors are compounded, in the case of [REDACTED]. Upon a recent meeting with the Prosecution to obtain an update on his security, the Witness confirmed his willingness to testify but indicated that he has concerns about his security. These – and other concerns – are described in Confidential and *ex parte* Annex A.

34. [REDACTED].

35. The Prosecution also relies upon other issues of concern, as elaborated in Confidential and *ex parte* Annex A.

36. The suggested measures are the least intrusive steps that will balance the interests of the public, the Parties and participants and the Witness. The requested measures are also not prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial. Although [REDACTED] identity should be withheld from the public, it has of course been disclosed to the Defence, who will be able to examine the Witness on any relevant issues and largely in open session.

Conclusion

37. For the foregoing reasons, the Prosecution requests that the Chamber order:

- i. That the testimony of [REDACTED] be provided *via* video-link from [REDACTED];
- ii. [REDACTED];
- iii. That Witness [REDACTED] is granted in-court protective measures in the form of the continued in-court use of a pseudonym, image and voice

²⁵ [REDACTED].

distortion, and recourse to *in camera* proceedings for identifying portions of the Witness' testimony.



Fatou Bensouda, Prosecutor

Dated this 23rd day of May 2016

At The Hague, The Netherlands