



Original: English

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

Date: 5 May 2014

**PRE-TRIAL CHAMBER I**

**Before: Judge Silvia Fernández de Gurmendi, Single Judge**

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE  
IN THE CASE OF *THE PROSECUTOR* v. *CHARLES BLÉ GOUDÉ***

**Public**

**Second decision on issues related to disclosure of evidence**

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

**The Office of the Prosecutor**

Fatou Bensouda

James Stewart

**Counsel for the Defence**

Nicholas Kaufman

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Herman von Hebel

**Detention Section**

**Victims and Witnesses Unit**

**Others**

**Victims Participation and Reparations  
Section**

**Judge Silvia Fernández de Gurmendi**, Single Judge for Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”), responsible for carrying out the functions of the Chamber in relation to the situation in the Republic of Côte d’Ivoire and the cases emanating therefrom,<sup>1</sup> issues the following decision on issues related to disclosure of evidence.

1. On 27 March 2014, Charles Blé Goudé (“Mr Blé Goudé”) appeared before the Single Judge, pursuant to article 60(1) of the Rome Statute (the “Statute”) and rule 121(1) of the Rules of Procedure and Evidence (the “Rules”).<sup>2</sup> During that hearing, the Single Judge set the date of the commencement of the confirmation of charges hearing at 18 August 2014.<sup>3</sup>

2. On 14 April 2014, the Single Judge issued the “Decision establishing a system for disclosure of evidence” (the “Decision of 14 April 2014”).<sup>4</sup>

3. On 1 May 2014, a status conference was held at which submissions relevant to the disclosure process were received from the parties.<sup>5</sup>

4. The Single Judge notes articles 61, 67 and 68 of the Statute, and rules 77, 81 and 121 of the Rules.

5. The purpose of the present decision is to issue further orders following the status conference of 1 May 2014 as necessary for proper disclosure of evidence by the parties in the present case, in particular as concerns the following issues: (i) specific time limits for disclosure of evidence by the Prosecutor; (ii) judicial control over exceptions to disclosure; (iii) provision of

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<sup>1</sup> Decision designating a single judge, 16 March 2012, ICC-02/11-02/11-9-tENG.

<sup>2</sup> ICC-02/11-02/11-T-3-CONF-ENG. A public redacted version is also available, see ICC-02/11-02/11-T-3-Red-ENG.

<sup>3</sup> ICC-02/11-02/11-T-3-Red-ENG, p. 12, lines 9-16.

<sup>4</sup> ICC-02/11/02/11-57.

<sup>5</sup> ICC-02/11-02/11-T-4-CONF-ENG.

element-based charts by the Prosecutor; and (iv) adoption of a protocol on the handling of confidential information.

6. On the basis of the general competence of the Chamber, under article 61(3) of the Statute, to issue orders regarding disclosure of evidence for the purposes of the confirmation of charges hearing, and consistent with previous practice of the Court, the Single Judge deems it appropriate to set intermediate time limits for disclosure of evidence by the Prosecutor ahead of the final time limit of 18 July 2014 set in the Decision of 14 July 2014.<sup>6</sup>

7. For this purpose, the Single Judge notes the Prosecutor's submissions at the status conference as to the anticipated time frame for disclosure. In particular, the Prosecutor stated that evidence which was previously disclosed to the Defence in the case of *The Prosecutor v. Laurent Gbagbo* could be disclosed to the Defence in the present case "probably within a week".<sup>7</sup> Further, the Prosecutor indicated that other evidence currently in her possession could be disclosed by 6 June 2014.<sup>8</sup> In the view of the Single Judge these time limits are appropriate in light of the present circumstances.

8. The Prosecutor also indicated at the status conference that it was her intention to continue the investigation, but that, at present, no estimate could be given as to the anticipated time of disclosure of evidence so obtained.<sup>9</sup> The Defence, on the other hand, submitted that "the Pre-Trial Chamber should not entertain any evidence at confirmation which is not as of this day currently in the hands of the Prosecution".<sup>10</sup>

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<sup>6</sup> Decision of 14 July 2014, p. 9.

<sup>7</sup> ICC-02/11-02/11-T-4-CONF-ENG, p. 4, lines 4-12.

<sup>8</sup> *Ibid.*, p. 5, lines 6-8.

<sup>9</sup> *Ibid.*, p. 6, lines 21-23; p. 7, line 23 to p. 8, line 2.

<sup>10</sup> *Ibid.*, p. 9, lines 17-19.

9. The Single Judge considers that there is no basis in the Statute or the Rules to preclude the Prosecutor from relying on evidence obtained as a result of investigation insofar as it is disclosed within the applicable time limits. What is required by the applicable law is that the Defence is informed within a reasonable time before the hearing of the evidence on which the Prosecutor intends to rely (article 61(3) of the Statute) and that the Prosecutor provide no later than 30 days before the hearing a list of evidence which she intends to present at the hearing (rule 121(3) of the Rules). Accordingly, the Single Judge is of the view that the Prosecutor may rely on any evidence obtained as a result of further investigation. The Single Judge emphasises that any additional evidence should be disclosed to the Defence as soon as practicable on an ongoing basis and in no case later than 18 July 2014.

10. In relation to the establishing of a simplified system of judicial control over exception to disclosure, both parties informed the Single Judge that an agreement had been reached between them with respect to redactions.<sup>11</sup> At the status conference, the Defence read out the agreement as follows:

With respect to Rule 77 and Article 67 material, the Defence agrees to the procedures set out in Laurent Gbagbo decision ICC-02/11-01/11-30 paragraphs 48 to 51, on the understanding that the basis for the redactions are included and that the redactions can be easily located in the documents.

[...]

Now, with respect to incriminating material, the Defence agrees to [...] the same procedure as with respect to Rule 77 and Article 67(2) upon the understanding that the Defence will be able to easily locate the redactions in documents and also that the basis for the redactions are included.

The Defence adds the additional requirement that if a concern is communicated to the Prosecution about any redaction, then the Prosecution is required to respond promptly within two working days. If the concern is not then resolved *inter partes*, then the Chamber is to be seized of the matter.<sup>12</sup>

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<sup>11</sup> *Ibid.*, p. 11, line 13 to p. 17, line 20.

<sup>12</sup> *Ibid.*, p. 15, line 24 to p. 16, line 15.

11. In the view of the Single Judge, this proposed solution can indeed be adopted for the purposes of the present case as it will allow for an efficient and expeditious process of disclosure, and as the Chamber will retain control over individual exceptions to disclosure in compliance with rule 81 of the Rules.

12. Therefore, in light of the foregoing, the procedure with respect to evidence which is to be disclosed with redactions in the present case shall be as follows:

- When the Prosecutor determines that certain information needs to be redacted, under rule 81 of the Rules, from an item of evidence to be disclosed, she shall disclose that item of evidence to the Defence with redactions;
- Simultaneously with such disclosure of redacted evidence, the Prosecutor shall provide to the Defence a document indicating the basis for redactions in the evidence disclosed, which shall also be filed in the record of the case;
- Upon receipt of disclosure, the Defence may seek further information from the Prosecutor regarding the redactions applied; in such case the Prosecutor shall respond to the Defence within two working days;
- If disagreement persists, the Defence may seize the Chamber of the matter.

13. The parties' agreement refers only to disclosure of evidence by the Prosecutor and does not refer to disclosure by the Defence. However, the Single Judge is of the view that the reasons justifying the adoption of the same procedure equally exist with respect to the latter, and that the same procedure can be adopted without prejudice to either of the parties.

14. The Single Judge turns now to the parties' submissions with respect to other information to be provided by the Prosecutor in addition to the disclosure of evidence.<sup>13</sup> On the basis of the agreement of the parties, the Prosecutor shall provide the following additional information:

- With respect to evidence disclosed under article 61(3)(b) of the Statute, the Prosecutor shall provide to the Defence with each batch of disclosure a chart organising each item of evidence in light of the constituent element of the relevant crimes ("Element Based Chart") and shall provide to the Defence a consolidated Element Based Chart within three working days of the submission of the document containing the charges;
- With respect to other evidence disclosed under article 67(2) of the Statute or rule 77 of the Rules, the Prosecutor shall provide a short explanation of the relevance of each item so disclosed.

15. It also appears from the submissions received at the status conference that the parties have discussed the format of the list of evidence to be filed by the Prosecutor, and have agreed that it would not include a reference to the relevant element of crimes for each cited item of evidence.<sup>14</sup> Accordingly, and also in light of the Decision of 14 April 2014, which suggested the inclusion of footnotes in the document containing the charges, with hyperlinks to the evidence on the electronic record,<sup>15</sup> the list of evidence need not be organised following the factual allegations of the document containing the charges but may simply present items of evidence consecutively in any clear order (for instance by categories of evidence).

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<sup>13</sup> *Ibid.*, p. 16, lines 3-7, p. 18, line 11, p. 20, line 2.

<sup>14</sup> *Ibid.*, p. 19, line 22 to p. 20, line 8.

<sup>15</sup> Decision of 14 April 2014, para. 13.

16. Finally, with respect to the handling of confidential information received through disclosure, the Single Judge recalls that both parties agreed to the adoption in the case at hand of the two protocols which were adopted for this purpose in the case of Laurent Gbagbo.<sup>16</sup> Therefore, the Single Judge considers that those two protocols can be adopted in the present case.

17. The Single Judge notes that, to date, the parties have not manifested the intention to refer any witness to the Victims and Witnesses Unit (the “VWU”) for the purpose of inclusion in the International Criminal Court Protection Programme (the “ICCPP”) pursuant to regulation 96 of the Regulations. Nevertheless, the Single Judge considers it appropriate, based on the jurisprudence of the Court, to establish the procedures governing the conditions under which the investigating party is allowed to contact the other party’s witnesses who are included in the ICCPP, on the one hand, and those who are not included in the ICCPP, on the other hand.<sup>17</sup>

18. With regard to the first category, the Single Judge recalls that inclusion in the ICCPP represents the most intrusive protection measure that can be applied to witnesses. Considering that the Registrar is mandated by regulation 96 of the Regulations to “take all necessary measures to maintain a protection programme for witnesses”, the Single Judge is of the view that the VWU is the only appropriate channel through which the investigating party may initiate the procedure to contact the other party’s witness benefiting from the ICCPP. Accordingly, should a party wish to interview an ICCPP witness

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<sup>16</sup> ICC-02/11-02/11-T-4-CONF-ENG, p. 21, lines 2-10. See also Pre-Trial Chamber III, Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations, 6 March 2012, ICC 02/11 01/11-49 and Annex.

<sup>17</sup> See Pre-Trial Chamber III, Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations, 6 March 2012, ICC 02/11 01/11-49, paras 29-32.

of the other party, it shall contact the VWU which will make the necessary arrangements for the interview to take place.

19. As for contacts with witnesses of the other party who are not included in the ICCPP, the Single Judge points out that these interviews may only take place if the witness consents. The consent must be given voluntarily and must be sought through the representative of the other party and after having informed the VWU of the intention to contact the witness.<sup>18</sup> It is recalled that the party calling the witness or relying on his or her statement “is prohibited from trying to influence the witness’s decision as to whether or not to agree to be interviewed” by counsel of another party.<sup>19</sup>

20. After obtaining the witness’ consent to be interviewed, the VWU shall be responsible for the necessary arrangements. Concerning the presence during the interview of a representative of the party calling the witness or relying on his or her statement, the Single Judge considers it appropriate to endorse the established practice of other Chambers. Accordingly, the party calling the witness or relying on his or her statement is entitled to have a representative attending the interview, unless the interviewing party objects to such presence and applies to the Chamber for a ruling on the matter.<sup>20</sup> However, if the witness wishes for the interview take place without a representative of the party calling him or her or relying on his or her statement, then there is no need for an application to the Chamber, as the witness’s consent in this sense is sufficient.<sup>21</sup>

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<sup>18</sup> See Trial Chamber II, Decision on a number of procedural issues raised by the Registry, 14 May 2009, ICC-01/04-01/07-1134, para. 28.

<sup>19</sup> *Id.*

<sup>20</sup> Trial Chamber I, Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, 3 June 2008, ICC-01/04-01/06-1372, paragraph 11.

<sup>21</sup> Trial Chamber II, Decision on a number of procedural issues raised by the Registry, 14 May 2009, ICC-01/04-01/07, para. 28.

**FOR THESE REASONS, THE SINGLE JUDGE**

**ORDERS** the Prosecutor to disclose to the Defence the evidence previously disclosed in the case of *The Prosecutor v. Laurent Gbagbo* which is subject to disclosure also in the present case as soon as possible and no later than **Friday, 9 May 2014**;

**ORDERS** the Prosecutor to disclose to the Defence other evidence currently in her possession which is subject to disclosure in the present case as soon as possible and no later than **Friday, 6 June 2014**;

**DECIDES** to adopt the procedure for disclosure of evidence with redactions as laid out at paragraph 12 of the present decision;

**ORDERS** the Prosecutor to provide to the Defence, in addition to disclosure of evidence, the documents specified at paragraph 14 of the present decision;

**DECIDES** that the parties shall apply the protocols on the handling of confidential information as annexed to the present decision;

**ORDERS** the parties to comply with the procedures set out in paragraphs 17 to 20 in relation to contacts with witnesses of the other party.

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

  
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**Judge Silvia Fernández de Gurmendi**

Dated this Monday, 5 May 2014

At The Hague, The Netherlands