

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: **26 May 2016**

TRIAL CHAMBER I

Before:

**Judge Geoffrey Henderson
Judge Olga Herrera-Carbuccia
Judge Cuno Tarfusser**

SITUATION IN COTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE***

PUBLIC

Public redacted version of “Defence Response to the ‘Prosecution’s application for Witness [REDACTED] to give testimony by means of video technology and for protective measures’ (ICC-02/11-01/15-494-Conf)”, 9 May 2016, ICC-02/11-01/15-508-Conf

Source: Defence of Mr Charles Blé Goudé

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

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I. Introduction

1. The Defence of Mr Blé Goudé (the “Defence”) files the present response (the “Response”) to the “Prosecution’s application for Witness [REDACTED] to give testimony by means of video technology and for protective measures”¹ dated 29 April 2016 (the “Application”).
2. The Defence does not oppose the portion of the Application requesting that Witness [REDACTED] be granted in-court protective measures. However, for the reasons set out below, the Defence opposes the first part of the Application that requests that the testimony of the witness be provided *via* video-link from [REDACTED].

II. Confidentiality

Pursuant to regulation 23*bis* (2) of the Regulations of the Court, the Defence files the Response as “confidential” as it responds to the Application which has been classified as confidential.

III. Procedural history

3. On 15 October 2015, the Office of the Prosecutor (“Prosecution”) filed the list of the first 20 witnesses it intends to call at trial, anticipating that it may, in due course, make an application to have witnesses [REDACTED] testify *via* video link.²

¹ ICC-02/11-01/15-494-Conf with confidential and *ex parte* Annex A – only available to [REDACTED].

² ICC-02/11-01/15-294, para. 8.

4. On 15 December 2015, the Prosecution requested that the Chamber allow Witness [REDACTED] to testify by means of video technology from [REDACTED].³
5. On 17 December 2015, the Prosecution requested that the Chamber also allow Witness [REDACTED] to testify *via* video link from [REDACTED] due to [REDACTED], which would make his traveling to the Hague unfeasible.⁴
6. On 21 January 2016, the Prosecution informed the Chamber that, after all, it would not be calling Witness [REDACTED] to testify in its first 20 witnesses.⁵
7. On 2 February 2016, the Presiding Judge rendered an oral decision by which he granted the Prosecution's application for Witness [REDACTED] to give testimony *via* video-link.⁶
8. On 15 April 2016, the Prosecution requested that the testimony of Witness [REDACTED] be given *via* video technology.⁷
9. On 29 April 2016, the Prosecution applied to the Chamber for Witness [REDACTED] to testify by means of video link from [REDACTED] and for protective measures.⁸

IV. Applicable Law

10. According to Article 69 (2) of the Rome Statute ("Statute"), while "[t]he testimony of a witness at trial shall be given in person", "[t]he Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, [...], subject to this Statute and in accordance with the Rules of

³ ICC-02/11-01/15-364-Conf.

⁴ ICC-02/11-01/15-367-Conf.

⁵ Email from the Prosecution to the Chamber dated 21 January 2016 at 10:55 am.

⁶ 02/11-01/15-T-12-CONF-FRA ET, p. 97, line 7.

⁷ ICC-02/11-01/15-486-Conf.

⁸ Application.

Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused."

11. According to Rule 67 (1) of the Rules of Procedure and Evidence ("Rules"), "*a Chamber may allow a witness to give viva voce (oral) testimony before the Chamber by means of audio or video technology, provided that such technology permits the witness to be examined by the Prosecutor, the defence, and by the Chamber itself, at the time that the witness so testifies.*" Rule 67 (3) of the Rules further specifies that "*[t]he Chamber, with the assistance of the Registry, shall ensure that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological wellbeing, dignity and privacy of the witness.*"

Also, Regulation 45 of the Regulations of the Court ("Regulations") stresses that the Presiding Judge and the Chamber shall determine the mode of questioning of witnesses so as to "*[m]ake the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth*" and "*[a]void delays and ensure the effective use of time.*"

V. Submissions

12. For the reasons elaborated in previous submissions,⁹ the Defence's view is that video technology is a generally undesirable alternative to live testimony and should only be used on an exceptional basis. The Defence will explain below why the reasons advanced in the Application do not constitute a valid basis to grant the extraordinary relief sought.

V.1. The Application is unsubstantiated

⁹ The Defence refers to and relies on the confidential "Defence Response to both the "Prosecution's application for Witness [REDACTED] to give testimony by means of video technology" (ICC-02/11-01/15-364-Conf) and to the "Prosecution's application for Witness [REDACTED] to give testimony by means of video technology" (ICC-02/11-01/15-367-Conf)" dated 6 January 2016, ICC-02/11-01/15-378-Conf.

13. In its Application, the Prosecution contends that Witness [REDACTED] is unable to travel to The Hague due [REDACTED].¹⁰ The Defence notes however that the Application is unsubstantiated in this regard. To the Defence's knowledge, the Prosecution did not provide the Chamber with any supporting material which would allow a concrete assessment of [REDACTED]. The Defence understands that confidential *ex parte* Annex A to the Application is an investigator's report related to [REDACTED] but does not contain any document that would corroborate the Prosecution's allegations regarding [REDACTED]. Therefore, the Defence submits that the Application is unsubstantiated, and should therefore be dismissed.

V.2. The Application is premature

14. In addition, the Defence submits that the Application is premature. According to the Prosecution, [REDACTED].¹¹ Similarly, based on the Prosecution's interpretation of its communications with [REDACTED].¹² The alleged [REDACTED] does not necessarily mean that [REDACTED]. It is the Defence's view that prior to requesting any video link measures for the testimony of Witness [REDACTED], the Prosecution first should have liaised with [REDACTED] to obtain [REDACTED]. Based on the information at hand, it is too early to draw any conclusion as to the feasibility or unfeasibility of having Witness [REDACTED] testify in person.

V.3. Witness [REDACTED]'s testimony via video link is prejudicial or inconsistent with the rights of the Accused

15. According to the Prosecution's suggested scenario, [REDACTED]. The Prosecution argues that such set up [REDACTED] and [REDACTED].¹³

¹⁰ Application, paras 22-23.

¹¹ Application, para. 23.

¹² Application, para. 23.

¹³ Application, para. 27.

According to Rule 67 (1) of the Rules, [REDACTED]. Therefore, contrary to the Prosecution's allegations,¹⁴ [REDACTED]. [REDACTED], the use of video technology will necessarily have an impact on its ability to control and oversee the proceedings, which will in turn negatively impact its truth seeking function. The fact that [REDACTED]¹⁵ in no way counterbalances the prejudice caused to the Accused by [REDACTED]. The remote mode of questioning will alter [REDACTED] and undermines the integrity of the proceedings.

16. Also, contrary to the Prosecution's allegations, the fact that video-link has been previously authorized in the present case in relation to [REDACTED] does not suggest that the granting of [REDACTED] video-link measures is not prejudicial to, or inconsistent with the rights of the Accused.¹⁶ The key factor in determining whether or not a witness should be allowed to testify by means of video technology is the witness's personal and exceptional circumstances. The personal circumstances preventing [REDACTED]. Considering, furthermore, that contrary to [REDACTED], it is crucial, bearing in mind the preservation of the truth seeking function of the Chamber and the rights of the Accused that Witness [REDACTED] testifies in person at the seat of the Court.¹⁷

17. The Prosecution further reminded the Chamber that while personal circumstances have often been linked to the well-being of the witness, it may consider other types of personal circumstances, such as "logistical difficulties in arranging a witness' travel to testify [...], which would seriously impact upon the expeditious conduct of the proceedings"(emphasis added).¹⁸ The

¹⁴ See footnote 17 of the Application, citing [REDACTED].

¹⁵ Application, para. 26.

¹⁶ Application, para. 7.

¹⁷ The Defence notes that the Prosecution conceded itself its preference to have [REDACTED] testify in person. See Application, paras 1, 22.

¹⁸ Application, para. 15.

Prosecution fails to explain how the alleged [REDACTED] in the instant case would seriously impact upon the expeditiousness of the trial. [REDACTED], do not necessarily trigger delays in the proceedings. Where [REDACTED] seems to be the main concern, the Defence's view is that as long as [REDACTED], then [REDACTED]¹⁹ The Defence regrets that the Prosecution, which has always been aware of [REDACTED], waited so long before communicating about such [REDACTED]. The Defence would be very much concerned if the delay in the submission of the Application would be the only reason that ultimately prevents Witness [REDACTED] from appearing at the seat of the Court.

18. To conclude, the Prosecution has not proved in the instant case any such personal circumstances that would prevent Witness [REDACTED] from travelling and testifying at the seat of the Court. The Application is premature as well as unfounded and should therefore be rejected.

RELIEF SOUGHT

19. In light of the foregoing, the Defence respectfully requests the Chamber to **DENY** the Prosecution's Application.

¹⁹ [REDACTED].

Respectfully submitted,



A rectangular box containing a handwritten signature in dark ink. The signature is written in a cursive style and appears to read 'Mr. Knoop'. The box is empty except for the signature.

Mr. Knoop, Lead Counsel and Mr. N'Dry, Co-Counsel

Dated this

26 May 2016

At The Hague, the Netherlands