

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: *English*

No: ICC-02/11-01/15

Date: 31 July 2015

TRIAL CHAMBER I

Before:

**Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Bertram Schmitt**

SITUATION IN COTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE

Public

**Defence Response to Prosecution's Request pursuant to regulation 35 seeking
permission to disclose a document under rule 77**

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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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural history

1. On 7 May 2015, Trial Chamber I (“the Chamber”) directed the Prosecutor to disclose “all incriminatory material [...] as well as all Article 67(2) and Rule 77 material in its possession for inspection to the two Defence teams on a rolling basis and no later than 30 June 2015.”¹
2. On 30 June 2015, the Office of the Prosecutor (“the OTP” or “the Prosecution”) filed the “Prosecution’s Request pursuant to regulation 35 in relation to a limited number of documents”, requesting an extension of time limit to complete its disclosure with respect to certain documents, including witness transcripts and audio tapes, and expert reports.²
3. On 27 July 2015, the Prosecution filed the “Prosecution’s Request pursuant to regulation 35 seeking permission to disclose a document under rule 77” (“the Request”).³

II. Applicable law

4. Under article 54(1)(a) of the Rome Statute (“the Statute”), the Prosecutor, in order to establish the truth, has the duty to:

“[...] extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute, and, in doing so, investigate incriminating and exonerating circumstances equally[.]”

¹ Trial Chamber I, Order setting the commencement date for trial, 7 May 2015, ICC-02/11-01/15-58, para. 22.

² Prosecution’s Request pursuant to Regulation 35 in relation to a limited number of documents, 30 June 2015, ICC-02/11-01/15-115-Conf.

³ Prosecution’s Request pursuant to regulation 35 seeking permission to disclose a document under rule 77, 27 July 2015, ICC-02/11-01/15-164.

5. Regarding the rights of the Accused *vis-à-vis* disclosure of evidence processed by the Prosecutor, article 67(2) of the Statute provides that:

“[i]n addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.”⁴

6. More concisely, rule 77 of the Rules of Procedure and Evidence (“the RPE”) obliges the Prosecutor to allow the Defence to inspect:

“[...] any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.”⁵

7. Finally, regulation 35(2) of the Regulations of the Court (“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 a 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.”⁶

⁴ Emphasis added.

⁵ Emphasis added.

⁶ Emphasis added.

III. Submissions

8. As a preliminary observation, the Defence of Charles Blé Goudé (“the Defence”) recalls the importance attributed by the Appeals Chamber to the process of disclosure, which is essential in ensuring the fairness of the proceedings.⁷
9. In the present case, the Prosecutor seeks an extension of time, under regulation 35 of the Regulations, to disclose a *Procès-Verbal* related to witness P-0049 under rule 77 of the RPE. However, the OTP does not substantiate such request, nor does it prove that it is based on reasons outside its control.

i. The reasons underlying the Second Request are within the control of the Prosecution

10. Pursuant to regulation 35 of the Regulations, the party seeking an extension of time, after the lapse of a time limit, shall demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.
11. In the Request, the Prosecution explains that “[the *Procès-Verbal*] was not disclosed before the 30 June deadline, as a result of an oversight”.⁸ Besides, it submits that witness P-0049’s statement has been disclosed to the Defence on 19 February 2015 and that:

⁷ Appeals Chamber, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, 28 August 2013, ICC-02/05-03/09 OA 4, para. 40.

⁸ ICC-02/11-01/15-164, para. 2.

“[t]he *Procès-Verbal* was overlooked by the Prosecution upon this disclosure taking place and the oversight discovered during the Prosecution’s review of its List of Witnesses, after filing on 30 June 2015”.⁹

12. The Defence notes that the Prosecution acknowledges that the present requested disclosure is delayed due to an “oversight” regarding of the material for which the Request is filed while the OTP “overlooked” said material. Therefore, it cannot be sustained that the Prosecution was not able to disclose the *Procès-Verbal* for reasons outside its control. On the contrary, the fact that the relevant material has not been disclosed by the 30 June deadline finds its origins in the negligence of the OTP. Hence, the Request may not be granted as the cause of the delayed disclosure, namely an “oversight” was entirely within the control of the Prosecution.

ii. The Defence would suffer a prejudice as result of the late disclosure.

13. In the Request, the OTP asserts that the Defence will not suffer any prejudice as result of the late disclosure, invoking the fact that it does not intend to use the *Procès-Verbal* at trial and that P-0049’s statement has been disclosed to the Defence with an annex within the disclosure deadlines. However, none of these elements are relevant to establish whether or not the Defence will suffer prejudice resulting from late disclosure.

14. First, although the OTP states that it does not intend to use the *Procès-Verbal* at trial, it appears, from the List of Witnesses provided by the Prosecution,¹⁰ that it will call P-0049 at trial. Thus, any material related to the witness is relevant

⁹ *Ibid.*, para. 10.

¹⁰ Prosecution’s submission of its List of Witnesses and List of Evidence, 30 June 2015, ICC-02/11-01/15-114 and Annex A Confidential List of Witnesses, ICC-02/11-01/15-114-Conf-AnxA.

material to the preparation of the defence. Moreover, the document in question, i.e. the *Procès-Verbal*, is a statement given by P-0049 to an investigating judge in the context of an examination before a Court in Abidjan. It may then be far from insignificant for the Defence. It contains elements which the Defence will have to investigate in order to prepare the cross-examination of P-0049. Since disclosure of it is required under rule 77, and since the OTP acknowledges that it is “*material to the preparation of the defence*”,¹¹ it cannot be sustained that the Defence will not suffer any prejudice from a late disclosure of the said material.

15. Second, in the *Banda & Jerbo* case, the Appeals Chamber invited Trial Chambers to consider with caution situations where the Defence is already in possession of relevant documents from the Prosecutor:

“Where appropriate, in deciding whether the information sought continues to be material to the preparation of the defence, the Chamber may also take into account whether the defence has already received relevant documents from the Prosecutor. However, caution should be exercised in taking such an approach as it must not undermine the paramount right of the defence to disclosure of all information material to the preparation of the defence. In this regard, the Appeals Chamber again recalls that the disclosure process is essential in ensuring the fairness of the proceedings.”¹²

16. As stated by the Defence, in the *Bemba* case, while referring to the ruling above, “*the caution to be exercised by a Trial Chamber is necessarily heightened when the material in question is not, as in the Banda case, general background*

¹¹ ICC-02/11-01/15-164, para. 2.

¹² ICC-02/05-03/09-501, para. 40. Emphasis added.

information about a conflict",¹³ but rather a statement given by a witness before a Court and related to concise events.

17. P-0049's statement and annex are only complete with the *Procès-Verbal* that was not timely disclosed. Therefore, the earlier disclosure of P-0049's statement cannot be considered as complete and should also, for this reason, be rejected. For the foregoing reasons, these materials are intrinsically related and should have been disclosed together, in due time, in February 2015, or at least before 30 June 2015.

18. Hence, the requested late disclosure impairs the rights of the Defence, and first and foremost since it infringes the fairness of the proceedings. A disclosure that is submitted more than one month after the ordered deadline may compromise the ability of the Defence to conduct the necessary investigation related to the material in question, especially in a case consisting of more than 130 witnesses and at a period of time when the Prosecution has still not disclosed the list indicating the order according in which it intends to call the first 20 witnesses.

iii. The fact that the Prosecution submitted the *Procès-Verbal* as confidential annex appears as an indirect disclosure without leave of the Chamber

19. The Defence disapproves the presentation of the Request by the OTP in which it submitted the *Procès-Verbal* for which late disclosure is requested as a confidential annex, thereby making this document available and readable to the parties, the participants and the Chamber. This practise amounts to

¹³ Public Redacted Version of Defence Reply to the Prosecution's Response to "Defence request for a stay of proceedings and request for further disclosure", 24 July 2015, ICC-01/05-01/08-3274-Red, para. 16.

indirect disclosure of the dispute material whereas authorisation to do so has not been granted by the Chamber.

20. It appears that by filing the current request, the Prosecution did not show good cause for an extension of time, pursuant to regulation 35 of the Regulations, while submitting the undisclosed document as an annex cannot remedy this failure. This practise in itself prejudices the Defence as it entails the risk to make the Chamber aware of the content of the *Procès-Verbal*.

RELIEF SOUGHT

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

- Reject the Prosecution's Request pursuant to regulation 35 seeking permission to disclose a document under rule 77.



A rectangular box containing a handwritten signature in dark ink. The signature is written in a cursive style and appears to be 'Mr. Knoop'.

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

Dated this 31 July 2015.

At The Hague, the Netherlands