

**Cour  
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**International  
Criminal  
Court**

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

Date: **4 November  
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**

**Public Redacted Version of “Defence Response to “Prosecution’s Request for an extension of time to disclose and add to its list of evidence two expert reports and to disclose a related report under rule 77” (ICC-02/11-01/15-234-Conf)” (ICC-02/11-01/15-277-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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**REGISTRY**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## **I. Introduction**

1. The Defence of Mr Blé Goudé (the “Defence”) files the present response (the “Response”) to the “Prosecution’s Request for an extension of time to disclose and add to its list of evidence two experts reports and to disclose a related report under rule 77” dated 22 September 2015 (the “Request”).<sup>1</sup>

## **II. Confidentiality**

2. Pursuant to regulation 23*bis* (2) of the Regulations of the Court, the Defence requests that the present response be received and marked as “confidential”, as it refers to the Request and its annex which have been marked as confidential.

## **III. Procedural history**

3. On 7 May 2015, Trial Chamber I (“Chamber”) issued its “Order setting the commencement date for trial”, whereby the Office of the Prosecutor (“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.<sup>2</sup>
4. On 30 June 2015, a few minutes before the deadline expired, 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, potentially, two additional expert reports from the *Nederlands Forensic Institute* (NFI).<sup>3</sup>

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<sup>1</sup> ICC-02/11-01/15-234-Conf, with one confidential annex.

<sup>2</sup> ICC-02/11-01/15-58 (“Order”), para. 22.

<sup>3</sup> ICC-02/11- 01/15-115-Conf, with one confidential annex. A public redacted version was filed on 2 July 2015.

5. On 18 August 2015, the Chamber considered in its “Decision on the Prosecution Request for variation of time limit for disclosure of certain documents” that *“the part of the First Request related to the extension of the time limit for disclosing potential NFI expert reports is premature”* and that should the Prosecution wish to rely on these expert reports, *“it shall seise the Chamber anew providing the necessary justification”*.<sup>4</sup>
6. On 22 September 2015, the Prosecution sought authorisation to disclose and add to its List of Evidence two additional expert reports prepared by Prosecution expert witness P-0601 and to disclose an autopsy report, CIV-OTP-0081-0532, under Rule 77 of the Rules of Procedure and Evidence (“Rules”).<sup>5</sup>

#### IV. Applicable Law

7. According to Regulation 35 (2) of the Regulations of the Court (“Regulations”), *“[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 outside his or her control.”*
8. According to Article 64 (2) of the Rome Statute (“Statute”), *“[t]he Trial Chamber shall ensure that a 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.”*

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<sup>4</sup> ICC-02/11-01/15-183-Conf (“Decision of 18 August 2015”), para. 39. A public redacted version was filed on the same day.

<sup>5</sup> Request.

9. Rule 77 of the Rules obliges the Prosecution 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."*

## **V. Submissions**

10. The Defence respectfully recalls the importance of the disclosure process, which is a guarantee of fair proceedings and should respect the adversarial principle.
11. In its Decision of 18 August 2015, the Chamber reminded the parties and participants that the purpose of the 30 June 2015 disclosure deadline ("Disclosure Deadline"), *"was to provide the Defence with sufficient time to prepare for trial and sufficient notice of the witnesses and material that the Prosecution will rely on at trial"*.<sup>6</sup> In its Order to set the commencement date for trial on 10 November 2015, the Chamber noted that, as a result of the Disclosure Deadline, *"the Defence will have more than four months between the date of full disclosure by the Prosecution and the opening statements. Thereafter, it will have two additional months before the commencement of the presentation of evidence, which the Chamber considers will afford the Defence sufficient time to carry out all necessary preparations"*.<sup>7</sup> Thus, the Chamber has assessed on several occasions that a deadline for final disclosure 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"*.<sup>8</sup> A contrario, any

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<sup>6</sup> Decision of 18 August 2015, para. 17. See Order, paras 15-16.

<sup>7</sup> Order, para. 16.

<sup>8</sup> Order, para. 16.

later date for final disclosure will not afford the Defence sufficient time to carry out all necessary preparations.

12. The Prosecution has had already four years to prepare its case and to conduct investigations. During the status conference dated 21 April 2015, the Prosecution assured the Chamber that [REDACTED].<sup>9</sup> Since the issuance of the Chamber's Order, the Prosecution has been aware that the completion of disclosure of evidence shall be terminated by 30 June 2015. Yet, the Prosecution has requested on eight occasions already, on the date of the Disclosure Deadline and thereafter, an extension of time limit for disclosure of additional evidence,<sup>10</sup> and is now requesting, almost three months after the Disclosure Deadline, an extension of time to disclose two additional expert reports as incriminating material and one autopsy report pursuant to Rule 77 of the Rules.<sup>11</sup>

13. At the last status conference of 25 September 2015,<sup>12</sup> the Defence observed that the Prosecution already requested multiple extensions of time pursuant to Regulation 35 (2) to disclose items after the expiration of the Disclosure Deadline. At the status conference of 25 September 2015, the Defence 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). Mindful that the Chamber so far has

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<sup>9</sup> Transcript of 21 April 2015, ICC-02/11-01/15-T-1-CONF-ENG, page 41, lines 11-13.

<sup>10</sup> [REDACTED], ICC-02/11-01/15-111-Conf-Red; "Prosecution's request pursuant to Regulation 35 in relation to a limited number of documents", ICC-02/11-01/15-115-Conf; "Prosecution's Request pursuant to regulation 35 seeking permission to disclose 35 documents with less redactions", ICC-02/11-01/15-118; "Prosecution's Request pursuant to regulation 35 seeking permission to disclose a document under rule 77", ICC-02/11-01/15-164; "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; "Prosecution's Request pursuant to regulation 35 for an extension of time to re-disclose three documents as incriminatory material", ICC-02/11-01/15-207-Conf; "Prosecution's request to add expert witness P-0606 to its list of witnesses", ICC-02/11-01/15-220, "Prosecution's omnibus request for an extension of time pursuant to regulation 35 of the Regulations of the Court", ICC-02/11-01/15-262-Conf.

<sup>11</sup> Request, paras 1, 4, 29.

<sup>12</sup> Transcript of 25 September 2015, ICC-02/11-01/15-T-4-ENG (ET WT), pages 24-25.

adjudicated such requests, on a case-by-case basis in conformity with the existing jurisprudence, the Defence respectfully submits that the Chamber is legally empowered, at a certain 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 Regulation 35 (2) requests made since the Disclosure Deadline on the fairness of the proceedings and the element of prejudice. The Defence deems it appropriate that at this juncture, namely the ninth request of the Prosecution under Regulation 35 (2), the Chamber should deny the Prosecution's Request on the basis of the foregoing reason in combination with the arguments developed below.

***V.1. The Prosecution failed to present reasons outside of its control***

14. The Prosecution seeks, after the expiration of the Disclosure Deadline, to add to its List of Evidence two additional expert reports prepared by Prosecution expert Witness P-0601 (the "Additional Reports") and to disclose an autopsy report, CIV-OTP-0081-0582, under Rule 77 of the Rules (the "Autopsy Report").
15. Regarding the Additional Reports, while acknowledging that Regulation 35 (2), last sentence, provides a strict standard affording only a few exceptions,<sup>13</sup> the Prosecution attempts to show that the criteria of Regulation 35 (2) are met in the present instance by explaining that the reason the Additional Reports were received late (allegedly 6 July and 16 September respectively) is "*because the NFI were at that time very much engaged with their scientific investigations into the downing of flight MH17 over Ukraine*".<sup>14</sup>

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<sup>13</sup> Request, para. 15.

<sup>14</sup> Request, paras 21-22.

16. Since the Request was made after the Disclosure Deadline, Regulation 35 (2), last sentence, applies. The Prosecution must therefore show that the inability to apply for an extension of time within the time limit was outside of its control. The Defence recalls the Chamber's observations that "*Regulation 35(2), last sentence, provides a strict standard affording only a few exceptions*".<sup>15</sup> Such observations are corroborated by former jurisprudence, which has ruled that Regulation 35 (2), last sentence "*only applies in exceptional circumstances, such as an incapacitating illness*".<sup>16</sup> Yet, no such exceptional reasons have been advanced by the Prosecution. The inability of the NFI to provide its report on time does not even constitute good cause, which is a lower standard than the one required under Regulation 35 (2) last sentence. Indeed, as previously indicated in the Defence response dated 15 July 2015,<sup>17</sup> given the very short time frame between the date the analysis was requested and the Disclosure Deadline, "*the Prosecutor should have been aware of the internationally known constraints of the NFI*", and should therefore "*have submitted the relevant material for analysis to another forensic institute*", ahead of the Disclosure Deadline. In view of the foregoing, the Defence submits that the criteria of Regulation 35 (2)'s last sentence are not met.

17. As an additional remark, the Prosecution fails to substantiate why, although the expert report dated 23 June 2015 was sent to the Prosecution pursuant to a letter dated 25 June 2015, *i.e.* prior to the Disclosure Deadline,<sup>18</sup> it was only received by it on 6 July 2015,<sup>19</sup> and why, if actually received on 6 July 2015, an extension of time for that particular report was not requested earlier.

<sup>15</sup> Decision of 18 August 2015, para. 19, referring to ICC-01/09/02/11-832, para. 10.

<sup>16</sup> ICC-01/09/02/11-832, para. 10. *See also* for instance ICC-01/07-1515-Corr, paras 28, 33, where the Defence notes that Trial Chamber II, in that instance, rejected the application for an extension of time limit based only on the failure for the Prosecution to satisfy the textual criteria of Regulation 35 (2), last sentence.

<sup>17</sup> "Defence Response to 'Prosecution's request pursuant to Regulation 35 in relation to a limited number of documents' (ICC-02/11-01/15-115-Conf)", ICC-02/11-01/15-140-Conf, paras 23-24. A public redacted version, ICC-02/11-01/15-140-Red2, was registered on 24 August 2015.

<sup>18</sup> *See* Annex A to Request, page 2.

<sup>19</sup> Request, paras 2, 21.

18. Regarding the Autopsy Report, the Prosecution explains that it “*received this report on 10 May 2015, but did not disclose it because the Prosecution could not evaluate its relevance before receipt of the 12 August 2015 report.*”<sup>20</sup>

19. The Defence notes that the Autopsy Report was in the Prosecution’s possession before the Disclosure Deadline. Considering that the Prosecution was directed by the Chamber to disclose any Rule 77 material already in its possession before 30 June 2015,<sup>21</sup> the Disclosure Deadline was applicable to that Autopsy Report and the Prosecution was therefore *required* to disclose it to the Defence before 30 June 2015, irrespective of its potential relevance in light of the potential upcoming receipt of the 12 August 2015 report. An autopsy report is necessarily useful for the preparation of the Defence and should have been disclosed independently of the Prosecution’s own strategy. If the Prosecution had later determined that it wished to rely on this Autopsy Report at trial, the reclassification request procedure would have then been available to it. The Prosecution’s argument is therefore not convincing and certainly fails to meet the high standard required under Regulation 35 (2), last sentence, described above.

***V.2. The prejudice suffered by the Defence outweighs the Prosecution’s justifications for late disclosure***

20. Consistent with the Chamber’s recent rulings,<sup>22</sup> when the terms of the Regulation are not met, the Chamber may nevertheless authorise the proposed addition after the relevant deadline, by conducting a case-by-case assessment that balances the justifications for late disclosure against any

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<sup>20</sup> Request, para. 27.

<sup>21</sup> Order, para. 22.

<sup>22</sup> Decision of 18 August 2015, para. 20. *See also* “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’”, dated 18 September 2015, paras 29-30.

potential prejudice to the Defence, and in the context of the Chamber's obligation under Article 64(2) of the Statute.<sup>23</sup>

21. 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.<sup>24</sup>
22. 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 additional factors that may be considered by the Chamber,<sup>25</sup> none of the Prosecution's justifications for late disclosure outweigh the prejudice to be suffered by the Defence.
23. If the reports were to be disclosed at this late stage of the proceedings, that is after a period of three months has elapsed since the Disclosure Deadline, it would leave the Defence with just one month prior to the commencement of the trial to re-investigate a key event in light of new corroborative allegedly incriminating evidence, to be presented by witnesses in relation to whom the Prosecution has made no commitments whatsoever as to when they would be called and who could therefore very well testify among the first witnesses. Additional research cannot realistically be achieved and additional time and resources (which are very limited for the Defence) cannot realistically be spent in parallel with the ongoing proceedings, in circumstances where the Prosecution has not presented any valid reasons for not seeking to disclose alternative equivalent material at an earlier stage of the proceedings. Contrary

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<sup>23</sup> Decision of 18 August 2015, para. 20.

<sup>24</sup> 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 material 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. *See* Decision of 18 August 2015, para. 20, referring to ICC-01/09-02/11-832, para. 11.

<sup>25</sup> *See supra* footnote 24.

to the Prosecution's arguments, neither the short size of the reports<sup>26</sup> nor the fact that the Chamber and the parties were put on notice that the Prosecution *might* need to disclose additional NFI expert reports in relation to the 12 August 2015 report,<sup>27</sup> are of relevance as to whether or not the Defence may suffer prejudice resulting from late disclosure.

24. Therefore, this late addition would have a significant impact on the Defence's preparation and the conduct of its investigations. The circumstances at the current time, very close to the commencement of trial, are not ripe for the addition of new evidence. 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 new Prosecution's Request must not be considered in isolation, but together with all the former Prosecution's requests for delayed disclosure.<sup>28</sup>

25. Given the complexity of the case, the number of Prosecution witnesses, the time needed to familiarise itself with the *Gbagbo* case, and the fact that the new Defence team has been constituted only in January / February 2015, it would be unfair and highly prejudicial to Mr. Blé Goudé if the Defence were to suffer once again the consequences of the Prosecution's negligence, which would be inevitable for the aforementioned reasons, if the Prosecution's Request were to be granted.

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<sup>26</sup> Request, paras 24, 26.

<sup>27</sup> The Defence notes that due to a further oversight, and while the related request to the NFI has been made on 8 May 2015, the Prosecution failed to anticipate in its 30 June 2015 request the need to disclose the 23 June 2015 report.

<sup>28</sup> The Defence notes that additional future requests for extension of time have already been announced by the Prosecution during the last status conference.

**RELIEF SOUGHT**

26. In light of the foregoing, the Defence respectfully requests the Chamber to deny the Prosecution's Request.

Respectfully submitted,

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

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

Dated this  
4 November 2015  
At The Hague, the Netherlands