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**International
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2016**

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

with confidential annexes 1, 2, 3 and 4

Public Redacted Version of "Defence request for additional disclosure of Article 67(2) and Rule 77 material relating to Witnesses [REDACTED] and [REDACTED]," 20 June 2016, ICC-02/11-01/15-594-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. On 3 June 2016, the Defence for Charles Blé Goudé (“the Defence”) requested the Prosecution to disclose the psychological evaluations prepared by OTP psychologist [REDACTED] for witnesses [REDACTED] and [REDACTED].¹ She was present for some of the Prosecution interviews with witnesses [REDACTED] and [REDACTED] to conduct psychological evaluations of the two witnesses, who at the time were detained at the [REDACTED] (“[REDACTED]”).²
2. Ten days after this Defence request, the Prosecution gave the Defence a definitive answer, and announced that a disclosure relating to the request would be made on Wednesday, 15 June 2016.³
3. On 15 June 2016, the Prosecution did not disclose the psychological evaluations of [REDACTED] as the Defence requested. Rather, the Prosecution disclosed pursuant to Rule 77 of the Rules of Procedure and Evidence (“the Rules”) two Prosecution investigator reports⁴ that were based, on what the Prosecution has termed “the psychosocial assessments” of the two aforementioned witnesses. The Prosecution investigator who originally interviewed the two witnesses at the [REDACTED], [REDACTED], drew these two reports, exactly one week after the Defence’s request for the

¹ Annex 1 to the present submissions contains the Defence’s email exchanges with the Prosecution concerning the request for the psychological evaluations of [REDACTED] and [REDACTED].

² See [REDACTED] transcripts: CIV-OTP-0046-0676, CIV-OTP-0046-0683, CIV-OTP-0046-0689, CIV-OTP-00460712, CIV-OTP-0046-0734, CIV-OTP-0046-0908, CIV-OTP-0046-0932, CIV-OTP-0046-1078, CIV-OTP-0046-1102, CIV-OTP-0046-1121, CIV-OTP-0046-1150; CIV-OTP-0046-1177; [REDACTED] transcripts: CIV-OTP-0046-1289, CIV-OTP-0046-1303, CIV-OTP-0046-1325, CIV-OTP-0046-1368, CIV-OTP-0046-1574, CIV-OTP-0047-0008.

³ See Annex 1.

⁴ Annexes 2 and 3 to the present submissions are the two OTP investigator reports relating to [REDACTED] and [REDACTED]. CIV-OTP-0092-0412 relates to the psychosocial assessment of [REDACTED] and is attached as Annex 2 whereas CIV-OTP-0092-0420 relates to the psychosocial assessment of [REDACTED] and is attached as Annex 3.

psychological evaluations.⁵ [REDACTED] also drafted a third report in which he detailed the detention history of [REDACTED] and [REDACTED] and in which he referred to the “precarious detention conditions” that [REDACTED] and [REDACTED] endured while they were detained at [REDACTED].⁶ Detention conditions, with which Mr. Blé Goudé is all too familiar, given that he was detained [REDACTED].⁷

4. Given that the Prosecution has informed the Defence that it will not disclose these psychosocial assessments,⁸ the Defence reverts now to Trial Chamber I (“the Chamber”) pursuant to Article 67(2) of the Statute. The Defence kindly requests the Chamber to order the Prosecution to disclose the reports to the Defence, since they contain potentially exculpatory material.

II. Confidentiality

5. The Defence files these submissions confidentially since they refer to confidential information pertaining to witnesses [REDACTED] and [REDACTED]. However, if the Chamber determines that the request should be reclassified as public, the Defence would not object.

III. Applicable Law

6. Article 67(2) of the Statute forms part and parcel of the fundamental rights of the accused, and imposes on the Prosecution an obligation to:

as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In

⁵ See Annex 2, p.1; and Annex 3, p.1.

⁶ Annex 4 to the present submissions contains the report whose ERN number is CIV-OTP-0092-0415.

⁷ *Ibid*, para. 7.

⁸ See Annex 1.

case of doubt as to the application of this paragraph, the Court shall decide.⁹

7. Similarly, Rule 77 of the Rules gives the Defence the right to inspect “any, books, documents, photographs and other tangible objects in the possession of the Prosecution, which are material to the preparation of the defence,” unless a restriction to disclosure pursuant to the Statute or Rules 81 and 82 applies.

IV. Submissions

8. Following the 15 June 2016 disclosure of the two prosecution investigator reports relating to the psychosocial assessments of [REDACTED] and [REDACTED],¹⁰ the Defence submits that it has a reasonable basis to believe that the content of the psychological assessments raises serious doubts as to: (1) whether the two witnesses were in a position to freely cooperate with the Prosecution investigators during their interviews at [REDACTED] and (2) whether the content of their purported evidence is credible. Therefore, the Prosecution has an obligation to disclose the two psychosocial assessments for the following three reasons: (1) the reports contain exculpatory material pursuant to Article 67(2) of the Statute, and could assist the Court in its truth finding function, (2) the reports do not appear to be subject to a disclosure restriction under the Statute and the Rules, and (3) the disclosure of the investigator reports prepared on the basis of the psychosocial assessments is not sufficient to discharge the Prosecution of its duty to disclose the assessments.

- a. **The two psychosocial assessments made of Witnesses [REDACTED] and [REDACTED] contain exculpatory material under Article 67(2) and could assist the Chamber in its truth finding function pursuant to Article 69(3)**

⁹ Article 67(2) of the Statute.

¹⁰ In addition to Annex 4.

9. Article 67(2) places a positive obligation on the Prosecution to disclose as soon as practicable evidence in its possession that “may affect the credibility of the prosecution evidence.” Rule 77 gives the Defence the right to inspect such material, and other items that are material to the preparation of the defence. In *The Prosecutor v. Lubanga*, the Court determined that exculpatory material under Article 67(2) encompasses material that may affect the credibility of prosecution evidence.¹¹
10. In the instant case, the Defence has concluded on the basis of the two OTP investigator reports¹² that the psychosocial assessments of [REDACTED] and [REDACTED] contain information that may affect the credibility of the witnesses’ purported evidence. Therefore, the two reports fall within the scope of exculpatory material.
11. From the information provided by the Prosecution investigator, the Defence learned that the psychosocial expert completed [REDACTED] assessment of [REDACTED] on 29 April 2013,¹³ and wrote [REDACTED] assessment on [REDACTED] on 3 May 2013.¹⁴ Thus, it appears that the Prosecution was already in possession of the two reports while it was still conducting its interviews of [REDACTED] and [REDACTED] that were concluded on 1 May 2013 and 4 May 2013 respectively.
12. Moreover, the OTP investigator report states that both [REDACTED] and [REDACTED] were subjected to torture as well as to inhuman and degrading prison conditions at [REDACTED]. For example, it states that [REDACTED] “had been subjected to psychological games in which [REDACTED] staff

¹¹ See ICC-01/04-01/06-1401, para. 59.

¹² Annexes 2 and 3.

¹³ Annex 4-CIV-OTP-0092-0420, para. 2.

¹⁴ Annex 3-CIV-OTP-0092-0412, para.2.

made him think that he could be arbitrarily killed.”¹⁵ Similarly, the OTP investigator noted that the expert found that [REDACTED] guards subjected [REDACTED] to “mind games.”¹⁶ The report also makes reference to [REDACTED]’s cognitive functioning being impaired due to inhumane detention conditions, and that he ran a serious risk of a mental breakdown if his conditions didn’t change.¹⁷ It also appears that [REDACTED]’s psychosocial functioning was better than that of [REDACTED], however the report states that the expert noted that [REDACTED] “could be at a high risk of a mental breakdown in the near future if his detention conditions did not change.”¹⁸

13. Article 55(1)(b) of the Statute, stipulates that a person “shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment.” The Defence submits that according to the plain language meaning of this provision, its scope is broader than that of Article 55(2), and applies to victims and witnesses.¹⁹ Under the jurisprudence of the ICTY’s appeals chamber, possible rewards for cooperating in giving a statement or inducing someone to give a statement could be considered as a form of coercion that overbears the will of the interviewee.²⁰

14. Based on the aforementioned content of the OTP investigator’s reports, the Defence has reason to believe that [REDACTED] and [REDACTED] were not in a position to give their consent to be interviewed by the Prosecution or to stop the interview whenever they wanted. The Defence does not wish to

¹⁵ Annex 4-CIV-OTP-0092-0420, para. 3.

¹⁶ Annex 3-CIV-OTP-0092-0412.

¹⁷ Annex 3-CIV-OTP-0092-0412, para. 4.

¹⁸ Annex 4- CIV-OTP-0092-0420, para.5.

¹⁹ See also Rule 111, which makes explicit reference to Article 55.

²⁰ See *The Prosecutor v. Halilovic*, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused From the Bar Table, IT-01-48-AR73.2 (19 August 2005), para. 63

insinuate that the Prosecution was complicit in possibly coercing the witnesses into giving statements, or intentionally inducing the witnesses to give statements. It notes that the Prosecution took steps to ensure compliance with its obligations under Article 55 such as: (1) informing the witnesses that they had a right to refuse to speak to them,²¹ (2) interviewing the witnesses in the presence of a lawyer,²² (3) asking [REDACTED] if he wanted to consult with the lawyer outside of its presence,²³ and (4) creating a humane environment.²⁴ However, access to the psychosocial reports will shed light on whether these measures were sufficient to counteract the effects of incommunicado detention, psychological torture, and inhuman detention conditions on the free will of the witnesses.²⁵ Disclosing the reports could also resolve questions regarding the possibility that the witnesses were induced by [REDACTED] to cooperate with the Prosecution. Treating individuals in an investigation with dignity, assuring them that the Court has an obligation to guarantee their well-being,²⁶ and giving them access to a lawyer for the first time since they have been arrested may be considered an inducement in the

²¹ See CIV-OTP-0046-0676, at 0677 and 0678; CIV-OTP-0046-1289, at 1291.

²² See [REDACTED] interview transcripts: CIV-OTP-0046-0676; CIV-OTP-0046-0683; CIV-OTP-0046-0689; CIV-OTP-0046-0712; CIV-OTP-0046-0734; CIV-OTP-0046-0737; CIV-OTP-0046-0750; CIV-OTP-0046-0759; CIV-OTP-0046-0780; CIV-OTP-0046-0790; CIV-OTP-0046-0814; CIV-OTP-0046-0839; CIV-OTP-0046-0862; CIV-OTP-0046-0886; CIV-OTP-0046-0908; CIV-OTP-0046-0932; CIV-OTP-0046-0961; CIV-OTP-0046-0991; CIV-OTP-0046-1005; CIV-OTP-0046-1008; CIV-OTP-0046-1011; CIV-OTP-0046-1033; CIV-OTP-0046-1050; CIV-OTP-0046-1078; CIV-OTP-0046-1102; CIV-OTP-0046-1121; CIV-OTP-0046-1150; CIV-OTP-0046-1177; [REDACTED] interview transcripts: CIV-OTP-0046-1289; CIV-OTP-0046-1303; CIV-OTP-0046-1325; CIV-OTP-0046-1345; CIV-OTP-0046-1368; CIV-OTP-0046-1397; CIV-OTP-0046-1427; CIV-OTP-0046-1461; CIV-OTP-0047-0008; CIV-OTP-0047-0036; CIV-OTP-0046-1545; CIV-OTP-0046-1574, CIV-OTP-0047-0008; CIV-OTP-0047-0036.

²³ CIV-OTP-0046-1289, at 1290, lines 39-40;

²⁴ See e.g. CIV-OTP-0046-1177, at 1183

²⁵ It should be noted that [REDACTED], despite being detained in what the expert called inhuman conditions and being subject to psychological torture, stated that he did not suffer verbal or physical violence while in custody at [REDACTED]. CIV-OTP-0046-0689, at 0692. However, he did state that he had not been given access to a lawyer until the Prosecution investigators came. CIV-OTP-0046-0689, at 0693. [REDACTED] was more explicit about the inhumane detention conditions, and also mentioned he did not have access to a lawyer until the OTP investigators came. CIV-OTP-0046-1289, at 1292-1293; CIV-OTP-0046-1303 at 1305-1306.

²⁶ See for example CIV-OTP-0046-1289 at 1293.

context of being detained incommunicado and subjected to torture at [REDACTED].

15. The effect of a possible forced statement not only impermissibly infringes on the fundamental rights of [REDACTED] and [REDACTED], but also affects their credibility as witnesses. It must be noted that after the Prosecution interviews, [REDACTED] and [REDACTED] remained in custody at [REDACTED] at the hands of their tormentors for a period of 9 months and 12 months respectively.²⁷ Thus, it is uncertain whether [REDACTED] and [REDACTED] were in a position to provide truthful answers during the Prosecution's interviews due to the fear or possible inducement from the Ivorian authorities to cooperate.

16. The content of the expert's assessments may answer these important questions regarding the credibility of the Prosecution's purported evidence, and thus should be disclosed under Article 67(2). Disclosure of these assessments will also assist the Chamber in its truth finding function. According to the Defence, the Chamber should be apprised of the precarious detention conditions in which [REDACTED] witnesses for the Prosecution were interviewed, and should be allowed to consider such evidence when weighing the probative value of testimony that could be elicited from such witnesses. The disclosure sought would thus be in line with the truth finding function character of the ICC proceedings.

b. The two psychosocial assessments do not appear to be subject to a disclosure restriction under the Statute and the Rules

17. The Defence avers that the Prosecution's disclosure obligations are not absolute and may be subject to certain restrictions under the Statute and

²⁷ Annex 4-CIV-OTP-0092-0415, paras. 1-2, 10-11.

Rules.²⁸ However, where the Statute prohibits the disclosure of information, containing potential exculpatory material, it does not necessarily mean that prohibitions on disclosure supersede the Prosecution's obligation to disclose the material under Article 67(2).²⁹ For example, in *The Prosecutor v. Lubanga*, the Court determined that a stay of proceedings was the only available remedy when the Prosecution refused to disclose documents pursuant to Article 54(3)(e) containing exculpatory material both to the Defence and the Chamber.³⁰

18. In the instant case, it is not in dispute that the reports are in the possession of the Prosecution and that they contain Rule 77 material. According to the Defence, as explained above, the two reports also contain potentially exculpatory material under Article 67(2), and thus similar to the Court in *Lubanga*, the Chamber should find that a statutorily imposed restriction on disclosure does not necessarily relieve the Prosecution from its disclosure obligation. Based on the two investigators reports and email exchanges with the Prosecution, the Defence is not in a position to ascertain the legal basis for not disclosing the two psychosocial assessments of [REDACTED] and [REDACTED], which the Prosecution simply qualifies as "confidential."³¹ The Defence does not wish to speculate as to the Prosecution's potential legal basis for not disclosing the assessments. However, in the event the Prosecution were to invoke Rule 73, the Defence is not able to adequately respond because on the basis of the investigators report it does not appear that the psychosocial expert met individually with the witnesses such that a relationship of confidence was formed between the patients, in this case [REDACTED] and [REDACTED] and the therapist, in this case, the

²⁸ See e.g. Article 68, Article 54(3)(e) and (f), Rules 73, 81, and 82.

²⁹ ICC-01/04-01/06-1486, para. 75.

³⁰ *Ibid*, para. 57.

³¹ See Annex 1.

psychosocial expert. Assuming that a therapist-patient relationship existed, it does not appear in the OTP investigator's reports that [REDACTED] and [REDACTED] opposed the disclosure of such reports. In any event, assuming the information is privileged, the Prosecution should seek consent from [REDACTED] and [REDACTED] to disclose to the reports before refusing to comply with its disclosure obligation.

19. Secondly, the Defence is of course aware that the content of the reports relates to the security and health of the two witnesses, and thus may implicate the applicability of Article 68 and Rule 81. The wellbeing and security of the witnesses go to the heart of the Defence's request for disclosure pursuant to Article 67(2). Therefore, the Defence requests that the Chamber determine to what extent the two psychosocial assessments may be disclosed.

c. The disclosure of the investigator reports prepared on the basis of [REDACTED] and [REDACTED]'s psychosocial assessments is not sufficient to discharge the Prosecution of its duty to disclose the psychosocial assessments

20. The disclosure of the two investigator reports prepared by the Prosecution on the basis of the two psychosocial assessments is not a satisfactory alternative to disclosing the reports. In the *Lubanga* Decision "Reasons for Oral Decision lifting the stay of proceedings, the Court, the Trial Chamber "carefully investigated each and every instance where the prosecution ...suggested alternative evidence and ...conducted an assessment of the replacement value of material as compared to the original information."³² In another *Lubanga* decision, the Court found that after the Prosecution had disclosed over 150 items relating to the use of child soldiers, and further disclosure was not necessary since it would not have a "material effect" on the defence preparations and would not provide additional assistance.

³² ICC-01/04-01/06-1644, para. 47.

21. Here, it is clear that the Prosecution's alternative to disclosing the psychosocial assessments does not have comparable value to the actual assessments written by the psychosocial expert. The disclosed reports have been compiled by a Prosecution investigator and are cursory in nature. In fact they were prepared one week after the Defence requested to obtain the assessments. Thus, they do not provide a full picture as to what the psychosocial expert observed from the demeanour and statements of witnesses [REDACTED] and [REDACTED], and how [REDACTED] came to [REDACTED] findings regarding their psychological functioning. Therefore, unlike in *Lubanga*, where the Prosecution had already disclosed 150 items relating to the use of child soldiers, in the instant case, the Defence has only received two short two page reports written in response to their email requesting the original psychological assessments. The observations, methodology and findings of the psychosocial expert, most likely present in [REDACTED] assessments, would undoubtedly assist the Defence in its preparations and have a material effect because the material significantly impacts its ability to test the credibility of witnesses [REDACTED] and [REDACTED].

22. The Defence acknowledges that the Statute does not permit it to have the keys to the Prosecution warehouse and determine for itself what material in the Prosecution's possession is exculpatory and material to the defence. The Prosecution's discretion in disclosure must at times be monitored when serious doubts arise as to whether the Prosecution's obligations have been fulfilled, and for this reason the Defence requests the Chamber to intervene in this instance.

RELIEF SOUGHT

23. In light of the foregoing, the Defence respectfully requests the Chamber to order the Prosecution to disclose the two psychosocial assessments of [REDACTED] and [REDACTED].

Respectfully submitted,

A rectangular box containing a handwritten signature in dark ink. The signature is written in a cursive style and appears to be 'Mr. Knoop'.

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

Dated this
23 August 2016
At The Hague, the Netherlands