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

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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

Public redacted version of "Prosecution's Request for an extension of time to re-disclose two videos for the purposes of in-court use", 3 May 2016

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Prosecution applies, under regulation 35 of the Regulations of the Court (“Regulations”), and articles 64(6)(f) and 69(3) of the Rome Statute (“Statute”), for an extension of time to re-disclose as incriminatory material two videos previously disclosed to the Defence.¹
2. The Prosecution seeks to use both videos during the upcoming testimony of witnesses. The Prosecution can provide a copy of these videos to the Chamber upon request.
3. For reasons elaborated below, the Prosecution submits that granting this Request is in the interests of justice, and will not cause the Defence any undue prejudice.

Confidentiality

4. This motion is filed confidentially as it includes information relating to the scheduling of upcoming witnesses and the substance of the testimony of said witness. A public redacted version is being filed simultaneously.

Legal framework

5. The Prosecution’s current application is brought under regulation 35(2) of the Regulations, given that it seeks permission to re-categorize as “incriminatory material” two videos:
 - a. The first consists of a video [REDACTED] previously disclosed pursuant to rule 77 during the pre-trial phase.² The Prosecution seeks to re-disclose this video in order to use it as incriminating material [REDACTED];
 - b. The second relates to a video previously disclosed by the Blé Goudé Defence to the Prosecution in September 2014,³ which in turn was

¹ These bear the Evidence Registration Numbers (“ERN”) [REDACTED].

² It was disclosed to the Gbagbo Defence on 15 May 2012 and to the Blé Goudé Defence on 24 April 2014.

disclosed pursuant to rule 77 to the Gbagbo Defence in May 2015.⁴
[REDACTED].

6. The Prosecution filed its list of evidence on 30 June 2015 as ordered by the Trial Chamber.⁵ Under regulation 35, prior to the expiry of a time limit, a Chamber may extend a time limit “if good cause is shown”, and after the expiry of a time limit, “an extension 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”. If the requirements of regulation 35(2) are met, the use of additional evidence is permitted “so long as such additions do not cause undue prejudice to the Defence”.⁶ This Trial Chamber has observed that regulation 35(2) provides a strict standard affording only a few exceptions.⁷
7. Nevertheless, the Trial Chamber may authorise an extension of the time limit for disclosure after the expiry of the deadline having conducted a case-by-case assessment taking into consideration the justifications for late disclosure and the potential impact it may have upon the receiving party – consistent with its obligations under article 64(2) of the Statute.⁸ Additional factors may be considered, such as: (i) whether the new evidence brings to light a previously unknown fact that has a significant bearing on the case; (ii) whether the other party will have adequate time to investigate the new evidence; and (iii) whether it

³ This video was disclosed by the Blé Goudé Defence pursuant to rule 78 of the Rules on 12 September 2014 under the ERN [REDACTED].

⁴ After the cases were joined, the Prosecution re-disclosed this same video to the Gbagbo Defence team on 19 May 2015 keeping the same original Blé Goudé Defence ERN [REDACTED].

⁵ ICC-02/11-01/15-58, para. 22.

⁶ ICC-01/09-01/11-899-Red, paras. 15-17; *See also* ICC-01/04-01/07-1590, para. 12 (stating that where regulation 35(2) is satisfied, “the Chamber will in principle allow the late submission, unless this would cause undue prejudice to the Defence”).

⁷ ICC-01/09-01/11-899-Red, paras. 15-17; *See also* ICC-01/04-01/07-1590, para. 12 (stating that where regulation 35(2) is satisfied, “the Chamber will in principle allow the late submission, unless this would cause undue prejudice to the Defence”).

⁸ ICC-02/11-01/15-183-Red, para. 20; *See also*, in the context of additions to the List of Evidence, in the *Ntaganda* case: ICC-01/04-02/06-740-Red, para. 13; and in the context of additions of witnesses to the List of Witnesses, in the *Kenyatta* case: ICC-02/09-02/11-832, para. 11. Article 64(2) requires the Trial Chamber to ensure that the trial is “fair and expeditious and is conducted with full respect for the rights of the accused”.

would be in the interests of justice to grant the request.⁹ Furthermore, regulation 35 does “not exist for its own sake”¹⁰ and should be read in accordance with regulation 1 and article 64 of the Statute.

8. Paragraph 43 of the Directions on the conduct of the proceedings foresees the possibility, upon leave of the Chamber, for a party to rely on material that was not included on its List of Evidence. The Chamber has reiterated recently its preference for early notice of the Prosecution’s wish to rely on material previously disclosed pursuant to rule 77, in order to use such material as incriminatory.¹¹ Therefore, [REDACTED], the Prosecution files this motion in advance in accordance with the Chamber’s guidance.

Submissions

Video of film-maker [REDACTED]

9. The Prosecution seeks leave to use video [REDACTED], which lasts 5 minutes and 43 seconds. The Gbagbo Defence included this video on its list of evidence of 1 February 2013 for the purposes of the confirmation hearing.¹²
10. [REDACTED]. The Gbagbo Defence disclosed to the Prosecution¹³ a handwritten witness statement signed by [REDACTED] during the confirmation stage of this case.¹⁴
11. [REDACTED]. [REDACTED].¹⁵ [REDACTED].

Video of an interview with [REDACTED]

⁹ ICC-02/11-01/15-183-Red, para. 20; ICC-01/04-02/06-740-Red, para. 13.

¹⁰ ICC-02/11-01/15-228, para. 29.

¹¹ See T-28, at p.62 line 12 to p.63 line 10.

¹² ICC-02/11-01/11-381 and ICC-02/11-01/11-381-Conf-Anx. The video appears as item 735 of the annex.

¹³ ICC-02/11-01/11-381-Conf-Anx, item 182, [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

12. The Prosecution seeks leave to use video [REDACTED], which lasts 34 minutes 21 seconds and consists, primarily, of an interview with [REDACTED]. As indicated above (para. 5(b)), this video was previously disclosed by the Blé Goudé Defence in August 2014, bearing the ERN [REDACTED]. However, the Prosecution obtained the same video with higher resolution, and, for this reason, seeks to rely on [REDACTED] instead. [REDACTED].

13. [REDACTED]. [REDACTED],¹⁶ [REDACTED]. .

14. Several factors support the Prosecution's Requests to re-disclose this video and add it to its List of Evidence.

a. [REDACTED].

b. [REDACTED].

c. [REDACTED].

15. Several witnesses will give evidence in relation to the use of youth groups during the crisis. Some of them will give evidence in particular about the activities of [REDACTED]. It is a contemporaneous recording of an interview given by a youth leader shortly after the arrest of Laurent Gbagbo and the end of the post-electoral violence.

16. The Prosecution does not intend to use this video before [REDACTED].

The lack of undue prejudice

17. In its ongoing efforts to review relevant material, the Prosecution considered that these two videos would assist the Trial Chamber in its truth-seeking functions. The probative value of both videos, in terms of incriminating and potentially exonerating evidence, justifies granting the Prosecution's request. Permission for

¹⁶ The Blé Goudé estimated date of the video is [REDACTED].

the Prosecution to disclose the new material, and rely on it at trial, is in the interests of justice and consistent with the Trial Chamber's obligations under article 64(2) of the Statute.

18. It is submitted that the Defence will suffer little, if any, prejudice as a result of the late disclosure, for the following reasons:

- a. Both videos were already disclosed and known to the Defence prior to the commencement of the trial.
- b. [REDACTED] was on Laurent Gbagbo's list of evidence for the confirmation hearing in February 2013.
- c. The substance of the videos is limited: first video is 5 minutes in length and the second video is 34 minutes in length.
- d. The first 3 minutes of [REDACTED] are already on the Prosecution's List of Evidence in the form of a short clip discovered *via* a different source.¹⁷
- e. Both Defence teams will have time to test this video with upcoming witnesses:
 - i. [REDACTED] intended to be used in approximately three weeks, giving the Defence sufficient time to review this short clip. [REDACTED] would be used during the course of the month of June, giving the Defence additional time to review its content.
 - ii. Considering the early stages of the case, the Defence will be in a position to test both videos with future witnesses.

¹⁷ [REDACTED] are both duplicates of the first 3 minutes of the 34 minute clip now proposed as [REDACTED].

Conclusion

19. For the reasons outlined above, the Prosecution seeks permission to:

- a. Re-disclose video [REDACTED] as incriminatory material;
- b. Re-disclose [REDACTED] as incriminatory material in a higher quality version [REDACTED]; and
- c. Add both videos to the Prosecution's List of Evidence for the purposes of the trial.



Fatou Bensouda, Prosecutor

Dated this 3rd day of May 2016

At The Hague, The Netherlands