

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/15
Date: 18 September 2015

TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO and
CHARLES BLÉ GOUDÉ***

Confidential

Decision on Defence requests for leave to appeal the 'Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents'

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Eric MacDonald

Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
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Legal Representatives of Victims

Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber I ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* ('Gbagbo and Blé Goudé case'), having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues the following 'Decision on Defence requests for leave to appeal the "Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents"'.

I. Procedural History

1. On 7 May 2015, the Chamber issued its 'Order setting the commencement date for trial', in which it, *inter alia*, set 30 June 2015 as the deadline for completion of disclosure by the Office of the Prosecutor ('Prosecution') and 10 November 2015 as the commencement date for the trial ('Order of 7 May 2015').¹
2. On 30 June 2015, pursuant to the Order of 7 May 2015, the Prosecution effected certain disclosure and filed the list of witnesses and list of evidence it intends to rely upon at trial.²
3. Also on 30 June 2015, immediately before the filing deadline, the Prosecution requested an extension of the aforesaid disclosure deadline in respect of certain material ('First Request').³
4. On 2 July 2015, the Prosecution filed another request ('Second Request') seeking permission to, by 7 July 2015, re-disclose with fewer redactions 35 incriminating documents which, for technical reasons, it was unable to

¹ Order setting the commencement date for trial, ICC-02/11-01/15-58.

² 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).

³ Prosecution's request pursuant to Regulation 35 in relation to a limited number of documents, 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); Prosecution's Request pursuant to regulation 35 seeking permission to disclose 35 documents with less redactions, 2 July 2015, ICC-02/11-01/15-118 with confidential Annex A;

process by the 30 June 2015 deadline.⁴ On 27 July 2015, the Prosecution filed a further request seeking permission to disclose a document under Rule 77 of the Rules that it had omitted to disclose by the Disclosure Deadline ('Third Request').⁵

5. On 18 August 2015, the Chamber authorised an extension of the deadline in respect of some of the requested material in the First Request, and granted the Second and Third Requests ('Impugned Decision').⁶
6. On 24 August 2015, the defence for Mr Gbagbo ('Gbagbo Defence') and the defence for Mr Blé Goudé ('Blé Goudé Defence; together the 'Defence'), filed requests for leave to appeal the Impugned Decision (respectively, 'Gbagbo Defence Request' and 'Blé Goudé Defence' Request, and together, 'Requests').⁷
7. On 28 August 2015, the Prosecution filed its response to the Requests ('Prosecution Response').⁸

II. Submissions

Gbagbo Defence Request

8. The Gbagbo Defence submits in general that a systematic refusal of requests seeking leave to appeal in matters related to the fairness of the proceedings could, in and of itself, encroach upon the fairness of the trial, particularly since

⁴ Prosecution's Request pursuant to regulation 35 seeking permission to disclose 35 documents with less redactions, ICC-02/11-01/15-118, with *confidential Annex A*.

⁵ Prosecution's Request pursuant to regulation 35 seeking permission to disclose a document under rule 77, ICC-02/11-01/15-164 and *confidential Annex A*.

⁶ Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents, ICC-02/11-01/15-183-Conf. A public redacted version was filed on the same date, ICC-02/11-01/15-183-Red.

⁷ *Demande d'autorisation d'interjeter appel de la «Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents»* (ICC-02/11-01/15-183-Conf), ICC-02/11-01/15-188-Conf+Anxs; Defence's application for leave to appeal the "Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents" (ICC-02/11-01/15-183-Conf), ICC-02/11-01/15-189-Conf.

⁸ Prosecution's response to Laurent Gbagbo's and Charles Blé Goudé's applications for leave to appeal the Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents (ICC-02/11-01/15-183), ICC-02/11-01/15-194-Conf.

the Chamber in the Order of 7 May 2015, stated that that it would address these issues at the appropriate time to ensure the fairness and expeditiousness of proceedings. Moreover, the Gbagbo Defence submits that a resolution of the issues below by the Appeals Chamber would materially advance the proceedings, since otherwise the Defence would be forced to go to trial without having sufficient time to evaluate the Prosecution's evidence and carry out the necessary investigations. A resolution by the Appeals Chamber would in its view 'purge' the judicial process of errors that could affect the fairness of proceedings or the outcome of the trial.⁹

9. In its request for leave to appeal, the Gbagbo Defence identifies the following four issues for appeal ('Four Issues'):

a) The Impugned Decision relied on irrelevant criteria for accepting late disclosure and for considering that doing so would not impact the preparation of the Defence

10. The Gbagbo Defence submits that the Impugned Decision did not take into consideration that: (i) the witnesses that were the subject of the late disclosure represent a significant part of the Prosecution's case, as reflected in the Prosecution pre-trial brief; (ii) only the French transcripts (and not the audio recordings or investigators' reports) are of use for the preparation of the defence, pursuant to Rule 76(3) of the Rules; and (iii) the Defence has the right to have adequate time to prepare for the entirety of the trial proceedings, and that as a consequence of the late disclosure, it will only have five weeks to prepare for trial.¹⁰

b) The Impugned Decision is unsubstantiated

⁹ Gbagbo Defence Request, ICC-02/11-01/15-188-Conf, paras 49-56.

¹⁰ Gbagbo Defence Request, ICC-02/11-01/15-188-Conf, paras 16-31.

11. The Gbagbo Defence argues that the Chamber does not explain in the Impugned Decision how it calculates the time necessary for the Defence's preparation for trial. In its view, the Chamber's determination also contradicts the Order of 7 May 2015, which had established that the Defence would have adequate time for preparation based on the disclosure deadline set out therein.¹¹

c) The Impugned Decision does not account for all of the consequences of late disclosure, including on the postponement of the appearance of the witnesses concerned

12. The Gbagbo Defence submits that the Impugned Decision is based on the logic that witnesses are to be considered in isolation and disregards the reality of a trial in which the Defence team needs to carry out investigations before the commencement of trial proceedings, and in which each witness's testimony cannot be considered in isolation. Consequently, the Gbagbo Defence argues it cannot adequately prepare for trial until it receives disclosure of the totality of evidence.¹²

d) The Redaction Protocol was erroneously not considered

13. The Gbagbo Defence contends that the Chamber should have based its assessment of the Second Request on whether it constituted a breach of the Prosecution's disclosure obligations pursuant to the Redaction Protocol.¹³

Blé Goudé Defence Request

14. The Blé Goudé Defence identifies the following two appealable issues ('Two Issues'):

¹¹ Gbagbo Defence Request, ICC-02/11-01/15-188-Conf, paras 32-36.

¹² Gbagbo Defence Request, ICC-02/11-01/15-188-Conf, paras 37-43.

¹³ Gbagbo Defence Request, ICC-02/11-01/15-188-Conf, paras 44-48.

- a) That the Chamber erred in failing to characterise which standard should apply to requests for extension of time filed before the time limit, yet decided upon by the Chamber after the time limit*

15. The Blé Goudé Defence submits that Regulation 35(2) of the Regulations of the Court (the 'Regulations') does not provide for the possibility of granting a variation of time limit after the deadline has expired, as was done in the Impugned Decision.¹⁴ In its view, the Chamber interpreted this provision in a manner that is most prejudicial to the accused, since, according to the approach taken in the Impugned Decision, the Prosecution only had to prove 'good cause' instead of having to prove that delay was caused for 'reasons outside of his or her control', as they ought to have been required to do under Regulation 35(2) of the Regulations. The Blé Goudé Defence argues that when a request for extension of time limit is filed so close to the expiry of the deadline, it cannot be considered as having been filed within the time limit since the Chamber is not in a position to render its decision prior to the deadline.¹⁵

- b) That the Chamber erred in its interpretation of Regulation 35(2) by substituting an analysis based on a case-by case assessment instead of applying the legal criteria set forth in Regulation 35(2) when determining whether disclosure after the deadline should be granted or not*

16. The Blé Goudé Defence submits that the Chamber should not have conducted a case-by-case assessment of the Requests instead of applying the criteria of Regulation 35 of the Regulations. It argues that the Chamber did not consider the criteria of 'good cause' or circumstances outside of the control by the

¹⁴ Blé Goudé Defence Request, ICC-02/11-01/15-189-Conf, paras 20-23.

¹⁵ Blé Goudé Defence Request, ICC-02/11-01/15-189-Conf, paras 24-33.

Prosecution, as required by Regulation 35(2) of the Regulations, but merely ruled on the basis of an analysis of the alleged prejudice to the Defence.¹⁶

17. The Blé Goudé Defence submits that resolution of the Two Issues would significantly affect the fair and expeditious conduct of proceedings, as, *inter alia*, untimely disclosure impairs the Defence's right to have sufficient and adequate time to prepare for trial. Moreover, in its view, since the Chamber has substituted the criteria set forth in Regulation 35(2) of the Regulations by other criteria 'construed by the [J]udges themselves', a ruling from the Appeals Chamber would clarify the interpretation of this provision, which may be relied upon again in the future, and would thus appear necessary with regard to the expeditious conduct of proceedings.

18. The Blé Goudé Defence also submits that since the material subject to the late disclosure consists of additional witness statements, some of whom have been deemed by the Prosecution as 'important insider witnesses', the resolution of the issues raised by the Impugned Decision will significantly affect the outcome of the trial. It also argues that the resolution of such issues will determine the admission or the non-admission of additional material on the list of evidence and maybe the admission of new witnesses on the list of witnesses.

19. The Blé Goudé Defence also states that a resolution by the Appeals Chamber may materially advance the proceedings, since in light of the criteria set out by the Impugned Decision, as long as it is not seen as creating any significant prejudice to the other party, it seems that any requests for extensions of time may always be granted. Finally, it submits that this creates legal uncertainty

¹⁶ Blé Goudé Defence Request, ICC-02/11-01/15-189-Conf, paras 34-44.

that should be resolved 'once and for all' so that parties can anticipate what their options are if they cannot meet a deadline in the future.¹⁷

Prosecution Response

20. The Prosecution submits that the Requests do not identify any appealable issues and fail to show how the Article 82(1)(d) criteria are met. It submits that the Gbagbo Defence submission - namely that the Chamber systematically rejects its leave to appeal requests -- results from the Gbagbo Defence's consistent failure to identify appealable issues when instead it is simply disagreeing with the Chamber 'and resort[ing] to dilatory tactics'. It submits that reasons to reject previous requests for leave to appeal apply equally to the current Requests insofar as the Gbagbo Defence fails to demonstrate that the Four Issues meet the criteria for leave to appeal.

21. The Prosecution contends that the Gbagbo Defence misrepresents the Impugned Decision, as it criticises the Chamber for having considered the short time elapsed between the disclosure deadline and the expected date of disclosure of the relevant material. In the Prosecution's view, the Gbagbo Defence ignores that in conducting its assessment, the Chamber was mindful of the right of the accused to prepare for trial. The Prosecution also argues that the Defence has been assisted in its preparation for trial by summaries and interview notes and therefore the argument that it only has five weeks to prepare for trial is a misrepresentation of facts. The Prosecution submits that the Gbagbo Defence has been capable of investigating matters arising out of these interviews for at least six months before the expected testimony of witnesses concerned and sufficiently in advance to prepare for the opening statements.

¹⁷ Blé Goudé Defence Request, ICC-02/11-01/15-189-Conf, paras 45-56.

22. The Prosecution also submits that the Gbagbo Defence raises logistical issues that pertain more to the Registry, while other matters are abstract and hypothetical. Moreover, the Prosecution contends that even if the issues were considered appealable, they do not meet the criteria of significantly affecting the fairness and expeditious conduct of proceedings, since, *inter alia*, the Defence has been in possession of 'the vast majority of the evidence for many months, in some cases'.¹⁸

23. Concerning the issues raised by the Blé Goudé Defence, the Prosecution submits, *inter alia*, that the question of interpretation of Regulation 35 of the Regulations is not an appealable issue, as the arguments raised by the Blé Goudé Defence should have been raised when the Chamber was deciding on the matter. The Prosecution avers that such arguments cannot be raised now on appeal for the first time. Moreover, the Prosecution contends that the Appeals Chamber does not have an 'advisory function' to address what the Blé Goudé Defence perceives as a gap in the statutory texts.¹⁹

III. Analysis

24. The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute as set out in previous decisions.²⁰ In order to succeed in their request, the party seeking leave must satisfy this Chamber that both requirements of Article 82 (1)(d) have been met. This requires an analysis of the issues raised by the specific decision complained of in the context of the specific circumstances of this case. The outcome of such an analysis serves as the basis for this Chamber's consideration on whether to grant leave to appeal. A general reference to the 'accused's fundamental rights and how the alleged violation

¹⁸ Prosecution Response. ICC-02/11-01/15-194-Conf, paras 3-13.

¹⁹ Prosecution Response. ICC-02/11-01/15-194-Conf, paras 14-22.

²⁰ See Decision on request for leave to appeal the 'Decision on objections concerning access to confidential material on the case record', 10 July 2015, ICC-02/11-01/15-132, para. 3 and the decisions cited in footnote 5.

necessarily affects the fairness of the proceedings, without more, cannot satisfy the leave to appeal criteria, which requires the demonstration of a specific link between the issue which has been identified and a significant impact on the fair and expeditious conduct of the current proceedings'.²¹

Gbagbo Defense Request

25. The Chamber considers that issues one, two and three can appropriately be considered together. Complaint is made that in arriving at its decision to extend the time to disclose the transcripts in particular of four insider witnesses (witnesses P-0435, P-0483, P-0500 and P-0607) to be relied on at trial and the audio recordings of the interview of witness P-0483, the Chamber among other things (i) did not take full account of the consequences of late disclosure and (ii) concluded that granting the extension would not adversely impact the Gbagbo defence in its preparation. In doing so, the Gbagbo Defence argues that leave should be granted because the failure of the Chamber to take essential facts into consideration led it to a decision which significantly affects the fair and expeditious conduct of the proceedings.

26. The Chamber concludes that issues one, two and three as raised in the Gbagbo defence request, have failed to meet the Article 82 (i)(d) criteria. In assessing whether the decision to extend time raises the issue of prejudice that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, the Chamber accepted the Prosecution's assertion that material relating to the witnesses had already been disclosed at the time that the request was made.²² The material that had already been disclosed included interview notes for all four witnesses , audio recordings of recent interviews for witnesses P-0435,P-0500 and P-607 as well as transcripts of previous

²¹ See Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'. 2 July 2015, ICC-02/11-01/15-117, para. 20.

²² Impugned Decision, ICC-02/11-01/15-183-Red, para. 24.

interviews regarding witness P-0435.²³ The Chamber recalls that the decision to extend time was made in the context that the Gbagbo Defence was assisted by summaries of the main facts regarding the expected testimony of each of the four witnesses and the Prosecution's undertaking to defer, until a later stage in the trial, the time when the four witnesses would be called to testify.²⁴ In this sense, the Chamber is not convinced by the submissions of the Gbagbo Defence that it may only begin to prepare once it has received every single item of the evidence in totality.²⁵ Having paid due regard to the specific context in which the Impugned Decision was made, the Chamber is not persuaded that it failed to take into account arguments raised by the Gbagbo Defence,²⁶ or further that in doing so, it rendered a decision which significantly affects the fair and expeditious conduct of the proceedings or outcome of trial. Thus, the Chamber is not persuaded that either individually or cumulatively, issues one, two or three satisfy the first limb of Article 82(1)(d) of the Statute as the Gbagbo defence has failed to demonstrate specifically how the identified issues have actually -- as opposed to speculatively -- affected the fair and expeditious conduct of the current proceedings.

27. With respect to issue four, concerning whether the Chamber failed to consider the redaction protocol, raised by the Gbagbo Defence, the Chamber notes that the Gbagbo Defence repeats their submissions made in the context of the Impugned Decision, emphasising the obligation of the Prosecution to adhere to the Redaction Protocol.²⁷ However, the Gbagbo Defence has not demonstrated, in the context of this case, how a finding of the Chamber pursuant to Regulation 35 of the Regulations instead of pursuant to the Redaction Protocol, significantly affects the fairness and expeditiousness of proceedings or the

²³ Impugned Decision, ICC-02/11-01/15-183-Red, para. 24.

²⁴ Impugned Decision, ICC-02/11-01/15-183-Red, paras 29-31.

²⁵ Gbagbo Defence Request, ICC-02/11-01/15-188-Conf, paras 37-43.

²⁶ See Impugned Decision, ICC-02/11-01/15-183-Red, paras 27-28.

²⁷ Gbagbo Defence Request, ICC-02/11-01/15-188-Conf, paras 44-48.

outcome of trial. Accordingly, the Chamber is not persuaded that the Gbagbo Defence has satisfied the requirements under Article 82(1)(d) in respect of this fourth issue.

Blé Goudé Defence Request

28. In respect of the issues raised by the Blé Goudé Defence that the Chamber erred in its approach when it considered whether to grant the Prosecution an extension of time pursuant to Regulation 35(2) of the Regulations, the Chamber considers that the Blé Goudé Defence has failed to demonstrate that the issue qualifies for leave pursuant to Article 82(1)(d) of the Statute. The Chamber considers it insufficient to argue in this context that simply because the material relates to important insider witnesses, that this *ipso facto* significantly affects the outcome of the trial. In the Impugned Decision, the Chamber gave careful scrutiny to whether disclosure should be effected and how it would impact the Defence, as noted above in its assessment of issues one, two and three raised by the Gbagbo Defence. Accordingly, the Chamber refuses leave on this issue for the same reasons.

29. Concerning the second issue raised by the Blé Goudé Defence as to whether an advisory decision by the Appeal Chamber on the proper application of Regulation 35 of the Regulations may materially advance the proceedings, an analysis of the Impugned Decision in the specific context of the case indicates that, again, this is unnecessary. In summary, complaint is made that the Chamber erred in failing to comply with the express terms of Regulation 35(2) of the Regulations. While the Chamber acknowledges the plain language of Regulation 35(2) and the criteria set out therein, the Chamber also recognises that the Regulations which were made for the Court's routine functioning do not exist for their own sake, but for the purpose of the Chamber performing its duty under Article 64 of the Statute.

30. Regulation 1 of the Regulations provides that the regulations of the Court shall be read subject to the Statute and the Rules. Article 64 of the Statute which outlines the functions and powers of the Trial Chamber, provides that such functions and powers shall be exercised in accordance with the Statute and the Rules of Procedure and Evidence. In particular, Article 64(2) of the Statute provides that the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the Accused and due regard for the protection of victims and witnesses, and Article 64(8)(b) of the Statute gives the Chamber the authority to give directions on the conduct of proceedings, taking into consideration whether such directions are exercised fairly and impartially. The overall function and powers of the Trial Chamber must be borne in mind, both when interpreting and applying the Regulations. The factors may often pull in opposite directions, and it is the duty of the Chamber to strike the balance.

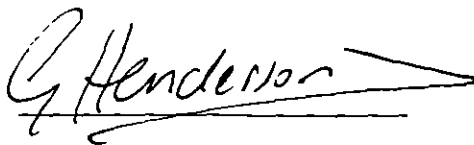
31. In the context of this case, the Chamber does not consider that granting leave to appeal on the factors a Chamber must take into consideration when considering a Regulation 35(2) request by allowing the Prosecution to disclose evidence to a party at a date later than that which was originally set by the Chamber, satisfies the leave to appeal criteria under Article 82(1)(d) of the Statute or would materially advance the proceedings. For this reason, leave is also refused on this issue.

32. In these circumstances, the Chamber considers that none of the issues raised by either the Gbagbo Defence or the Blé Goudé Defence satisfy the criteria under Article 82(1)(d) of the Statute.

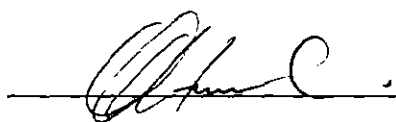
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Requests.

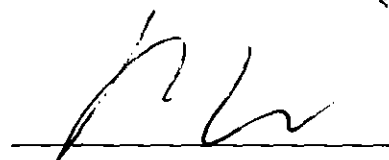
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'G Henderson', written over a horizontal line.

Judge Geoffrey Henderson, Presiding Judge

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Judge Olga Herrera Carbuccion

A handwritten signature in black ink, appearing to read 'Bertram Schmitt', written over a horizontal line.

Judge Bertram Schmitt

Dated 18 September 2015

At The Hague, The Netherlands