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No.: ICC-02/11-01/11
Date: 11 January 2012

PRE-TRIAL CHAMBER III

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Elizabeth Odio Benito
Judge Adrian Fulford

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

**Public
with Public Annexes 1-4**

**Prosecution Update on Discussions with Defence Regarding Procedures for
Disclosure and Redactions**

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

Counsel for the Defence

Mr Emmanuel Altit

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

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. On 9 December 2011, the Presiding Judge of Pre-Trial Chamber III (“Chamber”) scheduled a status conference to be held on 14 December 2011 “with a view to ensuring that disclosure takes place in a manner which is transparent, efficient and expeditious” and “to discuss all matters which might be relevant to the disclosure process”.¹ The Chamber specifically sought the views of the parties on the disclosure regime to be applied by the Chamber, including on the necessity of any analytical chart of evidence. In that context, the Chamber pointed the parties to the different models of disclosure adopted in the Abu Garda case (ICC-02/05-02/09-35) and in the Kenya case (ICC-01/09-02/11-48).²
2. During the status conference, and after the parties had made their submissions, the Presiding Judge instructed the parties to attempt to reach agreements on the applicable disclosure procedure, including the format of charts to be provided by the Prosecution, and as to how the Chamber should resolve redaction proposals. The Presiding Judge ordered the parties to inform the Chamber by 11 January 2012 of the progress of their discussions.³
3. On 20 December 2011, the Prosecution and the Defence met to discuss the issues referred to above. In addition, they exchanged emails to follow up on their discussions.
4. The Prosecution hereby informs the Chamber of the outcome of these discussions and the agreements reached by the Prosecution and the Defence on the applicable system of disclosure, format of an In-depth Analysis Chart and the procedure when seeking redactions. The Prosecution further requests the Chamber to endorse the agreed procedures.

¹ ICC-02/11-01/11-15, para.3.

² ICC-02/11-01/11-15, para.4; see also draft agenda provided by the Chamber.

³ ICC-02/11-01/11-T-3-ENG, p.11, ln.22-p.12, ln.7 ; p.26, lns.4-12 ; and p.31, lns.5-16.

5. In addition, the Prosecution informs the Chamber that its discussions with the Defence on protocols regulating the use of confidential information during investigations and contacts with witnesses of the other party are ongoing. The Prosecution will inform the Chamber of any outcome of these discussions as soon as possible.

Arguments

(i) *General agreements on the applicable disclosure process*

6. The Prosecution and the Defence have agreed to follow the disclosure model adopted by Pre-Trial Chamber I in the Abu Garda case (ICC-02/05-02/09-35),⁴ with minor adjustments to the Abu Garda model as specified below.
7. According to the Abu Garda model, disclosure is to be conducted *inter partes*.⁵ Therefore, the Prosecution will file each document it intends to rely on at the confirmation hearing with the Registry so that it can be communicated to the Chamber according to the applicable eCourt Protocol.⁶ Consistent with the Abu Garda model, the Prosecution and the Defence further agreed that disclosed materials on which they do not intend to rely upon at the confirmation hearing should not be filed in the record of the case and will therefore not be communicated to the Chamber.⁷

⁴ “Abu Garda Decision”.

⁵ Abu Garda Decision, para.8.

⁶ See Registry’s Submission of the Generic eCourt Protocol (ICC-02/11-01/11-18+Anx1). The Prosecution will also inform the Chamber by way of a filing of all incriminating material disclosed to the Defence. A list of the documents disclosed containing the ERN of the document, the type of document, its date, title, number of pages and date disclosed will also be submitted with this notice to the Chamber.

⁷ These are Article 67(2) and Rule 77 material; see Abu Garda Decision, para.11.

(ii) *Disclosure of information pursuant to Article 67(2) and inspection of information pursuant to Rule 77*

8. The Prosecution and the Defence agreed that, when disclosing evidence pursuant to Article 67(2) or allowing the Defence inspection of information pursuant to Rule 77, the Prosecution shall provide the Defence with a Disclosure Note or Pre-Inspection Report, as applicable, that provides the following information for each item: (a) document ID/ERN; (b) date of the document; (c) type of document; (d) title of document; (e) concise summary of the relevant portions of the content of the document; (f) indication as to the relevance of the document; (g) number of pages of the document; and (h) date of disclosure/inspection. Annex 1 consists of a template for a Disclosure Note or Pre-Inspection Report as agreed by the Prosecution and the Defence.
9. In addition, in order to facilitate the review of the information by the Defence, the Prosecution will highlight in each document the relevant portions that fall under Article 67(2) or Rule 77.
10. A copy of each Disclosure Note or Pre-Inspection Report signed by both parties shall be filed on the record of the case.

(iii) *In-depth Analysis Chart*

11. The Prosecution and the Defence agreed on the format of the In-depth Analysis Chart ("IDAC") for evidence on which the Prosecution intends to rely at the confirmation hearing. This IDAC will be fact-based, and will include the following information: (a) factual statement, derived from the Document Containing the Charges ("DCC"); (b) document ID or ERN; (c) title of the document; (d) document type; (e) date of the document; (f) relevant excerpts of

the document; and (g) elements of the charges to which the document pertains. Annex 2 consists of the agreed IDAC template.

12. Moreover, the Prosecution agreed with the Defence's proposal to produce an additional element-based chart or list that would identify, for each legal element (including the chapeau elements and the modes of liability), the relevant documents that go to prove that element. Annex 3 consists of the agreed element-based chart or list template.
13. The Prosecution submits that both the IDAC and element-based charts ("Charts") produced by the Prosecution shall be considered as non-exhaustive guides. The Prosecution and the Defence agreed that these Charts do not restrict the manner in which a certain piece of evidence can be used by the Chamber. In particular, it is understood that the Chamber can use evidence admitted at confirmation to prove any fact or element, as it deems appropriate. Therefore, the Chamber would not be prevented from relying on a specific document even if the Prosecution had not linked that document to a particular element or fact in its Charts.
14. Since the IDAC is based on the facts as set out in the future DCC and since the element-based list is based on the IDAC, the Prosecution will provide them to the Chamber and Defence pursuant to Rule 121(3) of the Rules of Procedure and Evidence.

(iv) Procedure for redactions

15. The Prosecution and the Defence agreed that redactions to materials disclosed pursuant to Article 67(2) or Rule 77 can be implemented without seeking authorisation from the Chamber. Once disclosed, the Defence may seek further information from the Prosecution regarding the redactions. If the Defence

thereafter disagrees with a redaction, it may seek a ruling from the Chamber to lift the redaction.

16. Concerning redactions to incriminating material or evidence the Prosecution intends to rely on for the purposes of the confirmation hearing, the Prosecution and the Defence have agreed that the Prosecution shall file a redaction request that includes the legal and factual reasons for each redaction. In particular, for each envisioned redaction, the Prosecution shall indicate in a Chart to be filed *ex parte*: (a) the document title; (b) the document ERN; (c) the information to be redacted; and (d) the reasons for which the redaction is sought, including reference to the relevant legal basis. Annex 4 consists of the agreed template to be submitted with a redaction request, including examples of the manner it will be applied.

Conclusion

17. The Prosecution requests the Chamber to endorse the agreements between the Prosecution and the Defence on the applicable systems of disclosure, the In-depth Analysis Chart and Element-based Charts and the procedure to be followed when seeking redactions. The Parties are also available to clarify, by way of a status conference with the Single Judge, these agreements.



Luis Moreno-Ocampo, Prosecutor

Dated this 11th day of January 2012

At The Hague, The Netherlands