

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **6 December
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 the Prosecution’s urgent application for testimony by means of video-link technology and for additional special measures with respect to Witness P-0554 (ICC-02/11-01/15-1070-Conf)”, 21 November, ICC-02/11-01/15-1074-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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**Victims Participation and Reparations
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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 urgent application for testimony by means of video-link technology and for additional special measures with regard to Witness P-0554 (the “Application”).¹
2. For the reasons set out below, the Defence opposes the request that the testimony of the witness P-0554 be provided *via* video-link from [REDACTED]. The Defence does not oppose the request for additional special measures.

II. Confidentiality

Pursuant to regulation 23bis (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. Applicable Law

3. 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.”

¹ ICC-02/11-01/15-1070-Conf.

4. 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.”*
5. 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

6. The Defence reiterates its position elaborated upon in previous submissions² that video technology is a generally undesirable alternative to live testimony

² 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), 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, to 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)” (ICC-02/11-01/15-796-Conf) dated 6 February 2017 and to “Corrected version of Prosecution’s application for protective and/or special measures for Witnesses P-0362, P-0554, P-0567, P-0568, P-0407, P-0185, and P-0404, for testimony by means of video-link technology for Witnesses P-0362 and P-0293, and for a change in the order of witnesses with respect to Witness P-0554”(ICC-02/11-01/15-1050-Conf) dated 19 October 2017.

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.³ However, in regard to the present Application, the Defence submits that the single reason advanced in the Application does not constitute a valid basis to grant the extraordinary relief sought.

IV.1 Video link testimony for Witness P-0554

7. According to Article 69(2), “[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” (emphasis added). That Chamber must grant permission clearly implies that it is not an automatic right left to the discretion of the calling party. Article 69(2) rather establishes a rebuttable presumption that testimony be given in person at the seat of the Court, and that it is for the party requesting testimony via video-link technology to sufficiently substantiate a departure from the general rule.
8. The Defence submits that the information provided in the Application does not provide substantial reasons for the failure of Witness P-0554 to testify at the seat of the Court as it (1) does not qualify as a relevant factor warranting the use of video link and (2) is insufficiently substantiated.

IV.1.1 The prosecution has failed to establish a relevant factor warranting video link

9. The Prosecution in its Application puts forward a single reason justifying that Witness P-0554 testify via video-link: a lack of travel documents to The Hague

³ ICC-02/11-01/15-758-Conf.

before the expected date of testimony. 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. However the need for a witness to obtain a passport in order to be able to travel is neither exceptional nor specific to a particular witness and cannot be a sufficient ground to depart from the general rule that testimony be done at the seat of the Court.

10. In fact it is an entirely foreseeable formality, and in this regard the Defence notes that Witness P-0554 has been on the Prosecution's list of Witnesses since April 2015.⁴ The Defence therefore submits that the Prosecution has failed to establish a relevant factor warranting that Witness P-0554 not testify in The Hague but by video link technology from [REDACTED].

IV.1.2 The Application is unsubstantiated

11. The Defence has taken due notice of the difficulties encountered by the Office of the Prosecutor and VWU in reaching Witness P-0554 and the steps undertaken to attempt to contact the witness.⁵ However the Defence notes that the Prosecution seems to have encountered similar issues with Witness P-[REDACTED] but that travel arrangements could still be made on time.
12. Indeed on Tuesday November 7, the Senior Trial Lawyer informed the parties that the Office of the Prosecutor was encountering issues to confirm the Witness P-[REDACTED]'s availability to testify and had only just recently managed to successfully contact the witness. On Friday, November 10, the Senior Trial Lawyer informed the parties that VWU was in contact with Witness P-[REDACTED] and was to meet with the witness on Monday,

⁴ ICC-02/11-01/15-35-Conf-AnxA.

⁵ ICC-02/11-01/15-1050-Conf-Corr, paras. 4, 33 and email messages to the Chamber from the Senior Trial Lawyer dated 14 and 16 November 2017.

November 13, to *begin* the traveling arrangements. On Tuesday, November 14, the Senior Trial Lawyer informed the parties that VWU was making arrangement for the visa application of P-[REDACTED].

13. The Defence is thus confounded by the fact that travel documents can be secured in time for P-[REDACTED] to come testify in The Hague but that the same result cannot be achieved for P-0554. Especially since Witness P-[REDACTED] is scheduled to testify before P-0554,⁶ thus allowing VWU a shorter time frame to make travel arrangements.

14. Furthermore, the Defence submits that the Prosecution did not exhaust all alternative remedies, and could have for example requested that Witness P-0554 be moved at the end of its list of Witnesses so as to allow more time to secure the necessary travel documents.

IV.2 Special measures for Witness P-0554

15. The Defence does not oppose the request for [REDACTED].

RELIEF SOUGHT

16. In light of the foregoing, the Defence respectfully requests the Chamber to **DENY** the Prosecution's request that Witness P-0554 testify via video-link technology from [REDACTED].

Respectfully submitted,

⁶ ICC-02/11-01/15-1060.



A handwritten signature in dark ink, appearing to read 'Mr. Kooops', is centered within a rectangular box. The signature is written in a cursive style with a long horizontal flourish extending to the right.

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

Dated this

6 December 2017

At The Hague, the Netherlands