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**International
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TRIAL CHAMBER I

Before:

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

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 testimony by means of video-link technology for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 67(1) (ICC-02/11-01/15-796-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 testimony by means of video-link technology for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 67(1) contained in the “Prosecution’s application to conditionally admit the prior recorded statements and related documents of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 68(3), and for testimony by means of video-link technology for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 67(1)” dated 6 February 2017 (the “Application”).¹ The Defence for Mr Blé Goudé will respond to the rule 68 request separately, and will file a response concurrently with the present submissions.
2. For the reasons set out below, the Defence opposes the request that the testimony of the witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 be provided *via* video-link from Abidjan.

II. Confidentiality

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

III. Procedural history

3. On 31 January 2017, the Office of the Prosecutor (“Prosecution”) filed an updated list of the remaining witnesses it intends to call at trial, anticipating that it may, in due course, make an application to have witnesses P-0433, P-

¹ ICC-02/11-01/15-796-Conf with confidential annexes 1 and 2.

0436, P-0438, P-0402, P-0459 and P-0109 testify *via* video link.² The Prosecution then issued an email notifying the parties, without [REDACTED].³

4. On 6 February 2017, the Prosecution requested that the Chamber allow Witnesses P-0436, P-0438, P-0402, P-0459 and P-0109 to testify by means of video technology from Abidjan.⁴
5. On 14 February 2017, the Defence team of Mr Laurent Gbagbo requested an extension of the time limit for its response to 6 March 2017.⁵ The Defence associated itself with this request via email.⁶ On 14 February 2017, the Presiding Judge granted such a request.⁷

IV. Applicable Law

6. 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 Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused."
7. 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*

² ICC-02/11-01/15-788-Conf-AnxA.

³ Email from [REDACTED] to Trial Chamber I dated 31 January 2017, at 17:02 hours.

⁴ ICC-02/11-01/15-796-Conf with confidential annexes 1&2.

⁵ ICC-02/11-01/15-811-Conf.

⁶ Email from [REDACTED] to Trial Chamber I dated 14 February 2017, at 13:41 hours.

⁷ 02/11-01/15-T-123-CONF-ENG ET, p. 1, lines 19-20.

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.”

8. Moreover, Regulation 43 of the 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

9. The Defence has taken notice of the Chamber’s concerns regarding the expeditiousness of the procedure, expressed *inter alia* in its Order of 23 January 2017⁸ and reiterated in the hearing on 6 February 2017.⁹ Nevertheless, for the reasons elaborated in previous submissions,¹⁰ 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. In cases of vulnerable witnesses for example, and where the application was sufficiently substantiated, the Defence has not opposed the request that a witness testify via video-link.¹¹ However, in regards the present Application, the Defence

⁸ ICC-02/11-01/15-785-Conf.

⁹ ICC-02/11-01/15-T-116-CONF-ENG-ET, p.12, lines 12-14.

¹⁰ The Defence refers to the confidential “Defence Response to both the “Prosecution’s application for Witness P-0398 to give testimony by means of video technology” (ICC-02/11-01/15-364-Conf) and to the “Prosecution’s application for Witness P-0441 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.

¹¹ ICC-02/11-01/15-758-Conf.

submits that the reasons advanced in the Application do not constitute a valid basis to grant the extraordinary relief sought.

V.1 The Application is unsubstantiated

V.1.1. The Prosecution has failed to establish specific factors for each witness warranting the use of video link

10. 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. Yet, in its Application, the Prosecution has failed to establish, for each witness respectively, which specific factors it considers as requiring the use of video link testimony for the witness in question. Instead, its arguments to support the appropriateness of AVL testimonies are merely generic and hypothetical in nature, despite the "Chamber's expressed disapproval of applications for measures that are supported by vague and generic statements with little or no factual support".¹²

11. Furthermore, Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 are expected to appear in [REDACTED].¹³ They are all [REDACTED] witnesses for which the Prosecution has submitted an application to conditionally admit the prior recorded statements and related documents under rule 68(3). In the present case it is thus difficult to understand the reasoned basis for the Prosecution's determination that P-0108 and [REDACTED] should testify in court while the other witnesses should be permitted to testify via video link, when nothing suggests any difference of circumstances.

¹² ICC-02/11-01/15-721-Anx, para. 5; *see also for example* ICC-02/11-01/15-T-67-CONF-ENT and ICC-02/11-01/15-T-74-CONF-ENG.

¹³ ICC-02/11-01/15-796-Conf

12. Additionally, such an application is contrary to the Prosecution's own previous position, as it has itself affirmed in this case that "applications for video link should be *individualized*" (emphasis added),¹⁴ "meaning that they *should not be made in respect of a class of witnesses*" (emphasis added)¹⁵ and that "applications should be considered [...] on a *case by case basis*" (emphasis added).¹⁶ The Prosecution's failure to submit individualised factors for each witness renders such assessment impossible. As highlighted by Judge Henderson in his dissent to the Chamber's decision on the modes of testimony of 68(3) witnesses, "by relying on such vague and generic basis, there is nothing to prevent the Chamber from giving inconsistent or totally arbitrary decisions".¹⁷

V.1.2. The Application is unsupported by any relevant factual material

13. The Prosecution submits that AVL testimony "*may well carry the additional benefit – for these particular witnesses – of protecting their physical and psychological well-being*". However, the Defence notes that the Prosecution has made no attempt to substantiate such premature and hypothetical submission. Instead, it merely deferred to the assessment of the VWU in this aspect of its request.

14. In fact, the Defence observes that the most recent health assessments established on 19th January 2017 clearly contradict the Prosecution's submissions. [REDACTED]'s Health and Security Assessment for instance, indicates that the witness "[REDACTED]", "[REDACTED]" and stated he was

¹⁴ ICC-02/11-01/15-T-80-CONF-ENG-ET, p.87, lines 4-5.

¹⁵ ICC-02/11-01/15-T-80-CONF-ENG-ET, p.87, lines 20-23.

¹⁶ ICC-02/11-01/15-T-80-CONF-ENG-ET, p.87, lines 23-24.

¹⁷ ICC-02/11-01/15-721-Anx, para. 5.

“[REDACTED]”.¹⁸ Likewise, [REDACTED]’s Assessment specifies that he looked “[REDACTED]”, and “[REDACTED]”.¹⁹

V.1.3. Trial practice in this case does not support the Prosecution’s argument that the use of video link testimony would facilitate the expeditiousness of the proceedings

15. The Prosecution also submits that if the rule 68(3) application were granted, the relevant witnesses testimony is likely to be shorter than for other witnesses, such as insider witnesses,²⁰ and that the use of AVL would allow them to testify in an uninterrupted manner, thereby promoting the expeditiousness of the proceedings.

16. Notwithstanding the fact that there are strong grounds on the basis of which the Prosecution’s application for rule 68(3) should be rejected,²¹ the Defence submits that previous practice in this case has clearly demonstrated the lack of foundation of such argument.²² Indeed, in particular during hearings in November and December 2016, the Prosecution’s projected schedule²³ departed considerably from the actual time spent on the testimony of each witness.

17. To conclude, the Defence thus submits that the Prosecution has failed to provide the Chamber with any substantial reason why video link testimony should be allowed for Witnesses P-0436, P-0438, P-0402, P-0459 and P-0109,

¹⁸ CIV-OTP-0095-0094.

¹⁹ CIV-OTP-0095-0096.

²⁰ ICC-02/11-01/15-796-Conf, para. 29.

²¹ The Defence’s response to the Prosecution’s application to conditionally admit the prior recorded testimony and related documents of Witnesses P-109, P-109, P-0433, P-0402, P-0438, P-0459, P-0109. This response will be filed concurrently with the present submissions.

²² Ibid.

²³ Email from [REDACTED] to all dated 25 November 2016, at 13:24 hours.

nor did it provide any supporting material which would allow a concrete assessment of its Application.

V.2. Witnesses P-0436, P-0438, P-0402, P-0459 and P-0109's testimony via video link is prejudicial or inconsistent with the rights of the Accused

18. The fundamental right of the Defence to examine a witness, as stated by the European Convention of Human Rights ("ECHR")²⁴ and in the Rules²⁵, requires the Defence to be awarded the necessary opportunities to prepare the examination of a witness, examine that witness as well as to show him/her any relevant exhibit as necessary.²⁶ It also requires the Judges to ensure that the trial is conducted with full respects for the rights of the accused as provided for in Article 64 of the Statute.

V.2.1. The use of video link testimony hinders the Defence's opportunity to prepare itself in manner consistent with the Accused's right to a fair trial

19. The Defence submits that previous practice in this case has shown that the use of video link testimony creates a higher risk of triggering considerable waste of resources for the Defence. An example of such a burden can be illustrated through the testimony, or rather lack thereof, of Witness P-0587, who was scheduled to testify via video-link as a 68(3) witness, yet [REDACTED].²⁷ Because the witness was testifying from Abidjan *via* video link, the Chamber and the parties were given notice of the witness' [REDACTED]. Had the

²⁴ Article 6(3)(d) of the ECHR, *see also Kostovski v. The Netherlands*, (Application No. 11454/85), ECtHR, Judgment, 20 November 1989 and *Doorson v. Netherlands*, (Application No. 20524/92), ECtHR, Judgment, 26 March 1996.

²⁵ Rule 67(1) of the Rules.

²⁶ *See also Judge Henderson's dissent to the Chamber's decision to the modes of testimony of 68(3) witnesses* ICC-02/11-01/15-721-Anx-para. 2.

²⁷ The Defence also notes that to this day, it has not been provided with any explanation as to why Witness P-0587 [REDACTED].

witness been scheduled to testify in The Hague, the parties would have been notified of the witness's [REDACTED] much earlier in the proceedings.

20. The Defence is of course aware that in the scale of a trial such as this one, this might not *prima facie* seem to amount to a relevant burden. However, the Defence submits that it is precisely *because* of the large scale of the trial that it must *constantly* adapt its preparation in accordance with new developments. Because of the short time of preparation between each witness, the Defence must therefore carefully prioritise how to best allocate its limited resources. As a result, when [REDACTED] and parties receive no relevant notice, the Defence will have wasted scarce and valuable resources.

V.2.2. The use of video link testimony for these specific witnesses hinders the parties' opportunity to fully examine them

21. Furthermore, the Prosecution submits that since "[c]ounsel for the accused would still be able to question the Witnesses, including through the use of documents",²⁸ the use of AVL testimony would not be prejudicial to or inconsistent with the rights of the Accused.²⁹

22. However, previous use of video link testimony in this case has shown that the presentation of documents, in particular any examination involving maps, was rendered much more difficult when using video link testimony. Yet the Defence notes that the Prosecution has already included [REDACTED],³⁰ [REDACTED],³¹ and [REDACTED]³² in its [REDACTED] for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109.³³

²⁸ ICC-02/11-01/15-796-Conf, para. 31.

²⁹ ICC-02/11-01/15-796-Conf, para. 31.

³⁰ CIV-OTP-0020-0391, CIV-OTP-0020-0393, CIV-OTP-0020-0396, CIV-OTP-0020-0397, CIV-OTP-0068-0189, CIV-OTP-0068-0190, CIV-OTP-0057-1585, CIV-OTP-0058-0611, CIV-OTP-0058-0612.

³¹ CIV-OTP-0020-0386, CIV-OTP-0020-0387, CIV-OTP-0020-0388, CIV-OTP-0020-0389, CIV-OTP-0020-

23. Furthermore, Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109, whose statements are all heavily based on hearsay and anonymous hearsay, are expected to testify about matters that are strongly contested by the parties or which pertain to core issues in the case, in particular in regards to very [REDACTED]. As a result, the Defence anticipates that it will also be presenting each witness with a number of maps and documents to annotate.

24. The possibility to view any documents shown to the witness by the parties, participants and the Chamber as well as the opportunity to mark any documents or diagrams have been considered as relevant factors by the Chamber in previous video link testimony applications.³⁴

25. To conclude, the Defence therefore submits that the use of video link technology for the testimony of Witnesses P-0436, P-0402, P-438, P-0459 and P-0109 is not a suitable mode of testimony as it obstructs the ability for *all* parties to examine the witness in question and to show any relevant exhibit to that witness as necessary. As a result, it fails to “make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth”.³⁵

RELIEF SOUGHT

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

0394.

³² CIV-OTP-0020-0390.

³³ ICC-02/11-01/15-796-Anx1.

³⁴ ICC-02/11-01/15-T-12-CONF-ENG, p.82, line 9.

³⁵ Regulations of the Court, regulation 43.

Respectfully submitted,




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

Dated this
24 April 2017
At The Hague, the Netherlands