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**International
Criminal
Court**

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

Date: **14 December
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 for an extension of time to disclose Witness P-0114’s second statement and Witness P-0360’s second statement and annexes” (ICC-02/11-01/15-312-Conf)”, 4 November 2015, ICC-02/11-01/15-332-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 Request for an extension of time to disclose Witness P-0114’s second statement and Witness P-0360’s second statement and annexes” dated 23 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 and its Annexes which have been classified 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 (“Disclosure Deadline”). 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 numerous documents and videos as incriminatory material, stressing that having now completed the review of its disclosure and of its List of Evidence

¹ ICC-02/11-01/15-312-Conf, with two confidential annexes.

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

and Witnesses pursuant to the Order, such request included “all outstanding disclosure-related matters” (emphasis added).³

5. On 23 October 2015, the Prosecution sought authorisation to disclose additional statements of Witnesses P-0114 and P-0360, as well as 18 photographs, as incriminating evidence, and to add them to its List of Evidence.⁴

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 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 respectfully recalls the importance of the disclosure process, which is a guarantee of fair proceedings and should respect the adversarial principle.

³ “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 (“Omnibus Request”), paras 1, 14.

⁴ Request.

9. The Chamber has assessed on several occasions⁵ 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*”.⁶ *A contrario*, any later date for final disclosure will not afford the Defence sufficient time to carry out all necessary preparations.
10. The Prosecution has had already four years to prepare its case and to conduct investigations. 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 continued its investigations after the Disclosure Deadline and requested on eight 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,⁷ and is now requesting, almost four months after the Disclosure Deadline, and despite having declared that the disclosure-related process was no longer outstanding, an extension of time to disclose additional allegedly incriminatory evidence.⁸
11. At the last status conference of 25 September 2015,⁹ 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 Deadline. At the same status conference, it also developed the argument that the Chamber should consider the cumulative impact on prejudice to the

⁵ “Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents”, dated 18 August 2015, ICC-02/11-01/15-183-Conf (“Decision of 18 August 2015”), para. 17. A public redacted version was registered on the same date. *See also* Order, paras 15-16.

⁶ Order, para. 16.

⁷ “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; Omnibus Request.

⁸ Request, paras 1, 27.

⁹ Transcript of 25 September 2015, ICC-02/11-01/15-T-4-ENG (ET WT), pages 24-25.

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. 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 the juncture at which the Chamber should deny any further requests has passed a while ago already and that the Prosecution's Request should therefore be denied 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

12. 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.

Witness P-0360's second statement together with the related 18 photographs

13. The Prosecution seeks, after the expiration of the Disclosure Deadline, to disclose and add to its List of Evidence P-0360's second statement as well as the 18 photographs annexed thereto.¹⁰ The Prosecution submits that for reasons outside of its control, namely that Witness P-0360 was only able to

¹⁰ Request, para. 1.

retrieve the photographs in September 2015, it was in turn unable to disclose the relevant materials before the Disclosure Deadline.¹¹

14. 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*".¹² Such observations are corroborated by former jurisprudence, which has ruled that Regulation 35 (2), last sentence "*only applies in exceptional circumstances, such as an incapacitating illness*".¹³ Yet, no such exceptional reasons have been advanced by the Prosecution. The fact that the Prosecution has not completed its investigations prior to the Disclosure Deadline and continues to obtain further alleged pieces of evidence thereafter cannot reasonably be considered as a reason outside of its control for not filing an extension of time request earlier. If this were to be the case, any incriminatory item that came into the Prosecution's possession after the Disclosure Deadline could be relied on at trial, which would render the whole purpose of a Disclosure Deadline meaningless. In view of the foregoing, the Defence submits that the criteria of Regulation 35 (2)'s last sentence are not met.

15. Furthermore, the Prosecution has filed the Omnibus Request on 1 October 2015, while it was informed early September 2015 that P-0360 had eventually been able to retrieve the relevant photographs.¹⁴ Therefore, the Prosecution was perfectly aware at the time of the notification of the Omnibus Request

¹¹ Request, paras 3, 7.

¹² Decision of 18 August 2015, para. 19, referring to Trial Chamber V(B), "Decision on Prosecution request to add P-548 and P-66 to its witness list", dated 23 October 2013, ICC-01/09-02/11-832, para. 10.

¹³ Trial Chamber V(B), "Decision on Prosecution request to add P-548 and P-66 to its witness list", dated 23 October 2013, ICC-01/09-02/11-832, para. 10.

¹⁴ Request, paras 7, 9. The Defence notes the contradictory statements of the Prosecution: in para. 7, the Prosecution states that it obtained the 18 photographs in September 2015 while in para. 10, it states that they were handed over to it in October 2015.

that it would obtain those photographs and yet did not notify the Chamber and the parties that an extension of time would be requested for such a disclosure and that therefore the supposedly final Omnibus Request would not be quite final after all. The Defence submits that in light of the Prosecution's oversight in failing to notify the Chamber in due course, the Prosecution should now be prevented from claiming that it is entitled to yet an additional extension of time for disclosure under Regulation 35 (2).

Witness P-0114's second statement

16. The Prosecution also seeks, after the expiration of the Disclosure Deadline, to disclose and add to its List of Evidence Witness P-0114's second statement, which allegedly [REDACTED].¹⁵ The Prosecution explains that it was only able to meet with Witness P-0114 for a follow-up interview last 15 October, [REDACTED].¹⁶ Again, the Prosecution does not satisfactorily explain why it did not apply for an extension of time limit before the Disclosure Deadline expired, considering that from the Prosecution's own account, it had been planning on re-interviewing Witness P-0114 several months prior to the Disclosure Deadline and had, for this purpose, [REDACTED].¹⁷ Despite the passing of the Disclosure Deadline, the Prosecution did not abandon its plans for the re-interview and continued to make arrangements, yet it did not inform the Chamber or the Defence. As stated by Trial Chamber before, *"the parties must, to the extent possible, keep the Chamber informed of ongoing or planned fact-finding missions, before the expiration of the deadline, when it is reasonable to think that they might lead to a request for additional disclosure after the set time limit, based on regulation 35 of the Regulations."*¹⁸ The Prosecution therefore does

¹⁵ Request, paras 15-20.

¹⁶ Request, paras 19-20.

¹⁷ Request, para. 18.

¹⁸ Trial Chamber II, "CORRIGENDUM Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)", dated 9 October 2009, ICC-01/04-01/07-1515-Corr, para. 27. *See also* Trial Chamber V(B),

not advance any valid reasons outside of its control that prevented it from filing a formal application under Regulation 35 (2) before the Disclosure Deadline. Hence, 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

17. Consistent with the Chamber's recent rulings,¹⁹ 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.²⁰

18. 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.²¹

19. 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,²² none of the Prosecution's justifications for late disclosure, outweigh the prejudice to be suffered by the Defence.

"Decision on Prosecution request to add P-548 and P-66 to its witness list", dated 23 October 2013, ICC-01/09-02/11-832, para. 13.

¹⁹ 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, ICC-02/11-01/15-228, paras 29-30.

²⁰ Decision of 18 August 2015, para. 20.

²¹ 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.

²² *See supra* footnote 24.

20. If the relevant materials were to be disclosed at this late stage of the proceedings, that is after a period of almost four months has elapsed since the Disclosure Deadline, it would 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.²³ 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 does not substantiate why it would be in the interest of justice to disclose such new materials.²⁴ Contrary to the Prosecution's argument, the fact that the Defence was put on notice that P-0360 would seek to retrieve the missing photographs,²⁵ does not reduce in any way the Defence's prejudice. The actual photographs have not been disclosed to the Defence. Therefore, the Defence was not given the opportunity to analyse them in a timely manner. Regarding Witness P-0114's second statement, it is inaccurate to claim that the Defence will suffer no prejudice if it were to be disclosed at this stage of the proceedings. The Defence would need to re-investigate a key event in light of new alleged corroborative incriminating evidence and involve experts to verify that [REDACTED].

21. 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

²³ 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.

²⁴ Request, para. 21.

²⁵ Request, para. 23.

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, including, in particular, the latest Omnibus Request.

22. The Defence respectfully reminds that Chamber of the Prosecution's assertion that the Omnibus Request was "*in relation to all outstanding disclosure-related matters*" (emphasis added)²⁶ and of the Defence's pending request to have, as a result, all further Prosecution's requests for late disclosure and/or addition of witnesses denied.

RELIEF SOUGHT

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

²⁶ Request, paras 1, 14.

Respectfully submitted,



A rectangular box containing a handwritten signature in dark ink. The signature is written in a cursive style and appears to read 'Mr. Knoop'. The box is empty except for the signature.

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

Dated this
14 December 2015
At The Hague, the Netherlands