



Original: English

No.: ICC-02/11-01/15
Date: 14 October 2015

TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

PUBLIC

Prosecution's response to Laurent Gbagbo's "Requête de la Défense aux fins d'obtenir l'accès à tous les éléments obtenus par le Procureur au cours de ses enquêtes" (ICC-02/11-01/15-256-Conf)

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

Ms Fatou Bensouda
Mr James Stewart
Mr Eric Macdonald

Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Ms Claver N'dry

Legal Representatives of the Victims

Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution opposes the Gbagbo Defence *Requête de la Défense aux fins d'obtenir l'accès à tous les éléments obtenus par le Procureur au cours de ses enquêtes*, filed on 1 October 2015,¹ for the reason that it is complying with its disclosure obligations and that the jurisprudence and practice of the Court does not support requests for access to all material in possession of the Prosecution. The same arguments apply to the alternative request seeking a final and exhaustive list of all items obtained by the Prosecution in its investigations. However, the Prosecution is not opposed to specific requests to review its evidentiary database.

Submissions

The Prosecution's disclosure obligations are not unlimited

2. The jurisprudence and practice of the Court, and that of other international criminal tribunals, offers no support to requests for open file disclosure, nor is such disclosure desirable in the current proceedings.
3. The Prosecution's disclosure obligations are regulated by a legal framework consisting of specific provisions, including articles 61(3), 67(2), and 68(5) of the Statute, and rules 76, 77, 81, 84 and 121(2) of the Rules of Procedure and Evidence ("Rules"). The broadest provision addressing Prosecution disclosure is enshrined at rule 77, which requires the Prosecution to permit the inspection of books, documents, photographs and other tangible objects which are "material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person."
4. As stressed by the Gbagbo Defence in its Request, the *Lubanga* Appeals Chamber ("*Lubanga* Appeal") has reasoned that the term "material to the preparation of the defence" should not be construed narrowly but "should be understood as

¹ ICC-02/11-01/15-256-Conf (the "Request").

referring to all objects that are relevant for the preparation of the defence”.² The *Lubanga* Chamber concluded that the scope of rule 77 is wide and that it extends to “any material” in the possession of the Prosecution “that may significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case.”³

5. However, a wide interpretation of rule 77 does not equate to unlimited access or open file disclosure. In 2013, the *Banda* and *Jerbo* Appeals Chamber recalled its above decision in the *Lubanga* Appeal, but held that “the right to disclosure is *not unlimited* and which objects are ‘material to the preparation of the defence’ will depend upon the specific circumstances of the case.”⁴ The Appeals Chamber found that rule 77 must be implemented in two stages, of which the first stage requires a determination “whether the ‘books, documents, photographs and other tangible objects’ in question are ‘material to the preparation of the defence’.”⁵ The *Banda* and *Jerbo* Appeals Chamber was thereby confirming the language of an earlier decision by the *Bemba* Trial Chamber, which also addressed the limited nature of disclosure, holding that “[a]n item will be considered material for rule 77 purposes only if it is ‘relevant for the preparation of the defence’ in the sense that it would ‘undermine the prosecution case or support a line of argument of the defence’ or ‘significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case’.”⁶
6. The *Bemba* Trial Chamber took note of the practice of *ad hoc* international criminal tribunals⁷ and observed that “the ICTY’s disclosure rules do not entitle the defence to inspect all documents in the prosecution’s possession”.⁸ Worthy of note is that the ICTY’s *Karadžić* Trial Chamber explained why there is no requirement for open file disclosure, stating that:

² ICC-01/04-01/06-1433 OA11, para. 77.

³ ICC-01/04-01/06-2624, para. 16.

⁴ ICC-02/05-03/09-501 OA4, para. 39 (emphasis added).

⁵ ICC-02/05-03/09-501 OA4, para. 35.

⁶ ICC-01/05-01/08-1594-Red, para. 21.

⁷ The Chamber relied on *Prosecutor v. Delalić et al*, IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996, para. 8-11.

⁸ ICC-01/05-01/08-1594-Red, para. 17, fn. 32.

“[G]ranting the Accused access to the Prosecution’s database is neither realistic nor practical, given the large volume of material involved, the necessary duplication of searches and the practical problems associated with identifying and controlling access to material provided by sensitive witnesses, material subject to protective measures and confidential third-party material”.⁹

7. Finally, the jurisprudence at the *ad hoc* international criminal tribunals has limited Defence access to the material in the Prosecution’s possession, by requiring that Defence’s requests for disclosure be specific.¹⁰
8. The Prosecution is fully aware and conscious of its disclosure obligations. A full disclosure of all seized materials is unnecessary and detrimental to focused, expeditious and fair proceedings. Indeed, such disclosure would unload a considerable amount of material irrelevant for the purposes of trial preparation.

The Prosecution is complying with its disclosure obligations

9. The Prosecution is complying with its disclosure obligations and has already disclosed materials in its possession which fall under article 67(2) of the Statute and rule 77 of the Rules. As for the disclosure of incriminating evidence,¹¹ the Prosecution has provided the entire list of material upon which it intends to rely at trial.¹²
10. The Prosecution notes that, to date, it has disclosed a total of 9317 documents to both Defence teams. Of this number, the Prosecution provided the Defence with 158 documents following the 30 June 2015 deadline. However, of this number, to

⁹ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused’s Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions, 11 May 2013, para. 22.

¹⁰ *Prosecutor v. Boškoski*, IT-04-82-T, Decision on Boškoski Defence Urgent Motion for an Order to Disclose Material Pursuant to Rule 66(B), 31 January 2008, para. 9-12; *Prosecutor v. Karemera et al*, No. ICTR-98-44-AR73.18, Decision on Joseph Nzirorera’s Appeal from Decision on Alleged Rule 66(B) Violation, 17 May 2010, para. 13; *Prosecutor v. Bagosora et al*, ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Rules, 25 September 2006, para. 10.

¹¹ Defence Request, para. 29-41.

¹² Prosecution List of Evidence, filed on 30 June 2015, ICC-02/11-01/15-114-Conf-AnxC.

date¹³ only three documents¹⁴ should have been disclosed prior to the 30 June deadline.¹⁵ Therefore, on a total of 9317 disclosed documents in this case, a fraction of 1 per cent of these should have been provided before the deadline. It is erroneous to portray disclosure as “*incessantes*” (unceasing).¹⁶ The limited volume of disclosure since 30 June 2015 does not warrant the disclosure process advocated in Mr Gbagbo’s Request.

11. Mr Gbagbo states that the number of incriminating documents disclosed by the Prosecution is lower than the number of potentially exonerating documents. Mr Gbagbo concludes that this is an indication that the Prosecution has withheld documents which could be material to the Defence’s preparation. This conclusion does not follow from the facts. Firstly, the Prosecution recalls that a disclosure letter is annexed with each batch, explaining that items disclosed as incriminatory may also be of potentially exculpatory nature or may contain elements material to preparation within the meaning of rule 77.¹⁷ For example, the statement of a witness which the Prosecution intends to call at trial will be disclosed as “incriminating” evidence, but such statements frequently include potentially exonerating evidence. Secondly, an oversimplified comparison of numbers is not indicative of prosecutorial disclosure compliance. The Prosecution’s disclosure is reflective of the nature of the evidence. Potentially exonerating material cannot be

¹³ These numbers do not account for the pending regulation 35 requests.

¹⁴ Of these three documents, one (CIV-OTP-0084-0367) was obtained in June 2015, see regulation 35 application ICC-02/11-01/15-203. Another one (CIV-OTP-0084-3950), although in the Prosecution’s possession since May 2012, was disclosed in June 2015 after the Prosecution interviewed the witness in May 2015; the witness’s dual status became apparent only on 26 June 2015, at 16:15, as per an email sent to the Parties on that day by the Prosecution. Finally, with respect to the third document (CIV-OTP-0007-0061), it relates to P-0049 whose identity was only disclosed in February 2015, see ICC-02/11-01/15-183.

¹⁵ This is so for the following reasons: (1) 35 documents were re-disclosed with lesser reactions, however the substance of the documents was known to the Defence; (2) 80 documents were interviews (audio, transcripts and / or translations) of witnesses P-0483, P-0435, P-0500, P-0607 and P-0608, which were all the subject of a regulation 35 application, see ICC-02/11-01/15-115-Conf; (3) 12 victim applications were re-disclosed as the redaction rule was modified from “B3.LRV” to “LRV”, the substance of the documents remaining the same; (4) 18 documents were received after 30 June 2015; (5) Four reports or investigator notes were disclosed by email on 30 June 2015 but formally disclosed in a batch following the deadline; (6) Six statements or documents relating to P-0590 already disclosed pursuant to rule 77 were re-disclosed as incriminatory material; (7) Three documents relating to P-0049, P-0582 and P-0483 which were in the Prosecution’s possession and which should have been disclosed before the deadline.

¹⁶ Gbagbo Request, para. 8.

¹⁷ Each letter accompanying the disclosure contains the following clause “Please note that the materials the Prosecution discloses as incriminatory evidence may or may not also contain evidence of a potentially exculpatory nature or rule 77 elements.”

manufactured for the purposes of reaching parity in disclosure volume. Thirdly, Mr Gbagbo is challenging, so far, every aspect of the case, including crime base evidence supporting the perpetration of the physical acts underlying the crimes committed during the post-electoral violence. This has forced the Prosecution to expand the body of evidence marked as “incriminating” and include in it material which, had the Defence opted for a different course of action, could have been disclosed under rule 77. In sum, a purely quantitative assessment of disclosure categories, such as the one undertaken by the Defence, does not lead to any reliable conclusion on disclosure policies.

12. Mr Gbagbo’s Request contains data relating to items he argues should have been disclosed earlier.¹⁸ Here, the Gbagbo Defence mischaracterises the review and disclosure process. The Prosecution agrees, and has acknowledged in the past,¹⁹ that some of this material could have been disclosed earlier. However, the fact that a document comes in the possession of the Prosecution does not necessarily generate an automatic disclosure obligation. The Prosecution’s investigations are confidential and some material may be withheld until the investigative activities in relation to this material are completed. The Prosecution was also reviewing its database, during the confirmation and pre-trial phases of this case, on an ongoing basis and items of evidence became relevant as the investigation unfolded or as the proceedings evolved.

13. The Prosecution therefore disagrees with the numbers put forward by the Gbagbo Defence in relation to items it claims should have been disclosed during the confirmation stage. The Prosecution complied with its disclosure obligations and where errors have arisen since the Trial Chamber’s disclosure deadline of 30 June 2015, the Prosecution has sought the Trial Chamber’s permission to disclose the said material.

¹⁸ Gbagbo Request, para. 31-42.

¹⁹ ICC-02/11-01/15-T-1, hearing of 21 April 2015, p. 32 l. 11-17; *see also* ICC-02/11-01/15-164, para. 6.

The lack of prejudice

14. The Prosecution more than largely completed its disclosure obligations by 30 June 2015 and cured a focused number of disclosure related questions since. It has shown, in its regulation 35 submissions, that little or no prejudice had been suffered as a result. Mr Gbagbo claims that his team is forced to wait for the completion of all disclosures before it is able to analyse the evidence as a whole.²⁰ This statement invites the reader to believe that the Defence have been waiting for the very last disclosure batch before commencing their analysis. This cannot be the case. In fact, Mr Gbagbo's Defence has shown through a variety of motions and oral applications that it has analysed and processed the material disclosed to it.²¹ The statement also suggests that the case against Mr Gbagbo dramatically shifts with every disclosure and that the Defence are unable to grasp the relevance of a newly disclosed document without a full review of the totality of previously disclosed material. The Prosecution submits that this is merely a misrepresentation of the facts.

The Defence always has the opportunity to provide specific search terms in order for the Prosecution to review its evidence database

15. Considering that the Prosecution's disclosure obligations are based on its "understanding of the case as a whole, including what is known or anticipated about possible defence(s)",²² the Prosecution invites the Defence to provide it with specific requests or search terms so that it can review its evidence database and disclose any resulting relevant material. In that sense, and without prejudice to the right to remain silent, the *Lubanga* Trial Chamber invited the Accused to provide "defences the accused is likely to rely on, together with the anticipated

²⁰ Request, para.8: "... obligée d'attendre la fin de divulgations incessantes pour analyser la preuve du Procureur comme un tout et pouvoir se préparer au procès."

²¹ Moreover, the Defence has received detailed and thoroughly sourced filings, including the Document Containing the Charges and the Pre-Trial Brief, which both provide notice of the main issues in the current proceedings. These writings enable the Defence to make an educated assessment of the gist of the Prosecution's case and the relevance of disclosed material.

²² ICC-01/04-01/06-1433 OA11, para. 36.

issues in the case”.²³ Moreover, in the *Katanga* and *Ngudjolo* case, the Prosecution offered the Defence on at least two occasions the opportunity to provide search terms so that it could review its evidence database.²⁴

16. It is submitted that these Defence requests for disclosure should be so specific as to reasonably allow for focused searches, as interpreted by the *ad hoc* international criminal tribunals.²⁵ The Prosecution notes that such requests are likely to reveal that the majority, if not all, of the documents retrieved as a result of specific requests have already been disclosed and that duplication is inevitable in this process.

The Parties' resources

17. Mr Gbagbo argues that the Prosecution possesses more resources than the Defence and compares the Prosecution's entire budget to the Gbagbo Defence's investigation budget. First, this analysis is flawed. Second, the principle of equality of arms is not to be interpreted as equality of means.
18. Mr Gbagbo uses the budget of the entire Office of the Prosecutor for comparative purposes,²⁶ whereas he only refers to one portion of his team's budget allotted for investigations. Moreover, the Prosecution's budget covers the resources relating to nine situations currently under investigation and another nine situations under preliminary examinations. Furthermore, this budget is not limited to the investigations division, but also extends to other sections of the Office of the Prosecutor. For these reasons, comparing Mr Gbagbo's investigation budget to the Prosecution's entire budget is of no assistance.

²³ ICC-01/04-01/06-T-71, p. 9, l. 4-7.

²⁴ ICC-01/04-01/07-T-26, p. 28, l. 12-17 and ICC-01/04-01/07-458, para. 2.

²⁵ *Prosecutor v. Boškoski*, IT-04-82-T, Decision on Boškoski Defence Urgent Motion for an Order to Disclose Material Pursuant to Rule 66(B), 31 January 2008, para. 9-12; *Karemera et al v. Prosecutor*, No. ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66(B) Violation, 17 May 2010, para. 13; *Prosecutor v. Bagosora et al*, ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Rules, 25 September 2006, para. 10.

²⁶ It is noted that the numbers provided in Mr Gbagbo's Request, paragraph 21, relating to the Prosecution's current budget do not match the numbers found in the material cited.

19. As for Mr Gbagbo's second argument, the jurisprudence of the *ad hoc* international criminal tribunals highlights a distinction between the Prosecution's role and that of the Defence. As often stated by the Gbagbo Defence, the Prosecution has the burden of proof. The Prosecution is expected to establish the context of the crime, prove the essential elements of each incident charged in the Document Containing the Charges by calling evidence supporting the perpetration of each crime, establish the linkage between these incidents and the Accused, and convince a Trial Chamber beyond reasonable doubt that the Accused are liable under one of the modes of liability listed at articles 25 and 28 of the Statute. For this reason, the *ad hoc* international criminal tribunals have maintained that equality of arms does not amount to equality of means.²⁷ A comparison of means and resources in support of the current Request is misguided.

Timing of Mr Gbagbo's Request

20. The Trial Chamber's order on the commencement of trial was issued on 7 May 2015 and fixed the opening of the case for 10 November 2015.²⁸ Mr Gbagbo files the current Request just over a month before the opening of the trial. Mr Gbagbo is cognisant of the impact of such a request, on the eve of the beginning of the trial, on the Prosecution's resources as well as the potential impact on the Gbagbo Defence's own resources. The late timing of the Defence Request is likely to have an adverse impact on the commencement of proceedings.

Mr Gbagbo's alternative relief

21. For the same reasons mentioned above, an exhaustive list of all documents obtained during the Prosecution's investigations in the current proceedings is not supported by the jurisprudence, nor does it emerge as a necessity out of the disclosure history in this case. Moreover, such a list would be of little assistance.

²⁷ *Prosecutor v. Kayishema and Ruzindana*, Case no. ICTR-95-1-T, Judgement, 21 May 1999, para. 20, 55-60.

²⁸ ICC-02/11-01/15-58, para. 16.

Lists typically include the date, title and ERN of a document. This information does not provide sufficient information as to the relevance and substance of the content of the document.

Conclusion

22. For the foregoing reasons, the Prosecution submits that the Request should be rejected in whole. The Prosecution nevertheless invites the Defence to submit specific requests or search terms to enable a review of its evidence database and disclose any resulting relevant material.



Fatou Bensouda, Prosecutor

Dated this 14th day of October 2015

At The Hague, The Netherlands