

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: *English*

No: ICC-02/11-01/15

Date: 25 September
2015

TRIAL CHAMBER I

Before:

**Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
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 (ICC-02/11-01/15-203)**

Source : Defence of Mr Charles Blé Goudé

Document 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 the Defence of Mr Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

Counsel for the Defence of Mr Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Legal Representatives of the Victims

Ms. Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms. Paolina Massida
Mr. Enrique Carnero Rojo

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**

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, immediately after this deadline, the Prosecution filed the “Prosecution’s Request pursuant to regulation 35 in relation to a limited number of documents” (“the First Request”), requesting an extension of time limit to complete its disclosure with respect to certain documents, including witness transcripts and audio tapes, and expert report.²
3. On 2 July 2015, the Prosecution filed the “The Prosecution’s Request pursuant to regulation 35 documents with less redaction” (“the Second Request”) requesting to re-disclose with fewer redactions 35 incriminating documents which for “technical reasons”, it was unable to process by the 30 June 2015 deadline.³
4. 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 Third Request”) requesting to disclose a *Procès-Verbal* related to Witness P-0049 under rule 77 of the RPE.⁴
5. On 18 August 2015, the Chamber decided in its “Decision on the Prosecution Request for variation of time limit for disclosure of certain documents” to partly grants the First Request and therefore authorized the extension of time limit sought in respect of materials relating to certain Witnesses. The Chamber granted the Second and Third Request.⁵

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, ICC-02/11-01/15-115

³ Prosecution's Request pursuant to regulation 35 seeking permission to disclose 35 documents with less redactions, ICC-02/11-01/15-118

⁴ Prosecution's Request pursuant to regulation 35 seeking permission to disclose a document under rule 77, ICC-02/11-01/15-164

⁵ Decision on the Prosecution Request for variation of the time limit for disclosure of certain documents, ICC-02/11-01/15-183

6. On 2 September 2015, the Prosecution filed the “Prosecution request for an extension of time to disclose a document under rule 77 of the Rules of Procedures and Evidence” (“the Request”).⁶

II. Applicable law

7. Under article 54(1)(a) of the Rome Statute (“the Statute”), the Prosecutor, shall :

“In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally; “

8. Article 57 (2) of the Statute provides for a disclosure obligation on part of the Prosecutor:

“In addition to any other disclosure provided for 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 the application of this paragraph, the court shall decide.”

9. As a consequence, Rule 77 of the Rules of Procedures and Evidence (the RPE) regulates the inspection of material in possession or control of the Prosecutor:

“The Prosecutor shall [...] permit 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.

10. Finally, regulation 35(2) of the Regulations of the Court (“the Regulations”) provides that:

“The 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 time limit, an extension of time may only be granted if the participant seeking

⁶ Prosecution’s request for an extension of time to disclose a document under rule 77 of the Rules of Procedures and Evidence, ICC-02/11-01/15-203

the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control⁷.”

III. Submissions

11. The Defence of Charles Blé Goudé (“The Defence”) respectfully recalls the importance of the disclosure process which is a guarantee of a fair proceeding which should respect the adversarial principle.
12. In its last decision on the Prosecution request for disclosure of certain documents, the Chamber had reminded the Prosecution of “*its obligation to be diligent in effecting disclosure in a thorough and timely manner*”.⁸
13. In the present case, the Prosecutor seeks an extension of time under Regulation 35 of the Regulations, to disclose a two-page investigation report of a medical appointment and medical expenses related to Witness P-0483 numbered CIV-OTP-0084-0367 under rule 77 of the RPE (“the Document”). 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 Request are within the control of the Prosecution

14. According to regulation 35 of the Regulations, 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.
15. In its request, the Prosecution explains that “*the Prosecution disclosed by email, on 30 June 2015, detailed interview notes related to P-0483’s March 2015 interview, the Document was not disclosed because it was overlooked at that time*”.

⁷ Emphasis added

⁸ Decision on the Prosecution Request for variation of the time limit for disclosure of certain documents, ICC-02/11-01/15-183, para.46

16. The Prosecution also specifies that *“Once the audio recordings and original language transcripts of P-0483’s March 2015 interview were processed - to be disclosed on 24 July 2015 - this non-disclosure came to the Prosecution’s attention”*.
17. The Defence notes that the Prosecution acknowledges that the present requested disclosure is delayed because the Document subject to the application has been overlooked by the Prosecution. Therefore, it cannot be sustained that the Prosecution was not able to disclose the Document 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 Office of the Prosecutor (“the OTP”).
18. Hence, the Request may not be granted as the cause of the delayed disclosure, that is to say the fact that the OTP “overlooked” the evidence, was entirely within its control.

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

19. In its request, the OTP asserts that *“The Defence will suffer little, if any, prejudice as a result of the late disclosure of the Document”* invoking: the content and the nature of the Document, the fact that Witness P-0483’s statement has been disclosed to the Defence, and the order from the Chamber that P-0483 will not be included in the Prosecution’s first 20 witnesses to testify at trial. However, none of these elements are relevant to whether or not the Defence may suffer prejudice resulting from late disclosure.
20. First, from the List of Witnesses provided by the Prosecution⁹ and the Request it appears, that it will call P-0483 at trial. Thus, any material related to the witness is relevant material to the preparation of the Defence. Moreover, the document in question is a report of a medical appointment and medical expenses. It is likely to

⁹ 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.

be significant for the Defence. It contains elements which the Defence will have to investigate in order to prepare the cross-examination of P-0483. Besides, the nature of such document requires specific skills in the medical field. Since disclosure of it is required under rule 77, and since the OTP acknowledges that it is “*material to the preparation of the defence*”, it cannot be sustained that the Defence will not suffer any or minimal prejudice for the late disclosure of the said material.

21. Secondly, in the *Banda & Jerbo* case, the Appeals Chamber invited the Trial Chamber 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.”¹⁰

22. As observed 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 information about a conflict*”¹¹.

23. In the instant case, the document in question is not merely “background information”. 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 two months 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 with opening statement in two months.

¹⁰ ICC-02/05-03/09-501, para.40

¹¹ 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.

Relief Sought:

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

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

Dated this 25 September 2015.
At The Hague, the Netherlands.