

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No: ICC-02/11-01/15

Date: 24 March 2016

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 request for an extension of time to re-disclose and use at trial a Forensic Report and related material pursuant to regulation 35 of the Regulations of the Court” (ICC-02/11-01/15-449-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 Charles Blé Goudé (“the Defence”) hereby opposes the Prosecution's request for an extension of time to re-disclose and use at trial a Forensic Report and related material pursuant to regulation 35 of the Regulations of the Court (“the Tenth Request”)¹ as it does not meet any of the conditions set forth in Regulation 35 of the Regulations of the Court (“the Regulations”) and determined by Trial Chamber I in its previous decisions on late disclosures.²

II. Confidentiality

2. Pursuant to regulation 23bis (2) of the Regulations, the Defence requests that the present response be received and classified as “confidential”, as it refers to a request which has been classified as confidential.

III. Procedural history

3. On 7 May 2015, Trial Chamber I (“the Chamber”) issued its “Order setting the commencement date for trial”,³ whereby the Prosecution was directed, *inter alia*, to disclose to the Defence all incriminatory material, Article 67(2) and Rule 77 material in its possession, as well as any expert report on a rolling basis and no later than 30 June 2015 (“the Disclosure Deadline”).⁴ The

¹ ICC-02/11-01/15-449-Conf.

² ICC-02/11-01/15-183-Conf ; ICC-02/11-01/15-306 ; ICC-02/11-01/15-350-Conf.

³ ICC-02/11-01/15-58.

⁴ *Ibid.*, para. 22.

Chamber further required the Prosecution, also by that date, to file a List of Evidence to be relied on at trial, as well as a List of Witnesses.⁵

4. On 30 June 2015, the Prosecution filed its List of Witnesses and its List of Evidence.⁶
5. On the same day, the Prosecution also filed a request pursuant to Regulation 35 of the Regulations (“the First Request”) seeking an extension of the Disclosure Deadline for the disclosure of several documents.⁷
6. On 2 July 2015, the Prosecution filed another request pursuant to Regulation 35 of the Regulations (“the Second Request”) seeking permission to re-disclose with fewer redactions 35 incriminating documents which, for “technical reasons”, it was unable to process by the 30 June 2015 deadline.⁸
7. On 27 July 2015, the Prosecution filed a further request seeking permission to disclose a document under Rule 77 of the Rules of Procedure and Evidence (“the Rules”) that it had omitted to disclose by the Disclosure Deadline (“the Third Request”).⁹
8. On 18 August 2015, the Chamber issued the Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents by which every above mentioned request was granted (“the First Decision”).¹⁰
9. On 2 September 2015, the Prosecution requested an extension of time to disclose one document under Rule 77 (“the Fourth Request”).¹¹

⁵ *Ibid.*, para. 25.

⁶ Annex A and C to Prosecution’s submissions of its List of Witnesses and List of Evidence, ICC-02/11-01/15-114-Conf-AnxA and ICC-02/11-01/15-114-Conf-AnxC. A corrigendum to Annex A was filed on 24 July 2015 (ICC-02/11-01/15-114-Conf-AnxA-Corr).

⁷ ICC-02/11-01/15-115-Conf with confidential Annex A. A public redacted version was filed on 2 July 2015 (ICC-02/11-01/15-115-Red).

⁸ ICC-02/11-01/15-118 with confidential Annex A.

⁹ ICC-02/11-01/15-164 with confidential Annex A.

¹⁰ ICC-02/11-01/15-183-Conf.

10. On 7 September 2015, the Prosecution requested an extension of time to re-disclose copies of three logbooks, previously disclosed under Rule 77 of the Rules, as incriminatory material ("the Fifth Request").¹²
11. On 15 September 2015, the Prosecution filed a request to add expert witness P-0606 to the List of Witnesses ("the Sixth Request").¹³
12. On 22 September 2015, the Prosecution filed a request seeking permission to disclose other material, either under Rule 77 of the Rules of as incriminatory evidence ("the Seventh Request").¹⁴
13. On 21 October 2015, the Chamber granted all the above mentioned requests ("the Second Decision").¹⁵
14. On 1 October 2015, the Prosecution filed a request for an extension of time limit to disclose various materials and to add certain of the materials to its List of Evidence ("the Eighth Request").¹⁶
15. On 23 October 2015, the Prosecution filed a further request for an extension of time to disclose P-0114's second statement and P-0360's second statement ("the Ninth Request").¹⁷
16. On 30 November 2015, the Chamber granted the Eighth and the Ninth Requests ("the Third Decision").¹⁸
17. On 22 February 2016, the Prosecution filed the Prosecution's request for an extension of time to re-disclose and use at trial a Forensic Expert Report and

¹¹ ICC-02/11-01/15-203.

¹² ICC-02/11-01/15-207-Conf.

¹³ ICC-02/11-01/15-220, with one confidential Annex.

¹⁴ ICC-02/11-01/15-234-Conf.

¹⁵ ICC-02/11-01/15-306.

¹⁶ ICC-02/11-01/15-262-Conf. A corrected version was filed on 8 October 2015 (ICC-02/11-01/15-262-Conf-Corr). A public redacted version was filed on 6 November 2015 (ICC-02/11-01/15-262-Corr-Red).

¹⁷ ICC-02/11-01/15-312-Conf.

¹⁸ ICC-02/11-01/15-350-Conf.

related material pursuant to regulation 35 of the Regulations of the Court (“the Tenth Request”).¹⁹

IV. Applicable law

18. Regulation 35(2) of the Regulations provides that:

“[t]he Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of the time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.”

19. Pursuant to Article 64(2) of the Rome Statute (“the Statute”), “[t]he Trial Chamber shall ensure that trial is fair and expeditious and is conducted with full respect for the rights of the accused [...]” Article 64(3)(c) of the Statute further states that the Chamber shall “provide for disclosure of documents [...], sufficiently in advance of the commencement of the trial to enable adequate preparation for trial”.²⁰

V. Submissions

20. Before addressing the conditions set forth in Regulation 35(2) of the Regulations (C), the Defence would like to elaborate on the procedural context of the Tenth Request (A) and the cumulative effect of the prejudice caused to the Defence by all the requests based on Regulation 35(2) that have already been granted (B).

¹⁹ ICC-02/11-01/15-449-Conf.

²⁰ Emphasis added.

A. The present request arises in the context of nine previous requests for late disclosure which have already been granted.

21. The Defence respectfully recalls the importance of the disclosure process, which is a guarantee of fair proceedings and which should respect the adversarial principle.

22. The Chamber has assessed on several occasions²¹ that the Disclosure Deadline set for 30 June 2015 would precisely balance the interest of the Defence and the Prosecution and “afford the Defence sufficient time to carry out all necessary preparations”.²² *A contrario*, any later date for final disclosure will not afford the Defence sufficient time to carry out all necessary preparations.

23. The Prosecution has had more than four years to prepare its case and to conduct investigations. Since the issuance of the Chamber's Order, the Prosecution has been aware that the disclosure of evidence shall be terminated by 30 June 2015.

24. Yet, the Prosecution has continued its investigations after the Disclosure Deadline and requested, on nine occasions, an extension of time limit for disclosure of evidence or for the addition of a witness on the List of Witnesses.²³ The Tenth Request, concerns an extension of time to disclose additional allegedly incriminatory evidence, eight months after the Disclosure Deadline, despite the Prosecutor having declared that he was not interviewing new witnesses.²⁴

25. The Defence reiterates its observations that the Prosecution has already benefited from multiple extensions of time pursuant to Regulation 35(2)

²¹ ICC-02/11-01/15-183-Conf, para. 17. See also ICC-02/11-01/15-58, paras. 15-16.

²² ICC-02/11-01/15-58, para. 16.

²³ See *supra* paras. 5-15.

²⁴ Transcript of 21 April 2015, ICC-02/11-01/15-T-1-CONF-ENG, page 41, lines 11-13.

although, on several occasions, the Chamber granted them despite the fact that they were based on an “oversight” by the Prosecution.²⁵

26. Besides, granting the Tenth Request would result in the addition of a 139th witness to the List of Witnesses. The number of witnesses to be called by the Prosecution in this case substantially exceeds the number of witnesses in all other cases. Therefore, the Defence deems it contrary to the principles of fair trial and expeditious justice to authorise the Prosecution to add another witness, especially since the trial has already begun.

B. The Tenth Request aggravates the cumulative effect of the prejudice caused to the Defence by all the previously granted requests for late disclosure.

27. The Defence has previously elaborated in writing and orally on the fact that the Prosecution has already benefited from multiple extensions of time pursuant Regulation 35(2) of the Regulations, allowing them to disclose items after the expiration of the Disclosure Deadline.²⁶

28. Moreover, the Defence has developed the argument that the Chamber should consider the cumulative impact on prejudice to the Accused and on the fairness of the disclosure process, which results from the entirety of such repeated late disclosures made pursuant to Regulation 35(2) of the Regulations.

29. Mindful that the Chamber has so far adjudicated such requests, on a case-by-case basis in conformity with the existing jurisprudence, the Defence has respectfully submitted that the Chamber is legally empowered, at a certain

²⁵ See ICC-02/11-01/15-164, paras. 2 and 10; ICC-02/11-01/15-203; ICC-02/11-01/15-207; ICC-02/11-01/15-234-Conf, para. 30

²⁶ See, for example, ICC-02/11-01/15-332-Conf, para 11; Transcript of 25 September 2015, ICC-02/11-01/15-T-4-ENG (ET WT), pp. 24-25.

point in time after the Disclosure Deadline, to reject a subsequent Regulation 35(2) request made by the Prosecution. Such rejection might be based upon the overall impact of the totality of all Regulations 35(2) requests made since the Disclosure Deadline on the fairness of the proceedings and on the prejudice to the accused.²⁷

30. In the Third Decision, the Chamber addressed and endorsed such theory of cumulative effect:

“[t]he Chamber has considered that the Defence submissions that the cumulative impact of late disclosure and additions to the List of Evidence must be taken into account when assessing the overall prejudice that it may cause to the Defence.”²⁸

31. In assessing the cumulative effect, the Chamber specifically took into account *“the specific circumstances of the case, including, notably, the commencement date for the evidentiary stage of trial [...]”*²⁹ At the time the Third Decision was issued, the trial had not yet begun, which is one of the reasons why the Prosecution’s requests were granted.

32. The Defence emphasises the fact that the situation has drastically changed. The evidentiary stage of trial began almost one month ago, which makes the cumulative effect of late disclosures, as well as an addition to the List of Witnesses, even more prejudicial to the Defence. While the Chamber found in November 2015, that seven late disclosures did not unduly prejudice the Accused, the Defence submits that at this stage of the proceedings, namely the start of the Prosecution’s case, the Defence has been materially prejudiced.

²⁷ See, ICC-02/11-01/15-332-Conf, para 11.

²⁸ ICC-02/11-01/15-350-Conf, para. 58.

²⁹ *Ibid.*

33. Therefore, the Defence submits that the Prosecution's Tenth Request should therefore be denied on the basis of the foregoing reasons in addition to the arguments developed below.

C. The Tenth Request does not meet the requirements set forth in Regulation 35(2) of the Regulations.

34. At the outset, the Defence would like to recall that according to the Chamber and to other Trial Chambers, "Regulation 35(2), last sentence, provides a strict standard affording only a few exceptions".³⁰

a. The Prosecution failed to present reasons outside of its control.

35. The reasons put forward by the Prosecution to substantiate the assertion that it was not able to file the application within the time limit for reasons outside of its control proves not only that it should have been able to file the application in due time but, also that the application relates to materials that have been investigated after the Disclosure Deadline had expired.

36. From the explanation of the factual steps the Prosecution had to perform to obtain the materials in question, it clearly appears that three elements underlie the Tenth Request:³¹

- i. Two expert reports disclosed to the Defence in June 2015 and must have been in the Prosecution's possession before that date;³²

³⁰ ICC-02/11-01/15-183-Red, para. 19.

³¹ ICC-02/11-01/15-449-Conf, para. 12.

³² *Ibid.*

ii. [REDACTED];³³

iii. Further investigations that were conducted from 29 October 2015.³⁴

37. In other words, the Prosecution should have been able to foresee in late June 2015, in the course of the First Request, that it would not be able to disclose the materials in question in due time. The Tenth Request should then have been filed in late June 2015.

38. Instead of requesting such late disclosure by the expiration of the Disclosure Deadline, which the Prosecution could have done as it has known since late June 2015 that the materials in question would not be ready for disclosure by the deadline, and contrary to what it had submitted orally, the Prosecution kept investigating several months after the Disclosure Deadline, in full knowledge that the time for investigation was over.

39. Hence, the Defence submits that the Prosecution has not acted in full transparency regarding the acquisition of the materials in question, fully ignoring the role and binding effect of the Disclosure Deadline and not applying in due time for the late disclosure of the materials in question and the requested addition of a witness to the List of Witnesses.

b. The Prosecution failed to present valid justifications for late disclosure.

40. Consistent with the Chamber's rulings,³⁵ when the terms of the Regulation 35(2) of the Regulations are not met, the Chamber may nevertheless authorise the proposed addition after relevant deadline, by conducting a case-by-case

³³ [REDACTED]

³⁴ *Ibid.*

³⁵ ICC-02/11-01/15-183-Conf, para. 20 ; ICC-02/11-01/15-228, paras. 29-30.

assessment that balances the justifications for late disclosure against any potential prejudice to the Defence, and in the context of Chamber's obligation under Article 64(2) of the Statute.³⁶

41. The Chamber, in conducting its analysis, should be mindful of the right of the Accused to have adequate time and facilities for the preparation of his defence. Additional factors that may be considered include: (i) the length of time that has elapsed since the deadline; (ii) whether the new evidence brings to light a previously unknown fact that has a significant bearing on the case; (iii) whether good cause exists for not seeking to add the witness at an earlier stage of the proceedings; (iv) whether the other party will have adequate time to investigate the new evidence, bearing in mind the need to conduct the trial fairly and expeditiously; or (v) whether it would be in the interests of justice to grant the request.³⁷

42. The Defence submits that, in light of the right of the Accused to have adequate time and facilities for the preparation of his defence, and considering the above additional factors, none of the Prosecution's justifications for late disclosure outweigh the prejudice to be suffered by the Defence if P-0626 were to be added as an expert at this very late stage of the proceedings.

43. First, a period of eight months has elapsed since the Disclosure Deadline and the trial has been going on for one month. The Prosecution has been investigating on the materials in question at least since late June 2015 and was in a position to file the Tenth Request earlier. Therefore, granting such request would constitute an unfair disadvantage to the Defence which could not expect the addition of another expert witness to the List of Witnesses.

³⁶ ICC-02/11-01/15-183-Conf, para. 20.

³⁷ *Ibid.*, referring to ICC-01/09-02/11-832, para. 11.

44. Second, the Defence submits that the new evidence does not bring to light a previously unknown fact that has a significant bearing on the case. Indeed, the Prosecution has been dealing for several months with its analysis of the events of 3 March 2011 as narrated in the Pre-Trial Brief. The late addition of P-0606 to the List of Witnesses also aimed at supporting the Prosecution's theory on this particular event, as sustained in the Sixth Request.³⁸ The Chamber granted this addition in the Second Decision and from that moment, the Defence was legitimate in its expectation that no further materials or witnesses related to this particular event would be added to List of Evidence and to the List of Witnesses.

45. Moreover, from the Prosecution's own words, "[t]he Expert Report for which the Prosecution now seeks an extension corroborates other previously disclosed material and does not constitute a novel element of which the Defence was not previously aware".³⁹ The fact that the Prosecution considers the materials in question as "additional layer of certainty"⁴⁰ is even more pertinent as to the relevance of the said materials. In other words, the materials at stake do not comply with the second condition set forth by the Chamber in its appreciation of late disclosure applications.

46. Third, the Prosecution has not shown good cause to add P-0626 to the List of Witnesses as it simply referred to materials disclosed on 2 February 2016 to the Defence without elaborating on the essential role of P-0626 to its theory.⁴¹

47. Finally, the Defence is of the view that granting the Tenth Request would create a precedent according to which the Prosecution would have extensive discretion to depart from the deadline set by the Chamber for the final

³⁸ ICC-02/11-01/15-220.

³⁹ ICC-02/11-01/15-449-Conf, para. 13.

⁴⁰ *Ibid.*, para. 14.

⁴¹ *Ibid.*, para. 13

disclosure of evidence. Such a precedent would not serve the interest of justice and the principle of legality.

c. The prejudice suffered by the Defence is material.

48. In determining whether to authorise the addition of new experts at this stage of the proceedings, the Defence submits that the Chamber must first be satisfied that the late addition does not interfere with the Defence's right to have adequate time and facilities to prepare for trial, as set out in Article 67(1)(b) of the Statute.⁴² In regard to his right, Article 64(3)(c) of the Statute stipulates that the Trial Chamber shall provide for disclosure "*sufficiently in advance of the commencement of the trial to enable adequate preparation for trial*".⁴³ Rule 76 of the Rules requires the Prosecution to provide the Defence with the names of witnesses whom the Prosecution intends to call to testify and copies of any prior statements made by those witnesses "*sufficiently in advance to enable the adequate preparation of the defence*".

49. The Defence submits that granting the Prosecution's Tenth Request would unduly prejudice the Accused's rights due to the fact that the trial is now on-going. If P-0626 were to be added on the List of Witnesses as an expert, the Defence would necessarily need to investigate, in addition to the substance of the evidence, the expert's background and qualifications, as well as the expert's sources and methodology, in order to assess his credibility and competence. Additional research cannot realistically be achieved at the same time as the on-going trials and preparation of witness questioning. The fact that the Prosecution undertakes not to call that expert in the first half of 2016

⁴² Trial Chamber II, "Decision on the Prosecution's Application to Add P-0317 to the Prosecution Witness List (ICC-01/04-01/07-1537)", 3 November 2009, ICC-01/04-01/07-1590, para. 26.

⁴³ Emphasis added.

will in no way, for the aforementioned reason, minimise the prejudice to the Defence.

50. The fact that the Defence has been in possession of the materials in question since 2 February 2016 does not minimise its prejudice as the said materials were disclosed under Rule 77 of the Rules, which led the Defence to the legitimate expectation that the Prosecution would not rely on the materials as incriminatory evidence.

51. Therefore, this late addition would have a significant impact on the Defence's preparation and conduct of investigations. It would deflect the Defence's attention to analysing and investigating P-0626 whilst the latter's testimony would not bring anything substantial to P-0606's testimony and would only constitute an "additional layer of certainty".

52. Consequently, the prejudice that the Defence would suffer if the Prosecution's Request were to be granted outweighs the alleged justifications for the late addition presented by the Prosecution. Furthermore, as indicated above, in order to precisely evaluate the potential prejudice, this Tenth Request must not be considered in isolation, but together with all the former Prosecution's requests for delayed disclosure.

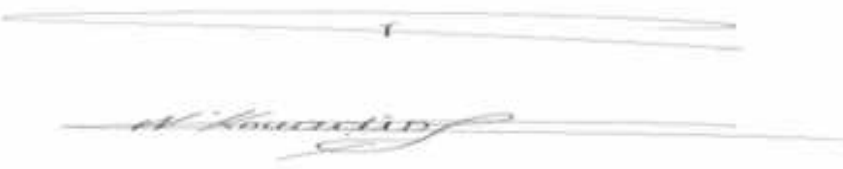
53. Given all the above mentioned, it would be unfair and highly prejudicial to Mr Blé Goudé if the Defence were to suffer again the consequences of the Prosecution's negligence or late investigations, which would be inevitable if the Prosecution's Tenth Request were to be granted.

RELIEF SOUGHT

For the fore going reasons, the Defence respectfully requests the Chamber to:

- REJECT the Tenth Request.

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

24 March 2016

At The Hague, the Netherlands