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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 to add expert witness P-0606 to its list of witnesses” (ICC-02/11-01/15-220)” (ICC-02/11-01/15-272-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 Mr Blé Goudé (“Defence”) files the present response (“Response”) to the “Prosecution’s request to add expert witness P-0606 to its list of witnesses” dated 15 September 2015 (“Prosecution’s Request”).¹

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 documents 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 file a list of evidence to be relied on at trial, as well as a list of witnesses, no later than 30 June 2015. The Chamber further required the list of witnesses to include a summary of the main facts on which each witness is expected to testify, an indication of the estimated length of time required for each witness and the total time for the presentation of the Prosecution case, in hours.²
4. On 30 June 2015, the Prosecution submitted, together with its List of Evidence, its List of Witnesses accompanied by a summary of the main alleged facts outlining each witness’ expected testimony.³
5. On 27 July 2015, the Prosecution filed a corrected version of the List of Witnesses and of the List of Evidence.⁴

¹ ICC-02/11-01/15-220, with one confidential annex.

² Trial Chamber I, “Order setting the commencement date for trial”, dated 7 May 2015, ICC-02/11-01/15-58 (“Order”), para. 25.

³ “Prosecution’s submission of its List of Witnesses and List of Evidence”, dated 30 June 2015, ICC-02/11-01/15-114, with three confidential annexes.

6. On 15 September 2015, the Prosecution sought authorisation to add expert witness P-0606 to its List of Witnesses.⁵

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.”*
9. Rule 76(1) of the Rules of Procedure and Evidence (“Rules”) specifies that *“the names of witnesses whom the Prosecutor intends to call to testify [...] shall be done sufficiently in advance to enable the adequate preparation of the defence.”*

V. Submissions

10. In its “Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents” dated 18 August 2015,⁶ the Chamber reminded the parties and participants that the purpose of the 30 June 2015

⁴ Corrigendum to ICC-02/11-01/15-114-Conf-AnxA and Corrigendum to ICC-02/11-01/15-114-Conf-AnxB, dated 30 June 2015.

⁵ “Prosecution’s request to add expert witness P-0606 to its list of witnesses”, ICC-02/11-01/15-220, with one confidential annex.

⁶ ICC-02/11-01/15-183-Conf (“Decision of 18 August 2015”). A public redacted version was registered on the same date.

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”*.⁷ In its decision 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”*.⁸ 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”*.⁹ *A contrario*, any later date for final disclosure will not afford the Defence sufficient time to carry out all necessary preparations.

11. 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].¹⁰ 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 seven occasions already, on the date of the Disclosure Deadline and thereafter, an extension of time limit for disclosure of additional evidence,¹¹ and is now requesting, two and a half months after the

⁷ ICC-02/11-01/15-183-Conf, para. 17. See Order, paras 15-16.

⁸ Order, para. 16.

⁹ Order, para. 16.

¹⁰ Transcript of 21 April 2015, ICC-02/11-01/15-T-1-CONF-ENG, page 41, lines 11-13.

¹¹ [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;

Disclosure Deadline, an extension of time to add expert witness P-0606 to its list of witnesses.¹²

12. At the last status conference of 25 September 2015,¹³ 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 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 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 eighth 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.

"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.

¹² Prosecution's Request, para. 1.

¹³ Transcript of 25 September 2015, ICC-02/11-01/15-T-4-ENG (ET WT), pages 24-25.

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

13. While regulation 35(2) of the Regulations gives the possibility to any party to apply for an extension of time limit as ordered by the Chamber, the Chamber is restricted pursuant to that Regulation as to the circumstances under which it may extend it and may only do so, when the application is filed after the time limit, provided that the inability to apply for an extension of time within the time limit was outside of the Prosecution's control.

14. The Prosecution seeks, after the expiration of the Disclosure Deadline, to add P-0606 to its List of Witnesses and to disclose a summary of the main alleged facts upon which that witness will testify. Yet, the Prosecution does not advance any existing reasons beyond its control that prevented it from filing a formal application under regulation 35(2).¹⁴ The Prosecution even acknowledges that Witness P-0606's name was omitted from its List of Witnesses "in error" and that it only realised its "oversight" upon reviewing its list of experts, on 14 September 2015.¹⁵ The Defence recalls the Chamber's observations that "Regulation 35(2), last sentence, provides a strict standard affording only a few exceptions".¹⁶ 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".¹⁷ As previously indicated, no such reasons have been advanced by the Prosecution. On the contrary, the fact that the relevant expert was not added before the deadline finds its origins in the negligence of the Prosecution. Hence, in the present instance, the criteria of Regulation 35(2)'s, last sentence, are not met.

¹⁴ Prosecution's Request, para. 10.

¹⁵ Prosecution's Request, paras 2, 15, 16.

¹⁶ Decision of 18 August 2015, para. 19, referring to ICC-01/09/02/11-832, para. 10.

¹⁷ 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.

V.2. The Prosecution failed to present valid justifications for late disclosure

15. Consistent with the Chamber's recent rulings,¹⁸ 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 potential prejudice to the Defence, and in the context of Chamber's obligation under Article 64(2) of the Statute.¹⁹
16. 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.
17. 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-0606 were to be added as an expert at this late stage of the proceedings.

¹⁸ 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.

¹⁹ Decision of 18 August 2015, para. 20.

18. First, a period of three months has elapsed since the Disclosure Deadline. The commencement date of the trial is still set for 10 November 2015, which leaves the Defence with less than six weeks from the present Response to prepare for trial. This lapse of time cannot simply be explained by an "oversight". The Defence could reasonably not have expected – two and a half months from the Disclosure Deadline and one month from the commencement of trial - to be confronted with yet another expert witness.
19. Second, the Prosecution's argument that "P-0606's evidence [would be] essential to the Prosecution's case, and necessary for the determination of the truth"²⁰ is not convincing and is inapposite since the Prosecution is not seeking to add P-0606's report to its List of Evidence – this has been completed already on 30 June – but to add the expert to its List of Witnesses. This argument is also not convincing in light of the two and half months that have elapsed since the Disclosure Deadline.
20. In any event, the evidence presented in this report, contrary to the Prosecution's allegations, will not "serve to prove beyond reasonable doubt that the high definition video [...] of the 3 March incident is authentic, and that both the image and sound have not been manipulated or tampered with" [emphasis added].²¹ The Prosecution misinterprets the evidence in this respect. [REDACTED].²² Again, [REDACTED].²³ Therefore, the interest of justice does not require the Prosecution's Request to be granted.
21. Thirdly, the Prosecution fails to show that good cause existed for not seeking to add the witness at an earlier stage of the proceedings. As indicated above, the Prosecution merely advances that despite its best efforts in providing the

²⁰ See Prosecution's Request, para 10.

²¹ Prosecution's Request, para. 14.

²² See [REDACTED].

²³ [REDACTED].

Defence with a complete List of Witnesses, it omitted to include P-0606 in the list, due to an “oversight”, and only realised its error on 14 September 2015, upon reviewing its list of experts in preparation for the status conference dated 25 September 2015. Therefore, the Prosecution fails to present any valid reasons for not seeking this addition earlier.

V.3. The prejudice suffered by the Defence is material

22. In determining whether to authorise the addition of new experts at this stage of the proceedings, 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(l)(b) of the Statute.²⁴ As regards this 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*”. 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*”.

23. The Defence submits that granting the Prosecution's Request would unduly prejudice it due to the start date set for trial and the additional investigation which would be required. If P-0606 were to be added to 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. In addition, the Defence would need to appoint its own expert to make such additional inquiries. As per the Chamber's directions

²⁴ Trial Chamber II, “Decision on the Prosecution's Application to Add P-317 to the Prosecution Witness List (ICC-01/04-01/07-1537)”, dated 3 November 2009, ICC-01/04-01/07-1590, para. 26.

dated 3 September 2015,²⁵ the parties should now be engaging in consultations to potentially jointly agree on experts and, if no agreement can be reached, the parties may challenge, by 1 December 2015, (i) the qualifications of the witness as an expert and/or (ii) the relevant of all, or parts of the report written by the expert. It means that if P-0606 were now to be added as an expert, the required investigations mentioned above would need to be carried out *prior to* 1 December 2015 and not later as the Prosecution attempts to argue. Additional research cannot realistically be achieved in parallel with the ongoing proceedings, while the fact that the Prosecution undertakes not to call that expert in the first half of 2016²⁶ will in no way, for the aforementioned reason, minimise the prejudice of the Defence.

24. More specifically, the time left for the preparation of the trial does not permit to assess how this expert's testimony would affect the Defence's approach to other witnesses. The Prosecution stresses that it is the combination of P-0606's testimony with the expected testimony of other Prosecution witnesses that allegedly would refute the different statements made soon after the 3 March 2011 incident, including statements allegedly made by Mr Blé Goudé's.²⁷ This remark from the Prosecution refutes the logic that witnesses are to be considered in isolation while it ignores the reality of a trial for which the Defence needs to carry out investigations before the commencement of trial proceedings, and in which each witness' testimony cannot be considered in isolation. The Defence has repeatedly stressed that a fair trial preparation is dependent on the date that full disclosure will be completed.²⁸ If the Prosecution's Request were granted, the Defence would be left with just one

²⁵ "Directions on the conduct of proceedings", dated 3 September 2015, ICC-02/11-01/15-205, para. 52.

²⁶ Prosecution's Request, para. 18.

²⁷ Prosecution's Request, para. 12.

²⁸ See e.g. "Defence Submissions on Agenda Items for the Status Conference of 21 April 2015", dated 14 April 2015, ICC-02/11-01/15-33, paras 23-31; "Defence request for leave to appeal the "Order setting the commencement date of trial" (ICC-02/11-01/15-58)", dated 13 May 2015, ICC-02/11-01/15-64, para. 20; "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), registered on 16 July 2015, ICC-02/11-01/15-140-Conf, para. 30.

month to prepare between the date of full disclosure and the opening statements, which will not afford the Defence sufficient time to carry out all necessary preparations as envisaged by the Chamber in its Order on the start of the trial.

25. The Prosecution submits that the Defence has been put on notice of the content of P-0606's report and the Prosecution's intention to rely on it and that therefore the intention of the Prosecution to call this expert at trial cannot come as a surprise.²⁹ While it is accurate that the Defence was on notice of the preparation of the report,³⁰ which was ultimately disclosed to it, it was never informed that the author of the report would be called to testify as an expert. Reviewing an *ad hoc* report is an exercise totally different from preparing for an expert testimony and for its cross-examination. Additionally, the fact that the Defence has been put on notice of the report is irrelevant since due to the lapse of time of two a half months between the Disclosure Deadline and the Prosecution's Request, the Defence was, due to the behaviour of the Prosecution, brought under the impression that the Prosecution had finally decided not to add P 0606 to its List of Witnesses.

26. 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-0606 whilst it is currently preparing its opening statements and assessing the credibility of the existing Prosecution's experts. The circumstances at the current time, very close to the commencement of trial, are not ripe for the addition of new experts. 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

²⁹ Prosecution's Request, para. 17.

³⁰ Transcript of 21 April 2015, ICC-02/11-01/15-T-1-CONF-ENG (ET), page 10, line 7 to page 11, line 7.

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.³¹

27. 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.

RELIEF SOUGHT

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

³¹ The Defence notes that additional future requests for extension of time have already been announced by the Prosecution during the last status conference.

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. Knoops'.

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

Dated this

4 November 2015

At The Hague, the Netherlands