

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **18 April 2017**

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

Public

Defence Response to the Prosecution's request for an extension of time pursuant to regulation 35 of the Regulations of the Court and application to submit documentary evidence under paragraph 43 of the Directions on the conduct of the proceedings relating to the testimony of P-0045 (ICC-02/11-01/15-869)

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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Detention Section

**Victims Participation and Reparations
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Other

I. Introduction

1. The Defence Charles Blé Goudé (“the Defence”) hereby opposes to the “Prosecution’s request for an extension of time pursuant to regulation 35 of the Regulations of the Court and application to submit documentary evidence under paragraph 43 of the Directions on the conduct of the proceedings relating to the testimony of P-0045” (“the Application”).¹
2. The Defence requests the Chamber to deny the Application based on Chamber’s decision of 13 May 2016 where the Chamber stated *inter alia* that: “Without prejudice to the Prosecutor's ongoing obligations under article 67(2) of the Statute and rule 77 of the Rules, the Chamber will no longer allow the addition of any further incriminating evidence.”² As the Chamber rightly pointed out, as a matter of principle and to protect the rights of the Accused under article 67 of the Rome Statute, “the Defence has the right to know the content of the Prosecutor's evidentiary case in its entirety.”

II. Submissions

3. The Application consists in a request for an extension of time to reclassify video CIV-OTP-0095-0368 as incriminatory material and add it to the Prosecution’s List of Evidence, under regulation 35 of the Regulations of the Court (“the Regulations”).
4. The Application also contains a request to submit the above mentioned video pursuant to paragraphs 43 and 44 of the Directions on the conduct of the

¹ ICC-02/11-01/15-869.

² ICC-02/11-01/15-524 para 21.

proceedings (“the Directions”). A transcript of the video is to be submitted along with the video.³

5. These two requests will be discussed separately.
6. As a preliminary observation, the Defence notes that where the Prosecution reminds the Chamber that the Defence of Laurent Gbagbo did not oppose the presentation of the video to the Witness in court,⁴ it does not mention that the Defence of Charles Blé Goudé objected to it.⁵

A. The request for late reclassification of Rule 77 material as incriminatory material

7. According to regulation 35 of the Regulations, “[a]fter the lapse of a 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 for reasons outside his or her control.”
8. On 13 May 2016, in the “Decision on request for leave to appeal the 'Fourth decision on matters related to disclosure and amendments to the List of Evidence' and other issues related to the presentation of evidence by the Office of the Prosecutor” the Chamber found that it would “no longer allow the addition of any further incriminating evidence.”⁶ The Chamber reasoned that “the Defence has the right to know the content of the Prosecutor's evidentiary case in its entirety,” and that the Chamber has the obligation to ensure Mr. Blé Goudé’s fundamental rights under Article 67(1) of the Statute.⁷ Therefore, the Chamber determined that any departure from this rule would

³ CIV-OTP-0097-0136, See ICC-02/11-01/15-869, para. 3.

⁴ ICC-02/11-01/15-869, paras. 1 and 12

⁵ ICC-02/11-01/15-T-119-CONF-FRA ET 09-02-2017, p. 103, l. 2-6.

⁶ ICC-02/11-01/15-524, para. 21.

⁷ *Ibid.*

have to meet the following two cumulative criteria: (1) the evidence is entirely new, non-duplicative, evidence and was obtained by the Prosecutor after the disclosure deadline, and (2) the Prosecution must show that the material could not reasonably have been obtained by a diligent Prosecutor before the disclosure deadline.⁸

9. In its Application, the Prosecution holds that it found the video on Youtube until July 2016 and disclosed it to the Defence.⁹ Indeed, the video was disclosed to the Defence on 21 July 2016 under Rule 77 of the Rules. However, from this first disclosure and until the appearance of the witness before the Chamber in February 2017, the Prosecution had ample time to seek reclassification of the video. Instead, on 8 February 2017, 15 minutes before the beginning of the hearing where P-0045 appeared, the Prosecution asked the Chamber's permission to show the video to the witness.¹⁰
10. This request was left without response until 9 February 2017 when the Prosecution reiterated this request orally.¹¹ Although the Gbagbo Defence finally decided not to oppose, it emphasized that between July 2016 and the appearance of the witness, the Prosecution had the necessary time to analyse the video and determine whether the evidence was incriminating or not.¹² As such, there is no reason that would explain the delayed reclassification. The Defence endorses this position and further considers that it also applies to the present Application. A request for reclassification of incriminatory material should be introduced as soon as possible by the party seeking the reclassification.

⁸ ICC-02/11-01/15-524, para. 22.

⁹ ICC-02/11-01/15-869, para. 9.

¹⁰ Email sent by the Prosecution to the Chamber, parties and participants on 8 February 2017, at 9:15 am.

¹¹ ICC-02/11-01/15-T-119-CONF-FRA ET 09-02-2017, p. 101, l. 26 to p. 102, l. 9.

¹² ICC-02/11-01/15-T-119-CONF-FRA ET 09-02-2017, p. 102, l. 12-28.

11. Besides, allowing such reclassification after the in-court testimony of the witness would amount to depriving the Defence of its right to question the witness on material that should have been presented to him in-court, on the condition that the Prosecution had included it on its list of material,¹³ or, at the very least, if it had informed the Chamber, parties and participants of the use of such material in a reasonable time and not 15 minutes before the appearance of the witness.
12. Therefore, the Defence considers that it has been put before a "*fait accompli*" as the Prosecution, because of its oversight of the video, now seeks the submission of the document through paragraphs 43 and 44 of the Conduct of Proceedings, thereby circumventing the right of the Defence to confront the witness with the video.
13. For the foregoing reasons, the Defence is of the view that the request pursuant to regulation 35 of the Regulations should be rejected as the Prosecution has failed to prove that it could not have presented it reasonably before the appearance of the witness.

B. The request pursuant to Paragraphs 43 and 44 of the Directions

14. The video shows an individual, with his face concealed, and presented by a speaker as a former warrant-officer in charge of the transmissions ("*ancien sous-officier chargé des transmissions*") who listened to communications of the Republican Guard for many hours. The individual then shows notes that the speaker partially reads out.
15. As the individual on the video appears with his face concealed, it would have been necessary to directly verify with the witness whether or not he was this

¹³ Which was not the case.

individual. Without a formal identification, it is impossible to assert that Witness P-0045 is the individual portrayed in the video. In this regard, it should not be sufficient to raise some similarities between the notes shown in the video and the copies presented to the witness during his testimony.¹⁴ Formal identifications of both the individual and the notes by Witness P-0045 would have been necessary.

16. Besides, only a few pages and a portion of a page are shown on the video. Indeed, 4 pages are shown very quickly and from so far that it is not possible to read them.¹⁵ Only one portion of a page is readable and read out by the speaker.¹⁶ Hence, the Defence considers that even if the video had been presented to the Witness, it should not have been sufficient to authenticate the notes.

17. Finally, the Defence does not understand the added value of the video since the Prosecution has had ample opportunity to question the witness about the authenticity of the so-called notes taken by him during the post-electoral crisis, during direct examination and also during re-examination.

18. For the foregoing reasons, the Defence considers that the video lacks the minimum relevance and probative value to be submitted to the case through a bar table motion.

RELIEF SOUGHT

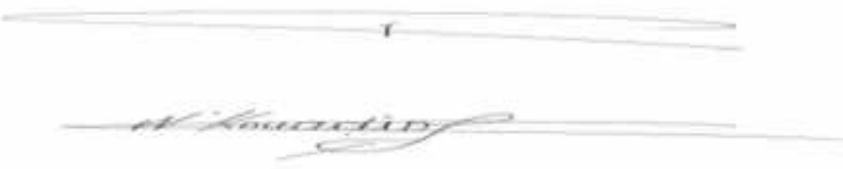
1. In light of the foregoing, the Defence respectfully requests the Chamber to **DENY** the Prosecution's Application.

¹⁴ ICC-02/11-01/15-869, para. 14.

¹⁵ CIV-OTP-0095-0368, 00:08:23 to 00:08:28.

¹⁶ CIV-OTP-0095-0368, 00:08:07 to 00:08:21.

Respectfully submitted,



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

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

Dated this
18 April 2017
At The Hague, the Netherlands