

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/11
Date: 14 February 2013

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
THE PROSECUTOR V. LAURENT GBAGBO**

Public document

**Decision on the “*Requête de la Défense en report de l’audience de confirmation
des charges prévue le 19 février 2013*”**

Decision to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Fatou Bensouda

Counsel for the Defence

Emmanuel Altit

Agathe Bahi Baroan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Silvana Arbia

Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) issues the following decision on the “*Requête de la Défense en report de l’audience de confirmation des charges prévue le 19 février 2013*” (the “Request”).¹

1. On 14 December 2012, the Chamber issued the “Decision on the date of the confirmation of charges hearing and proceedings leading thereto” (the “Decision of 14 December 2012”), whereby the Chamber, *inter alia*, set the commencement of the confirmation of charges hearing for Tuesday, 19 February 2013.²

2. On 8 February 2013, the Defence filed its Request. As its legal basis, the Defence refers generally to the importance of the right to a fair trial, and submits more specifically that protection of the rights of the Defence is the essence of the confirmation of charges hearing.³

3. The Defence states that the Prosecutor disclosed to it, between 15 and 22 January 2013, around one thousand documents, and again 26 items on 6 February 2013. Referring to its limited resources and the fact that it conducted a mission to Côte d’Ivoire between 22 January 2013 and 4 February 2013, the Defence submits that it is impossible to analyse the disclosed material in time for the confirmation of charges hearing.⁴

4. The Defence contends that many of the items of evidence in question should have been disclosed earlier as they have been in possession of the Prosecutor for several months. The Defence submits that the Prosecutor has violated her duty of loyalty, and is attempting to “drown” the Defence and prevent it from reacting, in order to put it at an inferior position at the

¹ ICC-02/11-01/11-390

² ICC-02/11-01/11-325.

³ Request, paras 11-20.

⁴ *Ibid.*, paras 21-28.

confirmation of charges hearing. In addition, the Defence argues that the disclosure in question took place in violation of the “Decision establishing a disclosure system and a calendar for disclosure” (the “Decision on Disclosure”).⁵

5. On this basis, the Defence requests the Chamber to determine that holding the confirmation of charges hearing on 19 February 2013 would result in a violation of Mr Gbagbo’s right to a fair trial, and to postpone the hearing to a new date not earlier than 25 March 2013.⁶

6. On 12 February 2013, the Prosecutor filed the “Prosecution’s response to ‘Requête de la Défense en report de l’audience de confirmation des charges prévue le 19 février 2013’” (the “Prosecutor’s Response”), opposing the Request.⁷

7. The Prosecutor submits that while the disclosure of incriminating evidence was subject to the 17 January 2013 time limit, no time limits are attached to other disclosable materials. Indeed, the Prosecutor states that she has an ongoing obligation to disclose potentially exculpatory evidence or information that is material to the preparation of the Defence, as long as investigations continue and evidence falling into either of these categories is collected.⁸

8. The Prosecutor explains that she disclosed, within the time frame referred to by the Defence:

- on 15 January 2013, 54 incriminating documents, which included 35 emails between one and three pages long;

⁵ *Ibid.*, paras 30-36. See ICC-02/11-01/11-30.

⁶ *Ibid.*, p. 12.

⁷ ICC-02/11-01/11-396.

⁸ *Ibid.*, para. 3, 5.

- on 15 and 17 January, and 6 February 2013, a total of 34 documents as potentially exculpatory under article 67(2) of the Rome Statute (the “Statute”); and
- on 17 January 2013, 885 items as material for the preparation of the Defence under rule 77 of the Rules, which included 439 emails and 443 attachments.⁹

9. The Prosecutor states that she did not deliberately delay disclosure of the emails to thwart or prejudice the Defence. She submits that the emails disclosed on 17 January 2013 were among thousands found on electronic devices, which had to be processed by an external company before they could be searched and potentially relevant content identified. Thereafter, as the Prosecutor states, emails with potentially relevant content were reviewed individually to identify those that were disclosable. This, in the submission of the Prosecutor, in fact avoided “drowning” the Defence as instead of disclosing thousands of irrelevant and unsearchable emails, the Prosecutor “used the time to search this overwhelming bulk of material and weed out the irrelevant items”.¹⁰

10. Finally, the Prosecutor emphasises that, in compliance with the Decision on Disclosure, she: (i) provided a concise summary of the content of each disclosed document; (ii) provided an explanation of the relevance of the document for the preparation of the Defence; and (iii) highlighted the relevant portion(s) that she believed were material to the preparation of the Defence. Thus, the Prosecutor submits that the Defence can quickly determine which documents may be relevant to its preparation, including of the confirmation of charges hearing. The Prosecutor notes that the Defence in fact added to its list of evidence 36 items from the 17 January 2013 disclosure under rule 77 of

⁹ *Ibid.*, paras 4 and 6.

¹⁰ *Ibid.*, para. 7.

the Rules, and does not oppose that the Defence relies at the hearing on any additional documents originating from this disclosure. However, the Prosecution contests as “meritless” the complaint that the Defence was prejudiced and cannot be expected to participate in the confirmation of charges hearing as scheduled.¹¹

11. On 13 February 2013, the Office of Public Counsel for victims (the “OPCV”), acting as common legal representative of the victims admitted to participate at the confirmation of charges hearing and in the related proceedings, submitted the “*Réponse du Représentant légal commun des victimes à la Requête de la Défense du 7 février 2013 en report de l’audience de confirmation des charges*”, also opposing the Request.¹²

12. Principally, the OPCV submits that the Request raises anew questions relating to the disclosure process in the present case which were previously addressed by the Chamber, and must as such be seen as an impermissible request for reconsideration of the Chamber’s previous decisions. As such, it must, in the submission of the OPCV, be rejected *in limine*.¹³

13. In the alternative, the OPCV submits that it is in the greatest interest of the concerned victims that the confirmation of charges hearing take place as soon as possible. The OPCV adds that this wish of the victims is in accord with the fundamental right of the suspect to have his case heard as soon as possible and without excessive delay. Indeed, the OPCV argues that the Defence appears not to be concerned with the expeditiousness of the proceedings, but rather to pursue a strategy of delaying. At the same time, the

¹¹ *Ibid.*, paras 8-11.

¹² ICC-02/11-01/11-399.

¹³ *Ibid.*, paras 20-26.

OPCV submits that the notion of integrity of proceedings is broader than that of fairness of the proceedings vis-à-vis the suspect.¹⁴

14. The Chamber notes articles 61 and 67(2) of the Statute and rules 77 and 121 of the Rules.

15. The Chamber notes that, pursuant to rule 121(7) of the Rules, the confirmation of charges hearing can be postponed by the Chamber, either at the request of the parties or *proprio motu*. In the view of the Chamber, the issue to be determined with respect to the present Request is whether, taking into account the recent disclosure of evidence by the Prosecutor, the Defence is in position to properly exercise its procedural rights under article 61(6) of the Statute.

16. The Chamber notes that the Prosecutor's disclosure of incriminating evidence was completed on 15 January 2013, within the time limit established in the Decision of 14 December 2012. The Chamber further observes that the majority of evidence to be relied upon by the Prosecutor has been disclosed to the Defence prior to the first postponement of the hearing in June 2012, and that only lesser amounts of additional incriminating evidence were disclosed subsequently. The final disclosure of incriminating evidence on 15 January 2013 concerned only 54 additional items of evidence. The limited disclosure carried out by the Prosecutor before the expiration of the time limit cannot be understood as affecting the ability of the Defence to prepare for the confirmation of charges hearing.

17. As concerns potentially exculpatory evidence and items material for the preparation of the Defence, within the meaning of article 67(2) of the Statute and rule 77 of the Rules, the Chamber notes that the Prosecutor is under a

¹⁴ *Ibid.*, paras 29-42.

continuous obligation to identify and disclose to the Defence any evidence falling under these provisions.¹⁵ Notably, this obligation is not terminated or suspended by the expiration of the time limit for disclosure of incriminating evidence for the purposes of the confirmation of charges hearing.

18. The Chamber notes that in the present case, disclosure under said provisions has continued recently, including after 17 January 2013, the time limit for disclosure of incriminating evidence.¹⁶ This is consistent with the legal instruments of the Court as recalled above and does not *per se* constitute a violation of the rights of the Defence. In addition, the Chamber also notes, as pointed out by the Prosecutor, that the disclosure was accompanied by additional information enabling the Defence to analyse the disclosed items, also for the purposes of the confirmation of charges hearing.¹⁷ The Defence has failed to identify any reason to conclude that this recent disclosure under article 67(2) of the Statute or rule 77 of the Rules was prejudicial to its rights.

19. Taking into account the above, the Chamber is of the view that the confirmation of charges hearing can take place as currently scheduled and that the Request must be rejected.

FOR THESE REASONS, THE CHAMBER

REJECTS the Request.

¹⁵ See Prosecutor's Response, para. 5.

¹⁶ See ICC-02/11-01/11-353 and annex; ICC-02/11-01/11-359 and annex; ICC-02/11-01/11-360 and annex; ICC-02/11-01/11-375 and annex; ICC-02/11-01/11-386 and annex; ICC-02/11-01/11-387 and annex.

¹⁷ Prosecutor's Response, para. 8.

Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi

Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this 14 February 2013

At The Hague, The Netherlands