

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No: ICC-02/11-01/15

Date: 1 December
2016

TRIAL CHAMBER I

Before:

**Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Geoffrey Henderson**

SITUATION IN COTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE

Confidential

**Defence Response to the « Demande d'autorisation d'interjeter appel de la
décision de la Chambre accordant des mesures de protection aux témoins P-0350,
P-0513 et P-0117 rendue oralement le 22 Novembre 2016 » (ICC-02/11-01/15-760-
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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Introduction

1. The Defence of Charles Blé Goudé ("the Defence") hereby responds to the "Demande d'autorisation d'interjeter appel de la décision de la Chambre accordant des mesures de protection aux témoins P-0350, P-0513 et P-0117 rendue oralement le 22 Novembre 2016" (the Request") filed by the Defence of Laurent Gbagbo ("the Gbagbo Defence") on 28 November 2016.¹
2. The Defence supports and joins the Gbagbo Defence submissions regarding the first issue raised in the Request, i.e. that "la Chambre a erré en droit en rendant **avant** l'expiration du délai accordé à la Défense pour répondre à la demande du Procureur une décision 1- octroyant au témoin P-0350 des mesures de protection, 2- permettant à ce témoin de déposer par liaison audio-vidéo".²

I. Confidentiality

3. The Defence files the present response as confidential pursuant to regulation 23bis(2) of the Regulations of the Court ("the Regulations") as it responds to a confidential submission from the Gbagbo Defence.

II. Procedural history

4. On 11 November 2016, the Prosecution filed the "Prosecution's application for protective and special measures, for testimony by means of video-link

¹ ICC-02/11-01/15-760-Conf.

² *Ibid.*, p. 4. No emphasis added.

technology, and for a change in the order of witnesses with respect to Witness P-0350" ("the Application").³

5. On 22 November 2016, the Chamber issued an oral consolidated decision on several requests for protective and special measures for witnesses ("the Impugned Decision")⁴ among which the Application.

III. Submissions

6. The Defence joins and supports the request for leave to appeal the Impugned Decision filed by the Gbagbo Defence in its first issue, i.e.:

"la Chambre a erré en droit en rendant **avant** l'expiration du délai accordé à la Défense pour répondre à la demande du Procureur une décision 1- octroyant au témoin P-0350 des mesures de protection, 2- permettant à ce témoin de déposer par liaison audio-vidéo".⁵

7. Protective measures are based on Rule 87 of the Rules of Procedure and Evidence ("the Rules") of which sub-paragraph c states that:

"[a] motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond".⁶

8. Besides, pursuant to Regulation 24(1) of the Regulations of the Court ("the Regulations"):

³ ICC-02/11-01/15-754-Conf.

⁴ ICC-02/11-01/15-T-103-CONF-ENG ET 22-11-2016, from p. 77, line 16 to p. 82, line 7.

⁵ ICC-02/11-01/15-760-Conf, p. 4. No emphasis added.

⁶ Emphasis added.

"The Prosecutor and the defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber."⁷

9. Such provisions establish the basis of the adversarial principle which is one of the core elements to the fundamental right to a fair trial.
10. Article 21(3) of the Statute binds the Court to apply and interpret the law applicable under the Statute in a manner consistent with "internationally recognized human rights", and the right to a fair trial has been acknowledged continuously as such by international treaties and conventions.⁸ As commonly stated by international courts,⁹ such as the International Court of Justice,¹⁰ and institutions,¹¹ the right to a fair trial¹² in its general understanding incidentally

⁷ Emphasis added.

⁸ See Universal Declaration of Human Rights, adopted and proclaimed by the United Nations General Assembly Resolution 217A(III) of 10 December 1948, article 10; The International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966), entered into force 23 March 1976, 999 United Nations Treaty Series 171, article 14 (1); The European Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, European Treaty Series No. 5, article 6 (1); The American Convention on Human Rights, "Pact of San José, Costa Rica", signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955, article 8 (1); The African Charter on Human and People's Rights, signed on 27 June 1981, entered into force on 21 October 1986, 1520 United Nations Treaty Series 26363, article 7 (1).

⁹ See *inter alia* European Court of Human Rights, *Case of Dombo Beheer BV v. The Netherlands*, "Judgment", Application No. 14448/88, 27 October 1993, par. 33: "Nevertheless, certain principles concerning the notion of a 'fair hearing' in cases concerning civil rights and obligations emerge from the Court's case-law. Most significantly for the present case, it is clear that the requirement of equality of arms, in the sense of a 'fair balance' between the parties, applies in principle to such cases as well as to criminal cases (see the *Feldbrugge v. the Netherlands* judgment of 26 May 1986, Series A no. 99, p. 17, par. 44)."; *Case of Brandstetter v. Austria*, "Judgment", Application no. 11170/84; 12876/87; 13468/87, 28 August 1991, par. 66; *Case of Ruiz-Mateos v. Spain*, "Judgment", Application no. 12952/87, 23 June 1993, par. 63; *Case of Rowe and Davis v. The United Kingdom*, "Judgment", Application no. 28901/95, 16 February 2000, para. 59 to 61; *Case of Laukkanen and Manninen v. Finland*, "Judgment", Application no. 50230/99, 3 February 2004, par. 34.

¹⁰ See *inter alia* International Court of Justice, *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion of 23 October 1956, ICJ Reports (1956) pp. 77, 84 et seq.

¹¹ See *inter alia* Views of the Human Rights Committee on Communications 207/86 (*Moraël v. France*) par. 9.3.: "the concept of a fair hearing in the context of article 14 (1) of the Covenant should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of *ex officio reformation in pejus* [footnote omitted] and expeditious

covers the right to an adversarial trial, which provides the same options to the Prosecution and the Defence in confronting one another's case, which underlies the notion of equality of arms. Indeed, at any stage of the judicial process, equality of arms, by its very nature, encompasses a fundamental requirement to grant access to adversarial proceedings. In *Belzniuk v. Poland*, the European Court of Human Rights ("the ECHR") proclaimed this principle is "only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial".¹³ The ECHR further declares that, in doing so, "both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party".¹⁴

11. In light of this settled case-law, and as extended to the principle of adversarial proceedings, equality of arms concedes to both parties the opportunity to respond to any document filed by any participant in the case. Likewise, not taking into account such response, filed within the given deadline, contravenes the right of the Accused to have access to adversarial proceedings and creates a difference in treatment between the Defence and other parties and participants.

12. The Defence is of the view that the issue raised by the Gbagbo Defence in the Request significantly affects the fair and expeditious conduct of the proceedings as it creates a precedent according to which the Chamber could decide on an application without authorizing the Defence to respond, hence in violation of the adversarial principle.

proceedings." and 514/92 (Fei v. Colombia) paragraph 8.4 (cited in: *Joseph S, Schultz J, Castan M.*, The International Covenant on Civil and Political Rights. Cases, Materials and Commentary, (Second Edition, Oxford University Press, 2004) para. 14.41 and 14.42).

¹² Rome Statute, article 64 (2).

¹³ European Court of Human Rights, *Case of Belzniuk v Poland*, "Judgment" Application no. 23103/93, 25 March 1998, par. 37.

¹⁴ *Ibid.*

13. If the Chamber intended to expedite the issuance of a decision on the Application in order to promote the expeditiousness of the proceedings, it could have shortened the deadline to respond, which would have put the Defence in a position to provide its submissions before any deliberations took place. On the contrary, the Chamber chose to maintain the eight-day deadline set at the beginning of the trial to respond to written submissions, and then kept the Defence in the belief that their written response would be taken into account in the final decision, consistently with Rule 87 of the Rules and Regulation 24 of the Regulations. Therefore, it was a complete surprise for the Defence to find out that the Chamber decided on the Application a few hours before the expiration of the deadline to file a response. The situation in which the Defence does not have the opportunity to respond to a filing made by the Prosecution affects in itself the fair and expeditious conduct of the proceedings.

14. The Defence is finally of the view that an immediate resolution by the Appeals Chamber may materially advance the proceedings as given the seriousness of the issue and the fact that it might occur again in the future, a ruling from the Appeals Chamber is needed on whether or not the Chamber may render a decision without having given to every party at trial the opportunity to assert their legal and factual arguments in a response.

RELIEF SOUGHT

For the foregoing reasons, the Defence respectfully requests the Chamber to:

- GRANT the leave to appeal as requested by the Gbagbo Defence in the 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 'N'Dry'. The box is empty except for the signature.

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

Dated this 1 December 2016

At The Hague, the Netherlands