

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **24 May 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

Public Redacted Version of “Defence Consolidated Response to the Prosecution requests ICC-02/11-01/15-874 and ICC-02/11-01/15-875” (ICC-02/11-01/15-882-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 for Charles Blé Goudé (the “Defence”) hereby responds to the following two Prosecution requests:
 - a) 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 Witness P-0010” (First Request),¹ and
 - b) The “Prosecution’s application to submit video evidence related to the Bar le Baron speech, to present the fullest possible reading of the speech” (Second Request).²
2. The Defence requests Trial Chamber I (“the “Chamber”) to deny the requests for three reasons. First, in regard to the Regulation 35 portion of the requests, the Prosecution has failed to substantiate why an exception should be made to this Chamber’s decision of 13 May 2016 where it held *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*” (*emphasis added*).³
3. Second, the Prosecution’s request to introduce document CIV-D15-0001-6610 under paragraph 43 fails to substantiate how an official journal listing officer promotions is relevant to the issue regarding the correct spelling of Captain Saganoko Mory’s name.

¹ ICC-02/11-01/15-874-Conf.

² ICC-02/11-01/15-875.

³ ICC-02/11-01/15-524 para 21.

4. Third, the Prosecution's request to introduce under paragraph 43 two small extracts from Mr. Blé Goudé's speech at the Baron Bar is wholly inappropriate. Instead of motivating its request by adducing information that would assist the Chamber in determining the videos' alleged relevance and probative value, the Prosecution has decided to eschew using facts, and instead uses its own unfounded interpretation of a few extracts taken from Mr. Blé Goudé's speech. An interpretation, which is clearly unsustainable given the plain meaning of Mr. Blé Goudé's words calling for peace. The Prosecution's legal qualification of these extracts is outside the scope of paragraph 43, and the Defence wishes to remind the Prosecution that this is not the time to be submitting arguments for its final brief. The Defence therefore leaves it to the discretion of the Chamber to take note *proprio motu* of the excerpts on another legal basis such that the Prosecution is prevented from putting the excerpts on its list of materials.

II. Confidentiality

5. Pursuant to regulation 23bis (2) of the Regulations of the Court ("Regulations"), the Defence files the Response as "confidential" as it is a consolidated response to two requests, one of which was classified as confidential.

III. Submissions

A. The Prosecution has failed to satisfy the requirements of Regulation 35(2)

6. In the First and Second Request, the Prosecution seeks the re-disclosure of two defence items as incriminatory material and the addition of the items to

their list of evidence.⁴ The First Request relates to item CIV-D15-0001-6610, which is a document taken from the *Journal Officiel* of Côte d'Ivoire. On page 6612 the promotions of elements of the national Gendarmerie to the rank of captain are listed, and the name Sangankoko Mory appears. The Second Request pertains to item CIV-D15-0001-0586, which is a 2 minute 50 second video clip of Mr. Blé Goudé's Baron Bar speech. The Defence submits that the two requests should be rejected for the requirements of Regulation 35 are not met, and the addition of the items to the Prosecution's list of evidence would be prejudicial to Mr. Blé Goudé.

7. In both requests, the Prosecution admits that the requirements of Regulation 35(2)' second sentence are not met.⁵ Therefore, Prosecution is not in a position to demonstrate that it was "unable to file the application within the time limit for reasons outside his or her control" for the simple reason that it could have sought the re-disclosure of these two items years before the disclosure deadline of 30 June 2015. The Defence for Laurent Gbagbo disclosed the document CIV-D15-0001-6610 to the Prosecution on 17 May 2014 and the extract taken from Mr. Blé Goudé's Baron Bar speech, namely CIV-D15-0001-0586 was disclosed to the Prosecution on 1 June 2012. Thus, the Prosecution had over a year to add document CIV-D15-0001-6610 to its list of evidence before the deadline, and it elected not to do so.
8. With regard to the Gbagbo defence video clip of the Baron Bar speech, the Prosecution had three years to decide whether to include this item on its list of evidence. The Prosecution could have foreseen the necessity to include the video clip given that since the pre-trial phase of the proceedings, the Prosecution has maintained that the alleged 25-28 February 2011 incidents in

⁴ First Request, para. 13; Second Request, para. 6.

⁵ First Request, para. 13; Second Request, para. 8.

Yopougon occurred in part as a result of Mr. Blé Goudé's Baron Bar speech.⁶ Thus, the Prosecution has failed to substantiate why an exception should be made to the Chamber's 13 May 2016 decision in which the Chamber determined that no further incriminatory material could be added to the Prosecution's list of evidence.

9. Further, the Chamber should not grant the Prosecution's alternative relief requested since it would amount to a complete evisceration of the 30 June 2015 deadline to disclose incriminatory material. If the alternative relief is granted, the Prosecution may continue submitting material that is not on its list of evidence by simply invoking Articles 64(6)(9) and 69(3) of the Rome Statute. The power of the Chamber to order the production of evidence should not be abused by the Prosecution to circumvent the safeguards the Chamber established in setting a disclosure deadline. Now, more than a year since the start of trial, the Defence must know the full content of the Prosecution's case against Mr. Blé Goudé. Any deviation must fulfil the strict criteria set out in Regulation 35 and the 13 May 2016 decision such that his fundamental rights under Article 67(1) are preserved. Additionally, the Prosecution's argument that since the documents emanate from the Defence, there is no prejudice does not pass muster. The documents are not before the Chamber, and as Defence documents, it is for the Defence to choose whether to submit these items or not in the presentation of its case.

B. The Prosecution has failed substantiate how an official journal listing officer promotions is relevant to any material fact

10. In substantiating its paragraph 43 request under the Directions on the Conduct of Proceedings, the Prosecution submits in its first request that document CIV-D15-0001-6610 is relevant with respect to three issues: 1.) the

⁶ See ICC-02/11-02/11-124-Conf-Anx2, para. 306.

spelling of Captain Mory's name, 2.) the authenticity of document CIV-OTP-0073-0215, and 3.) the credibility of P-10. The Defence submits that the document is not relevant to any of these issues.

11. Admittedly, P-10 stated on the stand that Captain Mory was promoted to the rank of Captain in July 2007.⁷ However, an extract from an official journal listing the promotions of certain elements in the gendarmerie does not make more or less probable the fact that [REDACTED]. The official journal listing SANGANOKO Mory as being promoted in 2007 is not an identity document. Therefore, it cannot reasonably attest to the spelling of the captain Mory's name.
12. Secondly, the issue of the authenticity of document CIV-OTP-0073-0215 was not primarily based on the spelling of Captain Mory's name. During the Prosecution's examination, Witness P-10 testified that [REDACTED].⁸ Whether Captain Mory [REDACTED] does not make the issue of whether [REDACTED] more or less probable. It is simply irrelevant.
13. Thirdly, Witness P-10 admitted that he had never seen Captain Mory's identity documents and also testified that [REDACTED]. Therefore, assuming *arguendo* that the spelling of Captain Mory's name is [REDACTED], it is wholly irrelevant to Witness P-10's credibility. [REDACTED]. Moreover, the spelling of the captain's name is also irrelevant to determining whether [REDACTED]. Since the document cannot assist the Chamber in either determining the spelling of Captain Mory's name or the authenticity of the document CIV-OTP-0073-0215, it is devoid of any probative value and should not be introduced under paragraph 43.

⁷ First request, para. 12.

⁸ ICC-02/11-01/15-T-139-Conf-ENG, p. 5.

C. The Second Request contains misinformation and is nothing more than a vehicle through which the Prosecution intends to submit its unfounded interpretation of Mr. Blé Goudé's speech at the Baron Bar

14. In the Second Request, the Prosecution seeks to introduce under paragraph 43 two short excerpts from the speech Mr. Blé Goudé gave at the Baron Bar on 25 February 2011. The Defence submits that the request contains misinformation that shows the Prosecution's lack of due diligence in its investigations. Further, the Prosecution does not adduce any information to show the relevance and the probative value of the two excerpts as required by paragraph 43 of the Directions on the Conduct of the Proceedings. Rather, the Prosecution substitutes information with its own speculations as to the "true" meaning of Mr Blé Goudé's words.
15. The Prosecution claims that these two excerpts in addition to the excerpt that the Prosecution presented to Witness P-369, form the fullest available reading of the Baron Bar speech.⁹ Further, the Prosecution submits that the speech lasted no more than 8 to 10 minutes. The Prosecution's assertions are simply unsubstantiated. Firstly, the Defence has in its possession another excerpt from Mr. Blé Goudé's Baron Bar speech that it will disclose and submit to the Chamber in due course. Therefore, the Prosecution cannot at this juncture submit that upon granting the Prosecution's request the Chamber will have before it the fullest reading available of the speech. Secondly, the Prosecution admits that it does not have a recording of the speech in full, but nevertheless sustains that the speech lasted from 8 to 10 minutes.¹⁰ Since the Prosecution did not, as a diligent Prosecution would, save the recordings of the alleged full speech when it was supposedly available, neither the Defence nor the Chamber can verify whether the speech did in fact last only 8 to 10 minutes, and whether important portions of the speech are missing from the case

⁹ Second Request, para 2.

¹⁰ Second Request, para. 12

record. The Defence submits that the speech did not last 10 minutes, but in fact was much longer given that the speech was conducted during a meeting that was held during the middle of the post-electoral crisis where large portions of the population were moving within Abidjan to seek safety from the Commando Invisible.

16. Moreover, the Defence takes issue with the Prosecution's submissions regarding the relevance and the probative value of the two excerpts. It is clear that three excerpts the Prosecution wishes to submit into evidence contain exculpatory material in which: (1) Mr Blé Goudé denounces the slitting of people's throat,¹¹ (2) he urges the crowd to not fall into the trap of civil war,¹² and (3) he insists that he does not want civilians to fight each other.¹³ These portions of the speech do not fit the Prosecution's theory about Mr Blé Goudé's Baron Bar speech, and thus the Prosecution uses of paragraph 43 to give an unfounded interpretation of it and to legally qualify Mr. Blé Goudé's words, which is outside the scope of paragraph 43.

17. Paragraph 44 directs the parties when seeking to introduce documentary evidence to provide succinct information indicating (i) the item's relevance, its probative value including authenticity; and (ii) the date on which it was disclosed to the other parties. An item of evidence is relevant if it makes a fact at issue more or less probable.¹⁴ When determining the probative value of an item, the Court will consider its reliability and "the measure by which an item of evidence is likely to influence the determination of a particular issue in the case."¹⁵

¹¹ See ICC-02/11-01/15-875-AnxB, page CIV-OTP-0094-0025, at lines 43-51; ICC-02/11-01/15-875-AnxC, page CIV-OTP-0097-0216, lines 96-101.

¹² See ICC-02/11-01/15-875-AnxC, page CIV-OTP-0097-0216 at lines 96-97.

¹³ See ICC-02/11-01/15-875-AnxC, page CIV-OTP-0094-0025 at lines 53-54 (« j'insiste là-dessus devant la presse, je **ne veux pas** d'affrontement entre civils en COTE D'IVOIRE ») (*emphasis added*).

¹⁴ ICC-01/04-01/07-2635, para. 16.

¹⁵ Ibid, para. 20.

18. In seeking to introduce item CIV-D15-0001-0586, the Prosecution states *inter alia* that the video is relevant because it shows “how Mr Blé Goudé instilled the pro-Gbagbo youth with fear that Mr. Gbagbo’s political opponents, with support from the international community, would perpetuate massacres, even genocide, if the pro-Gbagbo youth did not follow Mr. Blé Goudé’s guidance.”¹⁶ The Defence notes that in the excerpt Mr. Blé Goudé never says that the youth must follow his instructions in order to avoid genocide or massacres. Thus, the video cannot be submitted to prove this allegation. This is nothing more than the Prosecution’s interpretation of the said excerpt.
19. . The Prosecution adds that Mr. Blé Goudé’s words were not a call to peace because of the tenor of the rest of the speech. However, in none of the excerpts cited in the Second Request does Mr. Blé Goudé call on violence against civilians, on the contrary, as submitted above Mr Blé Goudé expressly states that he does not want civilians to fight one another. Thus, the submission of the two excerpts cannot assist the Chamber in determining whether it is less or more probable that Mr Blé Goudé did give instructions to commit violence against civilians. He asks the crowd to report the presence of unknown individuals in their neighbourhoods, and to stop ONUCI vehicles. The Prosecution will need to produce further evidence if it intends to prove this was a call to violence against a civilian population.
20. Similarly, instead of providing information as to the probative value of the two excerpts, the Prosecution provides the Chamber with its legal qualification of certain phrases taken from Mr. Blé Goudé’s speech. Thus, for excerpt CIV-D15-0001-0586 the Prosecution submits that the excerpt shows “Mr Blé Goudé’s control, and his assertion of his control over the pro-Gbagbo youth, and his knowledge of their readiness to carry out...acts of violence.”¹⁷

¹⁶ Second Request, para.19.

¹⁷ Second Request, para. 19

The alleged control that Mr. Blé Goudé is not a fact, but is a legal conclusion to be made by the Chamber once the Prosecution has presented its case. Since the video clearly cannot show control, the Prosecution has not substantiated how the submission of this video will advance the Chamber in its determination of a fact at issue in the case.

21. With respect to the second excerpt the Prosecution wishes to submit, namely CIV-OTP-0064-0087, the Prosecution submits the video has probative value since it shows Mr. Blé Goudé's ability to lead the youth in a coordinated fashion and because it implies that there was a system of reporting through which Mr. Blé Goudé was informed of the youths' activities.¹⁸ Again, the Prosecution does not adduce information that in support of these conclusions. It simply presents the Chamber with its interpretation of Mr Blé Goudé's instructions at the Baron Bar. As the Prosecution is well aware, Mr Blé Goudé's did not call the youth to go to the Golf Hotel one week after giving his Baron Bar speech, and what's more the Prosecution does not allege that the youth attacked it. Therefore, the Prosecution submitting that there were reporting systems in place and that the youth were organized in a coordinated fashion is based on pure speculation, and does not show the excerpts reliability or their importance in advancing the Chamber's inquiries with regard to Mr. Blé Goudé's actions during the post electoral crisis.

22. The Defence therefore requests the Chamber to reject the Prosecution's application under paragraph 43 and paragraph 44. However, the Defence leaves it in the hands of the Chamber to determine whether the videos should come before it through its own powers to compel the production evidence through Articles 64(6)(d) and 69(3).

¹⁸ Second Request, para. 25.

23. The Defence further submits that given the aforementioned arguments, any attempt by the Prosecution to show the excerpts of the Baron Bar speech during the examination of its witnesses will *ab initio* call for speculation. It will result in violating paragraph 23 of the Directions of the Conduct of the Proceedings with the result that the Defence will have to object every time the Prosecution intends to confront its witnesses with these excerpts. Therefore, the Defence requests the Chamber to not allow the Prosecution to ask questions regarding the content of the speech during its examinations of witnesses. The Defence request is supported by the Chamber's decision to sustain the Defence's objection regarding a question the Prosecution attempted to ask P-369 with regard to the excerpt of the Baron Bar speech, namely CIV-OTP-0064-0087. After showing the video to P-369, the Prosecution asked, "why did this speech stand out to you?"¹⁹ The Defence objected to this line of questioning, and the Chamber sustained it by reasoning that it is for the Chamber to determine why the video is important.²⁰ Therefore, the Defence requests the Chamber to order the Prosecution to refrain from using the three excerpts unless it can show that its questioning on the videos will not elicit opinion evidence.

RELIEF SOUGHT

In light of the foregoing, the Defence respectfully requests the Chamber to :

-DENY the Prosecution's First and Second Request with respect to an extension of time to re-disclose and add to its list of evidence incriminatory material

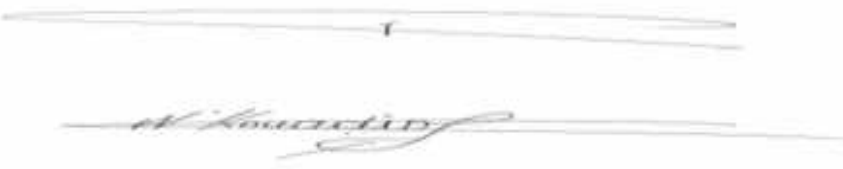
¹⁹ ICC-02/11-01/15-T-40-ENG-CONF,p.45.

²⁰ Ibid.

-DENY the Prosecution's First and Second Request with respect to its submissions under paragraph 43 and 44

- ORDER the Prosecution to refrain from using the excerpts CIV-OTP-0064-0087, CIV-D15-0001-0586, and CIV-OTP-0074-0083 unless it can make a showing that its submission will not elicit opinion evidence

Respectfully submitted,

A rectangular box containing a handwritten signature in dark ink. The signature is written in a cursive style and appears to be 'H. Knoop'. There are some horizontal lines above and below the signature, possibly indicating the end of a line or a separator.

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

Dated this
24 May 2017
At The Hague, the Netherlands