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**International
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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 omnibus request for an extension of time pursuant to regulation 35 of the Regulations of the Court" (ICC-02/11-01/15-262-Conf)", 19 October 2015, ICC-02/11-01/15-299-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 (the “Defence”) files the present response (the “Response”) to the “Prosecution’s omnibus request for an extension of time pursuant to regulation 35 of the Regulations of the Court” dated 1 October 2015 (the “Request”).¹

II. Confidentiality

2. Pursuant to regulation 23*bis* (2) of the Regulations of the Court, the Defence requests that the Response be received and marked as “confidential”, as it refers to the Request which has 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 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. The Chamber further required the Prosecution, also by that date, to file a list of evidence to be relied on at trial, as well as a list of witnesses.²
4. On 1 October 2015, the Prosecution sought authorisation to disclose:
 - a. as incriminatory evidence, and therefore to add to its List of Evidence:³
 - i. nine chain of custody documents;
 - ii. eleven audio-visual items;
 - iii. one duplicate video;

¹ ICC-02/11-01/15-234-Conf, with one confidential annex.

² ICC-02/11-01/15-58 (“Order”), paras 22-25.

³ Request.

- iv. twenty-one documents cited in the Prosecution's pre-trial brief ("Pre-Trial Brief") or witness summaries;
 - v. eleven expert reports on the autopsies of the 17 March 2011 incident and a related letter of instruction;
 - vi. one [REDACTED] authored by [REDACTED];
 - vii. five documents related to the FDS structure; and
 - viii. hard copies of three expert reports and three cover letters;
- b. under Rule 77 of the Rules of Procedure and Evidence ("Rules"):
- i. [REDACTED] authored by [REDACTED]; and
 - ii. one letter from [REDACTED].⁴

5. In addition, the Prosecution sought authorisation to add to its List of Evidence any documents for which an extension of time has already been granted or may be granted based on pending Prosecution's requests.⁵

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. 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 for reasons outside his or her control."*

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*

⁴ Request, para. 4.

⁵ Request, para. 2.

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.”

8. Rule 77 of the Rules obliges the Prosecution to allow the Defence to inspect: *“[...] any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.”*

V. Submissions

9. The Defence respectfully recalls the importance of the disclosure process, which is a guarantee of fair proceedings and should respect the adversarial principle.
10. In its Decision of 18 August 2015, the Chamber reminded the parties and participants that the purpose of the 30 June 2015 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”*.⁶ In its Order 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”*.⁷ Thus, the Chamber has assessed on several

⁶ Decision of 18 August 2015, para. 17. See Order, paras 15-16.

⁷ Order, para. 16.

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*”.⁸ *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].⁹ 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 evidence or for the addition of a witness,¹⁰ and is now requesting, three months after the Disclosure Deadline, an extension of time to disclose as incriminatory evidence numerous pieces of evidence which may substantially alter the content of its argumentation.¹¹

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

⁸ Order, para. 16.

⁹ Transcript of 21 April 2015, ICC-02/11-01/15-T-1-CONF-ENG, page 41, lines 11-13.

¹⁰ “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; “Prosecution’s request to add expert witness P-0606 to its list of witnesses”, ICC-02/11-01/15-220, “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. The Defence acknowledges that the “Prosecution’s notice that it was not in a position to interview [REDACTED]”, ICC-02/11-01/15-111-Conf-Red (“Notice”), does not constitute a request for an extension of time of the Disclosure Deadline *per se*, although it puts the parties and the Chamber on notice that an extension of time pursuant to regulation 35 of the Regulations of the Court may be sought in the future, in the event that an interview of this witness materialises. *See* Notice, paras 1, 13.

¹¹ Request, paras 4, 18-34.

¹² Transcript of 25 September 2015, ICC-02/11-01/15-T-4-ENG (ET WT), pages 24-25.

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 on the 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.¹³ 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 on the prejudice to the accused. 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.

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.

Nine documents relating to the chain of custody of media materials collected by Witness P-0541

¹³ The Defence notes that the Prosecution does not substantiate its allegation that the Chamber should not assess the Prosecution's applications under regulation 35 in their entirety. See Request, para. 17.

14. The Prosecution seeks, after the expiration of the Disclosure Deadline, to disclose and add to its List of Evidence nine documents allegedly establishing the chain of custody of media materials collected by Prosecution Witness P-0541, six of which have already been disclosed to the Defence on 19 February 2015 under Rule 77 of the Rules.¹⁴ Six of those documents are least have been in the Prosecution's hands for a very long time. Yet, the Prosecution does not advance any reasons that prevented it from disclosing these documents as incriminatory material or from filing a formal application under Regulation 35 (2) prior to the Disclosure Deadline. Hence, in the present instance, the criteria of Regulation 35 (2)'s last sentence are not met.

Audio-visual items

15. The Prosecution also seeks, after the expiration of the Disclosure Deadline, to disclose and add to its List of Evidence eleven videos previously disclosed under Rule 77, their yet to be disclosed transcriptions, as well as a duplicate footage of an open source video, which was previously disclosed as incriminatory.¹⁵ The Prosecution does not advance any reasons beyond its control that prevented it from disclosing part of those documents that were already in its possession as incriminatory material, prior to the Disclosure Deadline, , or from filing a formal application under Regulation 35 (2) before the Deadline. Neither the Prosecution' oversight¹⁶ nor the recent receipt of the transcriptions¹⁷ constitutes valid reasons. Hence, the criteria of Regulation 35 (2)'s last sentence are not met.

Twenty-one documents cited in the Pre-Trial Brief or in the witness summaries

¹⁴ Request, paras 18-20.

¹⁵ Request, paras 21, 23.

¹⁶ Request, paras 21, 23

¹⁷ Request, para. 21.

16. The Prosecution, despite admitting having checked for any discrepancies between the Pre-Trial Brief and the List of Evidence references “[p]rior to filing its pre-trial brief”,¹⁸ acknowledges that further errors have been identified and that it now seeks to disclose, as incriminatory material, twenty-one documents cited in its Pre-Trial Brief and summaries of witnesses, which were not included in its List of Evidence. Twenty of them had been previously disclosed to the Defence under the wrong classification, and one has never been disclosed.¹⁹ Most of those documents have been in the Prosecution’s possession for years.²⁰ Yet, the Prosecution does not advance any reasons that would explain this delayed disclosure or the classification error. Hence, the criteria of Regulation 35 (2)’s last sentence are not met.

Autopsy reports by expert witnesses P-0563 and P-0585

17. The Prosecution also seeks, after the expiration of the Disclosure Deadline, to reclassify as incriminatory material ten individual autopsy reports and one overall report completed by expert witnesses P-0563 and P-0585, as well as the Prosecution’s letter of instruction to these experts.²¹ The Prosecution does not advance any reasons that would explain this classification error. The Defence notes that the decision to classify those documents under Rule 77 in the joint case has been made only a few days before the Disclosure Deadline, namely at a time where the Prosecution was supposed to have completed its investigations and have an overall picture of its case. Therefore, the Prosecution’s classification error is even more unjustifiable. Hence, the criteria of Regulation 35 (2)’s, last sentence, are not met.

[REDACTED]

¹⁸ Request, para. 25.

¹⁹ Request, para. 25.

²⁰ Request, footnotes 32-33.

²¹ Request, para. 29.

18. The Prosecution seeks permission to reclassify [REDACTED].²² The Prosecution does not advance any reasons that prevented it from disclosing prior to the Disclosure Deadline [REDACTED]. Similarly, the Prosecution does not explain why it did not file a formal application under Regulation 35 (2) prior to the Disclosure Deadline. On the contrary, the Prosecution admits to having made [REDACTED] for not having disclosed [REDACTED].²³ Hence, in the present instance, the criteria of Regulation 35 (2)'s last sentence are not met.

Five documents related to the FDS structure

19. The Prosecution further seeks reclassification as incriminatory material of five documents related to the structure of the FDS. Once again, the Prosecution does not advance any reasons that would explain this late request for reclassification of documents which were in its possession since mid-2013²⁴ or end of 2014.²⁵

Conclusion

20. Since the Request was made after the Disclosure Deadline, Regulation 35 (2), last sentence, applies. The Prosecution must therefore show that the inability to apply for an extension of time within the time limit was outside of its control. The Defence recalls the Chamber's observations that "*Regulation 35(2), last sentence, provides a strict standard affording only a few exceptions*".²⁶ Such observations are corroborated by former jurisprudence, which has ruled that Regulation 35 (2), last sentence "*only applies in exceptional circumstances*,

²² Request, para. 31.

²³ Request, para. 30.

²⁴ CIV-OTP-0043-0212, CIV-OTP-0048-1143.

²⁵ CIV-OTP-0071-0154, CIV-OTP-0071-0404, CIV-OTP-0071-0539.

²⁶ Decision of 18 August 2015, para. 19, referring to ICC-01/09/02/11-832, para. 10.

such as an incapacitating illness".²⁷ Yet, no such exceptional reasons, if any, have been advanced by the Prosecution for any of the items/materials that are the object of the Request. In view of the foregoing, the Defence submits that the criteria of Regulation 35 (2)'s last sentence are not met.

V.2. The prejudice suffered by the Defence outweighs the Prosecution' justifications for late disclosure

21. Consistent with the Chamber's recent rulings,²⁸ 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, within the context of the Chamber's obligation under Article 64(2) of the Statute.²⁹

22. 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.³⁰

23. 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 additional factors that may be considered by the Chamber,³¹

²⁷ 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.

²⁸ 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.

²⁹ Decision of 18 August 2015, para. 20.

³⁰ 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 material 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. *See* Decision of 18 August 2015, para. 20, referring to ICC-01/09-02/11-832, para. 11.

³¹ *See supra* footnote 24.

none of the Prosecution's justifications, if any, for late disclosure, outweigh the prejudice to be suffered by the Defence.

24. If the relevant materials were to be disclosed or reclassified at this late stage of the proceedings, that is after a period of more than three months has elapsed since the Disclosure Deadline, it would leave the Defence with just a few weeks prior to the commencement of the trial to analyse and investigate numerous and new items of allegedly incriminating evidence. Such scenario 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, the fairness of which is dependent on the date that full disclosure will be completed.³² Additional research cannot realistically be achieved and additional time and resources (which are very limited for the Defence) cannot realistically be spent in parallel with the on-going proceedings, in circumstances where the Prosecution has not presented any valid reasons for not seeking to disclose the relevant material, or not seeking to disclose it under the appropriate classification, at an earlier stage of the proceedings. Contrary to the Prosecution's arguments, neither the alleged non substantive nature of certain documents,³³ their size,³⁴ nor the fact that others were already disclosed under a different classification,³⁵ are of relevance as to whether or not the Defence may suffer prejudice resulting from late disclosure. Indeed, document classification, whether under Rule 76, Rule 77 or Article 67 (2) of the Statute, is crucial to the Defence work in that it will impact the Defence's understanding and anticipation of the Prosecution's

³² The Defence has repeatedly stressed the same. *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.

³³ Request, para. 20.

³⁴ Request, para. 33.

³⁵ *See* Request, paras 22, 28, 29, 33.

case. The preparation of the defence in relation to a specific fact will be completely different depending on whether the relevant document is disclosed as incriminating or not.

25. The circumstances at the current time, very close to the commencement of trial, are not ripe for disclosure of new allegedly incriminatory material. Consequently, the prejudice that the Defence would suffer if the Prosecution's Request were to be granted outweighs the alleged and very few justifications for late disclosure presented by the Prosecution. Furthermore, as indicated above, in 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.

26. 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.

27. The Defence notes the Prosecution's assertion that this Request was "*an omnibus request in relation to all outstanding disclosure-related matters*" (emphasis added).³⁶ Therefore, the Defence respectfully asks the Chamber to acknowledge that the Prosecution's review of disclosure-related matters has come to an end and that there will be no further Prosecution's requests for late disclosure and/or addition of witnesses.

³⁶ Request, paras 1, 14.

RELIEF SOUGHT

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

- a. **Deny** the Prosecution's Request;
- b. **Acknowledge** that the Prosecution's disclosure-related review is finally completed, and
- c. **Inform**, in consequence, the Prosecution that any future request for extension of time in relation to disclosure shall be denied.

Respectfully submitted,




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

Dated this
14 December 2015
At The Hague, the Netherlands