

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No: ICC-02/11-01/15

Date: 02 November 2017

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 ‘Corrected version of Prosecution’s application for protective and/or special measures for Witnesses [REDACTED], for Testimony by means of video-link technology for Witnesses [REDACTED], and for a change in the order of witnesses with respect to Witness [REDACTED],” 19 October 2017, ICC-02/11-01/15-1056-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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Other

I. Introduction

1. The Defence of Mr Blé Goudé (the “Defence”) files the present response (the “Response”) to the Prosecution’s application for: (1) in-court protective and/or special measures for witnesses [REDACTED]; (2) testimony by means of video-link technology from Abidjan for Witnesses [REDACTED]; and (3) a change in order of appearance for witnesses [REDACTED]. These three requests are contained in the “Prosecution’s corrected version of Prosecution’s application for protective and/or special measures for Witnesses [REDACTED], for testimony by means of video-link technology for Witnesses [REDACTED], and for a change in the order of witnesses with respect to Witness [REDACTED]” dated 11 October 2017 (the “Application”).¹
2. For reasons set out below, the Defence:
 - a. Does not oppose the request for in-court protective measures in form of use of pseudonym, image and voice distortion during testimony and recourse to *in camera* proceedings for identifying portions of the testimony of Witnesses [REDACTED];
 - b. Does not oppose the request for special measures in form of in-court assistance for reading for Witnesses [REDACTED];
 - c. Does not oppose the request for special measures in form of regular breaks in testimony, adapted questioning, and the presence of a psychologist during testimony for Witnesses;
 - d. Opposes the request for the testimony by means of video-link technology for Witnesses [REDACTED];
 - e. Does not oppose the change in order of appearance for witnesses [REDACTED].

¹ ICC-02/11-01/15-1050-Conf with confidential annexes A, B, C and D.

II. Confidentiality

3. Pursuant to regulation 23bis (2) of the Regulation of the Court ("Regulations"), the Defence files the Response as "confidential" as it responds to the Application which has been classified as confidential. The Defence currently files a public redacted version of this submission.

III. Applicable Law

4. Article 69(2) of the Rome Statute ("Statute") establishes the rebuttable presumption of testimony being given in person. It allows for testimony to be conducted *via* video-link on the condition that such measures are not "*prejudicial to or inconsistent with the rights of the accused.*" Therefore, it is for the party requesting the video-link technology to sufficiently substantiate a departure from the general rule.
5. 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.*"
6. 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.”

IV. Submissions

In-court protective measures for witnesses [REDACTED]

7. The Defence does not oppose the request for in-court protective measures under rule 87 and/or rule 88(1) for witnesses [REDACTED] in the form of continued use of a pseudonym, image and voice distortion, and *in camera* proceedings.

Special measures for Witnesses [REDACTED]

8. The Defence does not oppose the request for special measures in form of in-court reading assistance for Witnesses [REDACTED].
9. The Defence does not oppose the request for special measures in form of regular breaks in testimony, adapted questioning, and the presence of a psychologist during testimony for Witnesses [REDACTED].

Reduction of the duration of the testimony of Witness P-0047

10. The Defence notes that the Prosecution intends to reduce its questioning time of Witness P-0047, one of its insider witnesses; from 10 hours² to 4 hours.³
11. The relevance of the testimony of witness P-0047 is not disputed and was noted by the Chamber in its decision to hear the testimony of Witness P-0047 earlier than scheduled by the Prosecution so that it could best exercise its powers in connection with its assessment of the evidence.⁴

² ICC-02/11-01/15-1050-Conf at Para 29

³ Annex 21, ICC-02/11-01/15-1034.

⁴ ICC-02/11-01/15-T-144-CONF-ENG, p.94: 16-20.

12. Although Prosecution intends to reduce the duration of its examination of witness P-0047, the Defence foresees that it might need more than 4 hours to examine this witness.
13. The Defence submits that it might need more than 4 hours to fully examine the witness and ensure that the right of Mr Blé Goudé to question the witness is respected.
14. Keeping the need for expeditiousness of proceedings at heart, the Defence will reassess the necessary time for examination of witness P-0047 after the Prosecution's questioning, and will not hesitate to reduce the requested time for its examination, should it deem it possible.

**Request for testimony by means of video-link technology for witnesses
[REDACTED]**

15. The Defence opposes the request for video-link testimony for witnesses [REDACTED].
16. Article 69(2) of the Rome Statute ("Statute") establishes the rebuttable presumption of testimony being given in person. It allows for testimony to be conducted *via* video-link on the condition that such measures are not "*prejudicial to or inconsistent with the rights of the accused.*" Therefore, it is for the party requesting the video-link technology to sufficiently substantiate a departure from the general rule.

Witness [REDACTED]

17. First, the Defence wishes to recall that witness [REDACTED] is a crime base witnesses, that his testimony relates in great part to the events of 17 March 2011, and that his testimony will be adduced under Rule 68(3).⁵

18. At the time of the Prosecution's application⁶ for the admission of witness [REDACTED] testimony under rule 68(3) the Defence opposed such admission for the reasons that:⁷

- a. *the statements of [REDACTED] (among other witnesses) concern core issues of the case that are materially in dispute and parts of the statements are uncorroborated;*
- b. *Witnesses [REDACTED] provide accounts on the event of 3 March 2011 that make the statements of other Prosecution witnesses uncorroborated;*
- c. *[REDACTED] relates that he saw a FANCI colonel on TV who asked the population to leave Abobo as it was declared "red zone".⁸ Whether Abobo was declared a warzone during the crisis is a core issue of the case that is highly and materially in dispute;*
- d. The testimony of [REDACTED] contradicts that of several witnesses. For instance, [REDACTED].⁹

19. Secondly, the Defence submits that the use of video link technology for the testimony of witness [REDACTED] hinders the parties' opportunity to fully examine the witness. Previous use of video link testimony in this case has shown that the presentation of documents was rendered much more difficult when using video link testimony. As a result, allowing testimony of witness [REDACTED] by video-link technology fails to "make the

⁵ Chamber's Decision ICC-02/11-01/15-950-Conf and ICC-02/11-01/15-1023.

⁶ ICC-02/11-01/15[REDACTED], para 88- 100.

⁷ [REDACTED]

⁸ [REDACTED] CIV-OTP-0071-0328, para. 28

⁹[REDACTED] CIV-OTP-0071-0328, para. 66.

questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth”.¹⁰

20. About 40 documents (statements including annexes) will be adduced through witness [REDACTED], and the Defence intends to explore each one of these documents with the witness. For this reason, the Defence hereby requests the Chamber 3 hours for the examination of witness [REDACTED].

21. The importance, the volume and detail of the evidence to be adduced through of witness [REDACTED] under rule 68(3)¹¹ validates the request for the Defence to have three hours. Besides, the Chamber decided, in its Decision pertaining to the introduction of prior recorded testimony under rules 68(3), that *“The Defence teams will not be constrained to the amount of time used by the Prosecutor for the supplementary examination, and will be granted a reasonable amount of time to examine each witness. Examination of the witnesses by the legal representative of the participating victims shall be subject to the general regime applicable.”*¹²

22. Thirdly, the Defence submits that the information provided in the Prosecution’s application, does not provide substantial reasons for the failure of witness [REDACTED] not testifying at the seat of the Court.

23. The Prosecution puts forward two reasons justifying that of witness [REDACTED] not testify at the seat of the Court: (a) possible security concerns by the witness and (b) lack of travel documents to The Hague before the expected date of testimony.

24. Vis-à-vis security concerns, the Defence submits that it is the responsibility of the VWU to assess the existence of security threats and advice the

¹⁰ Regulations of the Court, Regulation 43.

¹¹ ICC-02/11-01/15-573-Conf, at para. 25.

¹² ICC-02/11-01/15-573-Conf, para. 40&41.

necessary measure to be put in place to ensure that the identity of the witness is kept secret and reduce the risk of threats.

25. Concerning the availability of travel documents for witness [REDACTED] before the expected date of testimony, the Prosecution bases its argument on the assumption that the testimony of P-0047 will be reduced by about 60 per cent. However, as submitted by the Defence in this response, the Defence envisages that it will need more than 4 hours for the examination of witness P-0047. Therefore, there is sufficient time to obtain travel documents for [REDACTED] before the date of his testimony.

26. Furthermore, the Defence wishes to recall that the Prosecution placed witness [REDACTED] on its list of witnesses since 26 October 2015.¹³ Subsequently, the necessary actions should have been taken in time to ensure that witness [REDACTED] has the necessary travel documents.

27. The Chamber has, in its various decisions, acknowledged the prevalence of testimony in person to testimony via video-link. Furthermore, the use of video technology is a generally undesirable alternative to live testimony to be used on an exceptional basis, and such an application should be sufficiently substantiated.

28. For these reasons, the Defence submits that the request to have the testimony of witness [REDACTED] via video-link should be rejected because the Prosecution failed to provide a substantial reason for the inability of witness [REDACTED] to testify at the seat of the Court. Should there be a delay obtaining travel documents for witness [REDACTED], this witness should be rescheduled to testify at the end of the upcoming evidentiary bloc to facilitate his presence at the seat of the Court.

¹³ ICC-02/11-01/15-314-Conf.

Witness [REDACTED]

29. The Defence notes that Prosecution did not provide any reason to support its video link request for the testimony of witness [REDACTED], a crime base witness.

30. In accordance with the Chamber's position disapproving "applications for measures that are supported by vague and generic statements with little or no factual support",¹⁴ and for the reason stated above; the Defence submits that the request to have the testimony of witness [REDACTED] via video-link be rejected.

Order of testimony of witnesses [REDACTED]

31. The Defence notes that Witness [REDACTED] testimony primarily relates to [REDACTED].

32. The Defence does not oppose the request for the change in the order of appearance of witnesses with respect to Witness [REDACTED]. The Defence concedes that moving the testimony of Witness [REDACTED] after that of Witness [REDACTED] would, by some measure, advantage the presentation of evidence.

33. However, the Defence requests the Chamber to instruct the VWU to take necessary and appropriate measures to ensure that witness [REDACTED] and witness [REDACTED], do not discuss their testimony before and during their respective testimony. Changing the order of appearance of witnesses to allow witness [REDACTED] to testify right before witness [REDACTED]

¹⁴ ICC-02/11-01/15-721-Anx, para. 5; see also for example [REDACTED].

would be a suitable solution and reduce the risk of influence of the testimony of [REDACTED].

RELIEF SOUGHT

34. In light of the foregoing, the Defence respectfully requests:
35. That the Chamber grants, the Defence the possibility to have 3 hours for the examination of witness [REDACTED].
36. That the Chamber denies the Prosecution's request for Witnesses [REDACTED] to testify by means of video-link.
37. That the Chamber grants the change in order and allow Witness [REDACTED] to testify right after Witness [REDACTED] to reduce the risk of influence of the testimony of [REDACTED].

Respectfully submitted,



A handwritten signature in dark ink, appearing to read 'Mr. Knoop', is written over a horizontal line. The signature is fluid and cursive.

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

Dated this

02 November 2017

At The Hague, the Netherlands