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**International
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Date: **21 August
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 pursuant to Regulation 35 in relation to a limited number of documents (ICC-02/11-01/15-115-Conf)'" , 15 July 2015, ICC-02/11-01/15-140-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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Other

I. Introduction

1. The Defence of Mr Blé Goudé (“Defence”) files the present response (“Response”) to the “Prosecution’s request pursuant to Regulation 35 in relation to a limited number of documents” dated 30 June 2015 (“Prosecution’s Request”).¹

II. Confidentiality

2. Pursuant to regulation 23bis (2) of the Regulations of the Court (“Regulations”), the Defence files the Response as confidential since it is a response to the Prosecution’s Request, which has been classified as a confidential.

III. Procedural history

3. On 7 May 2015, Trial Chamber I (“Chamber”) issued its “Order setting the commencement date for trial”, whereby the Prosecution (“Prosecutor”) 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 2015.²
4. On 30 June 2015, [REDACTED] the Office of the Prosecutor informed the Chamber and the Defence teams through several emails that his team would be unable to disclose a certain number of items according to the E-court Protocol (in Ringtail compatible format) and transmitted a courtesy copy of

¹ “Prosecution’s request pursuant to Regulation 35 in relation to a limited number of documents”, ICC-02/11-01/15-115-Conf, 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. 22.

such documents by email.³ Also, on that date, [REDACTED] sought to delay the disclosure of lesser redacted forms of 35 incriminating documents.⁴

5. On the same day, the Prosecutor filed the Prosecution's Request, requesting an extension of time limit to complete its disclosure with respect to certain documents, including witness transcripts and audio tapes, and expert reports.

IV. Applicable Law

6. 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."
7. 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".

V. Submissions

8. The Defence recalls that in reaching its decision to set the commencement date for trial on 10 November 2015, the Chamber "has taken into account [...] that any limited material remaining to be disclosed, will be transmitted on a rolling basis and no later than end of June 2015".⁵ The Chamber further noted that "as a result, the Defence will have more than four months between the date of full disclosure by the Prosecution and the opening statements.

³ Email communications from [REDACTED] to the Defence teams on 30 June 2015 at 13:35 and 14:46; email communication from [REDACTED] to the Chamber on 30 June 2015 at 15:59.

⁴ Email communication from [REDACTED] to the Chamber on 30 June 2015 at 14:14.

⁵ Order, para. 15.

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”.⁶ Thus, the Chamber has assessed that a deadline for final disclosure set on 30 June 2015 would precisely balance the interest of the Defence and the Prosecutor and “afford the Defence sufficient time to carry out all necessary preparations”. A *contrario*, any later date for final disclosure will not afford the Defence sufficient time to carry out all necessary preparations.

9. The Prosecutor has had already four years to prepare its case and to conduct investigations. While announcing different estimated dates for final disclosure over the course of the proceedings, the Prosecutor always suggested dates which were prior to 30 June 2015. [REDACTED].⁷ Since the issuance of the Chamber’s Order, the Prosecutor has been aware that the completion of disclosure of evidence shall be terminated by 30 June 2015. Yet the Prosecutor now requests, on 30 June 2015 at 15:57pm, *i.e.* three minutes before the deadline expires, an extension of time limit for disclosure of, *inter alia*, “highly relevant and probative evidence at trial”⁸ or concerning “an important insider witness”.⁹
10. Notwithstanding the Prosecutor’s statement that “the Prosecution has completed its disclosure, but for a limited number of documents”,¹⁰ it is to be observed that the Prosecutor failed to meet the Chamber’s deadline to complete her disclosure obligations.
11. 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

⁶ Order, para. 16.

⁷ Transcript of 21 April 2015, ICC-02/11-01/15-T-1-CONF-ENG, page 41, lines 11-13.

⁸ Prosecution’s Request, para. 6. *See also* Prosecution’s Request, para. 11.

⁹ Prosecution’s Request, para. 11.

¹⁰ Prosecution’s Request, para. 2.

is restricted as to the circumstances under which it may extend it and may only do so, when the application is filed within the time limit, provided that good cause is shown. The Defence will demonstrate below that good cause has not been shown and that therefore, the Prosecution's Request should be rejected.

12. In addition, the Prosecutor argues that late disclosure of a limited number of documents would result in minimal prejudice, if any, to the Defence.¹¹ The Defence strongly disagrees with this statement for the reasons explained below. Authorising the Prosecutor to complete its disclosure obligations after the time limit has lapsed would have a serious impact on the rights of Mr Blé Goudé to a fair trial in that it would reduce the time allocated to the Defence team to prepare for trial even further.

V.1. The Prosecutor failed to demonstrate good cause

Witnesses P-500, P-0435, P-0607 and P-0608

13. With respect to Witnesses P-500, P-0435, P-0607 and P-0608, the Prosecutor does not give any valid reason as to why the transcripts of their respective interviews have yet to be disclosed. The Prosecutor notes that "the transcripts [...] are in the process of being finalised",¹² without even attempting to demonstrate a sound reason for not complying with the required time limit.

14. The fact that those witnesses were interviewed or re-interviewed as late [REDACTED] May 2015 until [REDACTED] June 2015 and, as a result, the Prosecution asserts to not have had the time to complete the related transcripts, does not constitute good cause. It was the Prosecutor's obligation to take into account the time required to comply with the disclosure deadline, balanced against the time needed to complete the transcripts of the interviews

¹¹ Prosecution's Request, paras 6, 19, 26.

¹² Prosecution's Request, para. 5.

; yet the Prosecutor failed to do so. The Defence recalls that according to the Court's jurisprudence, lack of resources to transcribe material can never be a reason for not complying with legal obligations or deadlines.¹³

15. On a similar note, all these interviews have been performed *after* the Chamber had set the commencement date of the trial on 30 June 2015. Therefore, the Prosecutor, although officially informed of the deadline, continued to investigate and gather evidence until the very last moment. The Prosecutor wilfully took the risk of failing to meet the required time line in relation to its disclosure obligations and should, in these circumstances, not be granted any extension of time for good cause.

Witness P-0483

16. With respect to Witness P-0483, the Prosecutor indicated in her written submissions in view of the Status Conference that she "expect[ed] to be in a position to disclose the transcripts of the interview of [...] P-0483 [...] in the second half of May 2015" and that it would "also include their [REDACTED]".¹⁴ The Prosecutor now requests to be authorised to disclose the audio tapes of the interview of P-0483 by 24 July 2015 and the related transcripts translated into French by the end of September 2015,¹⁵ that is more than four months after the Prosecutor's initial expected disclosure date.

17. While the Prosecutor adduces an argument as to why the production of the transcripts took more time than expected, this argument does not demonstrate good cause. The use of [REDACTED] to complete the related transcripts may have been preferable, but was not essential. If the Prosecutor

¹³ *The Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, "Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translation of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redaction (ICC-01/04-01/07-1260", dated 27 July 2009, ICC-01/04-01/07-1336 ("Katanga and Ngudjolo Decision"), para. 6.

¹⁴ [REDACTED], para. 5.

¹⁵ Prosecution's Request, paras 18, 28.

had determined that [REDACTED],¹⁶ it was her duty to search for an alternative [REDACTED] able to produce the relevant transcripts within the time limit. The Prosecutor should have at least tried to find an alternative solution in order to meet the deadline. In the alternative, she should have reported the issue to the Chamber and the other parties in advance, rather than simply wait until the last minute for the receipt of the transcript [REDACTED],¹⁷ and then request an extension of time. This is even more unacceptable given that she had announced last April, thus several weeks after the interview had been conducted,¹⁸ that disclosure of the relevant items would be completed in May.¹⁹ Surely, the Prosecutor was already aware of the difficulties linked to this particular witness, and therefore should not have anticipated that May was a feasible disclosure date.

Witness P-0439

18. The Prosecutor submits that despite being in communication with Witness P-0439, the youth expert, on a regular basis for over a year to obtain some clarity as to when his expert report would be ready for disclosure, this witness failed to disclose his report by 28 June 2015, as had been lastly agreed.²⁰ The Prosecution therefore requests an extension of time to disclose such report by 7 July 2015 in light of Witness P-0439's latest assurance that [REDACTED].²¹

19. Given that this witness has been postponing the disclosure of his report for over a year, the Prosecution should not have blindly relied on the witness' promise to disclose the report on 28 June 2015, that is only two days prior to the disclosure deadline fixed by the Chamber.

¹⁶ Prosecution's Request, para. 15.

¹⁷ The Defence notes that such draft was received on 29 June 2015, i.e. on the eve of the deadline set by the Chamber. See Prosecution's Request, para. 16.

¹⁸ The Defence notes that this witness was interviewed between [REDACTED] March 2015. See Prosecution's Request, para. 13.

¹⁹ See *supra* para. 16.

²⁰ Prosecution's Request, paras 22-23.

²¹ See Annex A to Prosecution's Request.

20. Witness P-0439 indicated to [REDACTED] in his email [REDACTED] attached to the Prosecution's Request that [REDACTED], which suggests that the Prosecution has not requested any update as to the progress of his work since that time. Furthermore, given the proven lack of reliability of that expert for over a year, the Prosecution should have anticipated the failure of that expert to comply with his commitment and should have decided to secure the availability of another youth expert for the purpose of preparing a similar expert report. Lastly, the Prosecutor had the opportunity, for instance during the Status Conference, to report any issue or delay relating to the preparation of that expert report, which she did not. On the contrary, the Prosecutor indicated in his written submissions in view of the Status Conference that "[t]he Prosecution expert on the phenomenon of youth groups in Cote d'Ivoire has almost completed his report which should be disclosed by the end of April"²² [REDACTED].²³

21. Therefore, the Prosecutor's lack of anticipation prevents her now to argue that she (i) had valid reasons not to disclose the relevant report on time and (ii) should be authorised to disclose that report at a later date.

NFI reports

22. The Prosecutor submits that she is still expecting two additional expert reports from the *Nederlands Forensic Institute* (NFI) and explains that it was not disclosed within the required time limit because "[t]he NFI is still very much engaged with its scientific investigations into the downing of flight MH17 over Ukraine". The Prosecutor requests an extension of time to disclose such

²² [REDACTED], para. 9.

²³ Transcript of 21 April 2015, ICC-02/11-01/15-T-1-CONF-ENG, page 41, lines 11-13.

reports by Mid-August 2015 and to, as the case may be, “require the addition of one, or possibly, two experts to the Prosecution List of Witnesses”.²⁴

23. The Prosecutor submitted the [REDACTED] to the NFI for analysis as late as on 12 May 2015.²⁵ First, the Prosecutor does not give any valid reasons as to why she asked for this further forensic analysis at such a late stage of the proceedings. Secondly, given the very short time frame between the date the analysis was requested, and the deadline for disclosure set by the Chamber, the Defence submits that the Prosecution should have foreseen the inability of the NFI to disclose the related reports before the disclosure deadline and should have submitted the relevant material for analysis to another forensic institute. It was indeed public knowledge that the NFI had been in charge of the scientific investigations in relation to the downing of flight MH17 over Ukraine since the event, in July 2014, and that at least until the end of the first half of 2015, was still very much involved in these investigations, which caused significant delays in the analysis of evidence in other criminal cases.²⁶ Therefore, the Prosecutor should have been aware of the internationally known constraints of the NFI, and should have secured an alternative solution.

24. In view of the foregoing, the Defence submits that the Prosecutor failed to demonstrate good cause and objects to the late disclosure of the two aforementioned NFI expert reports.

²⁴ Prosecution’s Request, paras 24-25.

²⁵ Prosecution’s Request, para. 24.

²⁶ See NOS press release dated 30 August 2014 accessible at: <http://nos.nl/artikel/692872> ; letter from NFI to the Dutch Minister of Security and Justice dated 19 August 2014 accessible at: http://www.rtlnieuws.nl/sites/default/files/content/documents/2014/08/29/brief_nfi.pdf. See also NOS article dated 30 June 2015 accessible at: <http://nos.nl/artikel/2044386-kans-identificatie-twee-mh17-slachtoffers-zeer-klein.html>, which confirms that the identification process in the MH17 event will end on 1 July 2015. For examples of investigative delays in other criminal cases due to the NFI’s involvement in the MH17 investigations, see: <http://www.crimenieuws.nl/om-berechting-van-drugsverdachten-te-langzaam/> dated 12 June 2015; http://www.telegraaf.nl/binnenland/23900255/_Vrouw_gepakt_in_zaak_GHB-dode_.html dated 8 April 2015.

Laptop

25. For the same reasons as set out above, the Prosecutor has not shown good cause as to why, after investigating this case for over four years, she needs additional time to investigate the contents of the laptop, which laptop has most likely already been in possession of the Prosecutor for a considerable time.²⁷

V.2. The prejudice suffered by the Defence is material

26. The Prosecutor first submits with respect to Witnesses P-500, P-0435, P-0607, P-0608 and P-0483 that, the prejudice to the Defence will be minimal since investigator notes and audio recordings – save for Witness P-0483 – have already been disclosed. The Defence would like to highlight that Witnesses P-500, P-0435, P-0607 P-0483 are all insider witnesses and according to the Prosecutor herself, “will give highly relevant and probative evidence at trial”.²⁸ Moreover, in the absence of transcripts, the analysis of audio recordings alone would be a waste of time in that their review proves to be much lengthier and less reliable than the review of related transcripts. Finally, investigator notes are per definition very subjective and cannot be relied on by the Defence separately from the other items. Therefore, the prejudice suffered by the Defence is material, in particular regarding Witness P-0483, [REDACTED],²⁹ since the Defence will not receive the transcripts in French before end of September 2015, namely just over a month before the start of the trial.

27. In addition, in what seemed to be an attempt to reassure the Chamber that no prejudice would be suffered, the Prosecutor submits that “Witnesses P-500, P-0435 and P-0607 are unlikely to be called at the beginning of the presentation

²⁷ See Prosecution’s Request, para. 27.

²⁸ Prosecution’s Request, para. 6.

²⁹ Prosecution’s Request, para. 11.

of the evidence in this case” (emphasis added).³⁰ In the Defence’s view, this vague statement should not be given any weight by the Chamber, in particular in light of the Prosecutor’s recent failure to comply with several time estimates that had been announced.³¹ The Prosecutor is in no event giving any guarantee that those witnesses will not be called at the beginning of the presentation of the Prosecutor’s case and the Prosecutor’s statement should not be treated as such.

28. With respect to the youth expert P-0439, the Defence notes that the new time limit of 7 July requested by the Prosecutor has lapsed and that she has once again failed to meet a deadline to which she had committed.³² The uncertainty as to when this expert report, which is supposed to constitute new evidence, will be available to the Defence is very prejudicial. More generally, this casts some serious doubt as to the reliability of the time estimate given by the Prosecutor to disclose the material that is yet to be disclosed. Continuous and repeated delayed disclosure could result in a much greater prejudice to the Defence. The Prosecutor cannot use regulation 35 of the Regulations simply as a tool to disclose all evidence she might gather, if and when such evidence materialises, without any limit.³³ This would contravene the right of the accused to a fair trial and the rationale of regulation 35.

29. Finally, the Prosecutor submits that the prejudice suffered by the Defence, if any, due to the late disclosure of the two NFI reports, will be minimal as this evidence “will corroborate an existing and wide ranging body of evidence

³⁰ Prosecution’s Request, para. 7.

³¹ *See supra* paras 4-5.

³² Assuming that the Prosecutor would reply that the reason why the report was not disclosed on 7 July 2015 was because she was waiting for a ruling of the Chamber, the Defence notes that the 35 documents for which the Prosecutor sought an extension of time to 7 July 2015 to re-disclose with less redactions were indeed disclosed on 7 July 2015, notwithstanding the fact that the Chamber has not yet authorised the extended deadline. *See* “Prosecution’s Request pursuant to regulation 35 seeking permission to disclose 35 documents with less redactions”, dated 2 July 2015, ICC-02/11-01/15-118 and “Prosecution’s Communication of Evidence Disclosed to the Defence on 7 and 8 July 2015”, dated 8 July 2015, ICC-02/11-01/15-128.

³³ *See also*, for similar practice, [REDACTED].

related to the 3 March 2011 incident”.³⁴ This argument should be disregarded as it would not be efficient or financially sound for the Defence to initiate its investigations and spend time and resources (which are quite limited for the Defence) in Cote d’Ivoire in relation to a particular event until it is satisfied that the entirety of the evidence regarding that event has been provided. In addition, the late disclosure of such reports implies the addition of “one, or possibly, two experts to the Prosecution List of Witnesses”,³⁵ which will necessarily increase the Defence’s workload in terms of trial and cross-examination preparation. The same counts for a potential disclosure of the contents of the mentioned laptop. Therefore, this late disclosure would have a significant impact on the Defence’s preparation and conduct of investigations.

30. In conclusion, late disclosure from the Prosecutor of highly relevant material would be very prejudicial to the Defence in that the time allocated to the Defence to prepare for trial as scheduled last 7 May 2015 is already extremely limited and of great concern, especially in light of the recent changes to the Defence team which led last January/February to the composition of a new Defence team.³⁶ The Defence has stressed many times that a fair trial preparation is dependent on the date that full disclosure will be completed.³⁷ If the Prosecution’s Request were granted, the Defence would have much less than four months 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 as set forth in its Order on the start of the trial. Given the complexity of the case, the number of Prosecution’s witnesses, the time needed to familiarise itself with the Gbagbo

³⁴ Prosecution’s Request, para. 26.

³⁵ Prosecution’s Request, para. 25.

³⁶ See “Defence Submissions on Agenda Items for the Status Conference of 21 April 2015”, dated 14 April 2015, ICC-02/11-01/15-33, para. 15, referring to ICC-02/11-02/11-201 paras 24-28.

³⁷ 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.

case, and the fact that the new Defence team has been constituted only recently, it would be unfair and highly prejudicial if the Defence were to suffer the consequences of the Prosecutor's late investigations and lack of anticipation, which would be inevitable for the aforementioned reasons, if the Prosecution's Request was granted.

31. For the above reasons, the Prosecution's Request should be dismissed. Consequently, the relevant witnesses and related evidence should be excluded from the List of Witnesses and the List of Evidence and, for those already included in those lists, removed. If the Chamber were to reject the Prosecution's Request and therefore, refuse late disclosure of the relevant witnesses' transcripts, it would be highly prejudicial to the Defence and completely anomalous, if the Prosecutor was permitted at trial to rely on the related incriminating audio recordings and investigator notes that have been disclosed on time. One piece of evidence will only be complete once each and every part of it is available. As the transcripts form an integral part of the witness interviews, the relevant witness interview should not be considered as complete in the event that the transcripts are missing. Therefore, the other constituent parts of that witness interview should be disregarded completely.³⁸

32. In the alternative, if the Chamber were to grant the Prosecution's Request, the Defence submits that the commencement date of the trial should be postponed and re-calculated by the Chamber so as to afford the Defence sufficient time to carry out all necessary preparations, which was determined by the Chamber itself as being a period of six months between final disclosure and the effective commencement date of trial.

RELIEF SOUGHT

³⁸ See e.g., *Katanga and Ngudjolo* Decision, para. 13.

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

- a. Dismiss the Prosecution's Request;

34. In consequence:

- a. Exclude from the List of Witnesses Witnesses P-500, P-0435, P-0607, P-0483, P-0439 and, as the case may be, the two additional NFI experts; and
- b. Exclude from the List of Evidence all evidence related to the Witnesses mentioned in paragraph 34 a. above, as well as exclude any documents from the laptop the Prosecutor is referring to;

35. In the alternative, set a new time line for final disclosure by the Prosecutor, holding that the six month timeframe initially allocated to the Defence to carry out all necessary preparations for the effective start of trial shall run from this new disclosure date.



A handwritten signature in dark ink, appearing to read 'Mr. Knoops', is centered within a rectangular box. The signature is written in a cursive style with a horizontal line extending to the right.

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

Dated this
21 August 2015
At The Hague, the Netherlands