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No.: ICC-02/11-01/11
Date: 12 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

Prosecution's response to "Requête de la Défense en report de l'audience de confirmation des charges prévue le 19 février 2013"

Source: Office of the Prosecutor

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

The Office of the Prosecutor

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

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REGISTRY

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Ms Silvana Arbia

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. On 8 February 2013, the Defence filed a request seeking the postponement of the confirmation hearing on the grounds that the Prosecution deliberately delayed disclosure of a large number of documents, until a month prior to the start of the confirmation proceedings, in order to “*noyer la défense et l’empêcher de réagir*”.¹ Arguing that the Prosecution breached its duty of “*loyauté*”,² the Defence submits that it needs additional time to review this material before the confirmation hearing presently scheduled to begin on 19 February 2012.³
2. The Prosecution objects to the Defence’s request. First, notwithstanding the unfounded accusation of bad faith, the delay in disclosure was caused by the difficulty to process and review tens of thousands of seized computer files more promptly. Second, the Defence misconstrues the Prosecution’s disclosure obligations; while disclosure of incriminating evidence was subject to a firm deadline, no comparable deadline was imposed for potentially exculpatory items or information that is material to the defence. Finally, as to the complaint that the Defence team is unable to fully take advantage of the materials without a month’s additional preparation time, the Prosecution also provided a detailed Chart that allows the Defence to quickly identify the most relevant material. Indeed, the Defence has already included items from the recent disclosure on its own list of evidence, and the Prosecution does not object if the Defence requests to add other items - disclosed on 17 January 2013 - during the confirmation hearing.

Observations

3. Contrary to the Defence’s assertion,⁴ the Prosecution was ordered to disclose by 17 January 2013 any additional *incriminating* material on which the Prosecution

¹ ICC-02/11-01/11-390, para. 29-31. See also para. 36.

² ICC-02/11-01/11-390, paras. 34 and following.

³ ICC-02/11-01/11-390.

⁴ ICC-02/11-01/11-390, para. 9.

intended to rely on for the purposes of the confirmation hearing.⁵ This deadline did not apply to non-incriminating rule 77 or article 67(2) documents.

4. On 15 January 2013, the Prosecution disclosed 54 incriminating documents, which included 35 emails that are between one and three pages long.⁶ In relation to these documents, it also disclosed a Chart that identified specifically the element(s) of the crimes to which each document was predominantly material.
5. Though no deadlines are attached to the other disclosable materials, the Prosecution has ongoing obligations to disclose potentially exculpatory evidence (article 67(2)) or information that is material to the preparation of the Defence (rule 77). So long as investigations are ongoing, as in the present case and in the situation in Côte d'Ivoire, the Prosecution will inevitably collect evidence that will be disclosable under one or both of those provisions.
6. On 15 and 17 January and on 6 February 2013, the Prosecution disclosed a total of 34 documents as potentially exculpatory under article 67(2).⁷ On 17 January 2013, the Prosecution disclosed 885 items, which included 439 emails and 443⁸ attachments that appear to be material to the preparation of the defence ("17 January 2013 Rule 77 disclosure").⁹ At least 37 emails or attachments did not contain any Rule 77 information and were simply disclosed out of completeness, as indicated in the disclosure report and list provided to the Defence.¹⁰
7. The Prosecution did not deliberately delay disclosure of the emails to thwart or prejudice the Defence. The emails were among thousands that were found on electronic devices. It was impossible to read each email separately within a

⁵ See ICC-02/11-01/11-325, p. 14. "ORDERS the Prosecutor to disclose to the Defence by Thursday, 17 January 2013 any additional evidence on which she intends to rely at the confirmation of charges hearing, and for which no redaction is requested".

⁶ ICC-02/11-01/11-352.

⁷ For the respective disclosure lists see ICC-02/11-01/11-353-Conf-AnxA, ICC-02/11-01/11-359-Conf-AnxA and ICC-02/11-01/11-386-Conf-AnxA.

⁸ Out of these 443 attachments, 19 items are articles or videos derived from internet links mentioned in several of the disclosed e-mails and which were registered by the OTP.

⁹ For the disclosure list see ICC-02/11-01/11-360-Conf-AnxA.

¹⁰ ICC-02/11-01/11-360 and its Confidential Annex A. The emails were also disclosed to provide context.

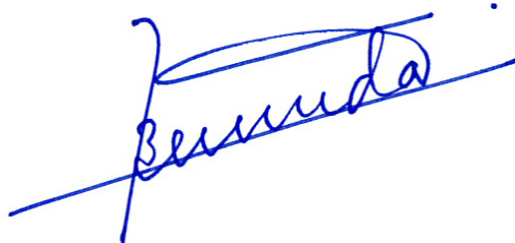
reasonable time. Accordingly, the Prosecution had to take steps to make it possible to search their content. That required that the Prosecution first identify and then contract with a company that had the capacity, including the appropriate software, to process the information. The Prosecution eventually selected a company that was able to upload the large number of emails in order to make their content searchable. Only once that was done could the emails be preliminarily searched to identify those with potentially relevant content. When those were identified, the emails were then reviewed individually to identify those that were relevant to the case and disclosable to the Defence. This laborious process in fact avoided “drowning” the Defence; instead of disclosing thousands of completely irrelevant and unsearchable emails, the Prosecution used the time to search this overwhelming bulk of material and weed out the irrelevant items. Unfortunately, the processing of such a large volume of information could not be completed before the December 2012 Court recess.

8. It is important to recall that although these emails were disclosed in mid-January 2013, the Prosecution fully complied with the “Decision establishing a disclosure system and a calendar for disclosure” (“Disclosure Decision”) which orders the Prosecution for each document to: (1) provide a concise summary of the content of each document; (2) provide an explanation of the relevance of the document for the preparation of the defence; and (3) highlight the relevant portion(s) that it believes are material to the preparation of the Defence.
9. And indeed, the Defence complaint about the length of the Prosecution’s disclosure list -- *“la liste des huit cent quatre vingt cinq documents divulgués sous la Règle 77 le 17 janvier 2013 comporte à elle seule cent soixante neuf pages”*¹¹ -- confirms that the disclosure was accompanied by summaries and explanations, as ordered by the Chamber, which minimized rather than exacerbated the difficulties for the

¹¹ ICC-02/11-01/11-390, para. 21.

Defence.¹² The Defence can quickly determine which documents may be relevant to its preparation, including of the confirmation hearing.

10. Additionally and as ordered in the Disclosure Decision, for each item disclosed, the Prosecution highlighted within each email or disclosed document the information deemed to be relevant pursuant to Rule 77 or Article 67(2). The Prosecution notes that the Defence added 36 documents from the 17 January 2013 Rule 77 disclosure on its List of Evidence for the confirmation hearing.¹³
11. For those reasons, the complaint that the Prosecution prejudiced the Defence and that it accordingly cannot be expected to participate in the currently-scheduled confirmation hearing is meritless. Nevertheless and in order to hold the confirmation hearing as scheduled, the Prosecution would not object to any request of the Defence, during the confirmation hearing, to rely on additional documents it may not have identified from the 17 January 2013 Rule 77 disclosure and on which they would now seek to rely.¹⁴



Fatou Bensouda, Prosecutor

Dated this 12th day of February 2013

At The Hague, The Netherlands

¹² See the List at ICC-02/11-01/11-360-Conf-AnxA.

¹³ ICC-02/11-01/11-381-Conf-Anx.

¹⁴ Rule 77 Pre-Confirmation Package 14, see also ICC-02/11-01/11-381.