

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/15

Date: 22 March 2016

TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

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

Public

**Fourth decision on matters related to disclosure and amendments to the List of
Evidence**

Decision 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 Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

Legal Representatives of Victims

Ms Paolina Massidda

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

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber I ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to Articles 64(2), 64(3)(c) and 67(2) of the Rome Statute ("Statute") and Regulations 29 and 35 of the Regulations of the Court ("Regulations"), issues the following "Fourth decision on matters related to disclosure and amendments to the List of Evidence".

I. BACKGROUND AND SUBMISSIONS

1. On 7 May 2015, the Chamber issued the "Order setting the commencement date for trial", directing, *inter alia*, the Office of the Prosecutor ("Prosecutor") to: (i) disclose to the defence teams for Mr Gbagbo ("Gbagbo Defence") and Mr Blé Goudé ("Blé Goudé Defence", collectively "Defence") all incriminatory material in the form of witness statements and any other material to be relied on at trial, as well as all Article 67(2) and Rule 77 material in its possession for inspection on a rolling basis and no later than 30 June 2015 ("Disclosure Deadline"); and (ii) file, by the same date, the lists of witnesses ("List of Witnesses") and evidence ("List of Evidence") she intends to rely upon at trial.¹

2. On 18 August 2015, 21 October 2015 and 30 November 2015, the Chamber granted a number of Prosecutor's requests to disclose materials and to add them to the List of Evidence ("First Disclosure Decision", "Second Disclosure Decision" and "Third Disclosure Decision" respectively).² In the Third Disclosure Decision, the Chamber instructed the Prosecutor to review her file and to certify that no disclosable materials remain undisclosed as soon as practicable.

¹ Order setting the commencement date for trial, 7 May 2015, ICC-02/11-01/15-58.

² Decision on the Prosecution requests for the variation of time limit of disclosure of certain documents, ICC-02/11-01/15-183-Red; Second Decision on Prosecution's requests for variation of the time limit for disclosure of certain documents and to add some to its List of Evidence, ICC-02/11-01/15-306; Third decision on disclosure related matters and amendments to the List of Evidence, ICC-02/11-01/15-350-Conf.

3. On 22 February 2016, the Prosecutor filed a request for extension of time to disclose as incriminatory material the video-recording of an interview with Laurent Gbagbo (CIV-OTP-0088-0029), which took place in January 2011 ("First Request").³
4. The Defence did not respond to the First Request. On 15 March 2016, the Defence submitted into evidence a portion of item CIV-D15-0004-1157. The Prosecutor noted that item CIV-D15-0004-1157 is the same as item CIV-OTP-0088-0029, requested that the video be submitted in its entirety and observed that, as a consequence, the First Request became moot. A discussion between the parties ensued as to the existence of a distinction between the submission of an item and the possibility for such item to be (belatedly) included in the Prosecutor's list of evidence, and as to the possible legal implications of such distinction.⁴
5. Also on 22 February 2016, the Prosecutor filed an application seeking leave to re-disclose as incriminatory a forensic expert report of a video of the women's march ("3 March Incident") and nine related video excerpts (collectively, the report and the video excerpts, "Expert Report") and to add them to the List of Evidence ("Second Request").⁵ The Prosecutor submits that, after obtaining the original, high-definition version of the video in March 2015 only, she promptly took additional investigative steps, including having the video analysed and authenticated; she duly disclosed and included in her List of Evidence the reports resulting from those steps. Investigative actions conducted close to the time of the original Disclosure Deadline and the filing of the List of Evidence triggered the need to conduct additional analysis of the video; accordingly, she took further steps culminating in requesting - in October 2015 - additional expertise on the audio track of the video. The Expert Report, drafted by expert witness P-0583 and by another expert (whom

³ Prosecution's Request for an extension of time to disclose a video interview with Laurent Gbagbo, ICC-02/11-01/15-448.

⁴ ICC-02/11-01/15-T-31-ENG, pages 1-4.

⁵ Prosecution's request for an extension of time to re-disclose and use at trial a Forensic Expert Report and related material pursuant to regulation 35 of the Regulations of the Court, ICC-02/11-01/15-449-Conf. A public redacted version was filed on the same day (ICC-02/11-01/15-449-Red).

the Prosecution seeks to add to its List of Witnesses under witness code P-0626), was finalised on 7 January 2016. The Prosecutor submits that granting the Second Request is not prejudicial to the Defence, since the Expert Report was disclosed pursuant to rule 77 on 2 February 2016, is not a new element and merely corroborates experts reports previously disclosed in a timely manner. She further undertakes to not call expert witnesses P-0583 and P-0626 before September 2016 at the earliest.

6. On 2 March 2016, the Gbagbo Defence responded to the Second Request, opposing it.⁶ It submits (i) that the delay in requesting the production of the Expert Report results from the Prosecutor's lack of diligence; (ii) that the Defence would suffer a prejudice from the late disclosure of the materials and the addition to the List of Witnesses of P-0626 and (iii) that the cumulative impact of the late disclosure granted so far to the Prosecution gravely affects its preparation. Finally, the Gbagbo Defence requests that, in the event that the Chamber grants the Prosecutor's request, it should order the Prosecutor to not call any witness expected to testify on the 3 March 2011 Incident before the end of the year or beginning of next year.

7. On 2 March 2016, the Blé Goudé Defence filed its response, also opposing the Second Request.⁷ It argues that the request should be rejected on the basis of the cumulative impact of the late disclosures sought so far by the Prosecutor and of the fact that it does not meet the criteria of Regulation 35(2) of the Regulations, as the Prosecutor should have been able to anticipate the need to file the Second Request in June 2015, *i.e.* prior to the Disclosure Deadline.

⁶ *Réponse de la Défense à la « Prosecution's request for an extension of time to re-disclose and use at trial a Forensic Expert Report and related material pursuant to regulation 35 of the Regulations of the Court »* (ICC-02/11-01/15-449-Conf), ICC-02/11-01/15-454-Conf. A public redacted version was filed on the same day (ICC-02/11-01/15-454-Red).

⁷ Defence Response to the "Prosecution's request for an extension of time to re-disclose and use at trial a Forensic Expert Report and related material pursuant to regulation 35 of the Regulations of the Court" (ICC-02/11-01/15-449-Conf), ICC-02/11-01/15-455-Conf.

II. ANALYSIS

8. The Chamber recalls the applicable law relating to requests for extension of time for disclosure of materials and amendment to the List of Evidence as set out in its previous decisions in relation to disclosure matters and addition to the List of Evidence.⁸
9. With regard to the First Request, the Chamber notes the fact that the video consists of an interview given by Mr Gbagbo (as such well-known to him), the initial lack of opposition from either the Gbagbo or the Blé Goudé Defence and the fact that the Defence for Mr Gbagbo used a portion of the video in the context of its examination of Witness 625.
10. The Chamber further notes its oral rulings to the effect that, once an item is submitted by a party, that item is to be considered as being before the Chamber in its entirety, irrespective of the fact that only limited portions of the item might have been used or referred to in the courtroom.⁹ The Chamber has verified that item CIV-D15-0004-1157 and item CIV-OTP-0088-0029 are two video versions of an interview of Mr Laurent Gbagbo broadcast on the French channel *Canal +* and that they are identical except for the following: the Prosecutor's version (CIV-OTP-0088-0029) is 21:13 minutes long and the Defence version (CIV-D15-0004-1157) is 19:50 minutes long; the Prosecutor's version indicates 12 January 2011 as "main date", includes the very beginning and the very end of the interview, as they appeared in the show in the context of which the interview was broadcast and is of a better quality; some limited portions of the interview (such as a part of the interviewer's comment appearing at minute 3:23 of the Prosecutor's version) seem to be missing from CIV-D15-0004-1157 (which has 13 January 2011 as "main date").

⁸ First Disclosure Decision, ICC-02/11-01/15-183-Red, paras 17-20; Second Disclosure Decision, ICC-02/11-01/15-306, paras 17-20 and 27; Third Disclosure Decision, ICC-02/11-01/15-350-Conf, paras 15 and 25.

⁹ ICC-02/11-01/15-T-31-ENG, page 4, lines 13-21 ; ICC-02/11-01/15-T-33-ENG, page 5, lines 2-13.

The Chamber considers that these differences are not suitable to conclude that we are in the presence of two different items. It is one and the same interview, which is now to be considered before the Chamber in its entirety; both item CIV-D15-0004-1157 and item CIV-OTP-0088-0029 are to be considered as submitted. On this basis, the Chamber finds that the First Request is moot.

11. With regard to the Second Request, the Chamber notes that, once the necessity of conducting additional analysis on the video became clear to the Prosecutor in June 2015, she promptly took adequate steps, including the acquisition of necessary software to conduct the analysis. Accordingly, the Chamber considers that the Prosecutor's failure to disclose the material referred to in the Second Request prior to the Disclosure Deadline was not the result of negligence on her part but rather of factors outside her control. Accordingly, the Chamber finds that the criteria of Regulation 35 (2) are met.

12. The Chamber further notes: (i) the Prosecutor's submission that the Expert Report does not constitute a novel element but merely corroborates other previously disclosed material; and (ii) the Prosecutor's undertaking not to call expert witnesses P-0583 and P-0626 before September 2016.

13. As regards the Defence submission that the cumulative impact of late disclosure and additions to the List of Evidence must be taken into account, the Chamber considers that granting the First and the Second Requests, even when bearing in mind the previous Prosecutor's requests granted in the First, Second and Third Disclosure Decisions, does not unduly prejudice the Defence.

14. In reaching this conclusion, the Chamber has given due regard to the specific circumstances of the case: in particular, the fact that the volume of material sought to be disclosed after the Disclosure Deadline, if compared to the total volume of evidence timely disclosed, remains limited and the fact that the trial is still in its

early stages, which amply allows the parties to adequately prepare in light of new developments.

15. By the same token, and mindful of the need to avoid that no prejudice, however limited, be caused to the Defence, the Chamber orders that witnesses P-0583 and P-0626 shall not be called to testify before the summer judicial recess. This shall ensure that the Defence has sufficient time to adequately prepare before the Expert Report is used at trial and the witnesses questioned thereon.

16. Finally, the Chamber recalls that on 17 February 2016 the Prosecutor indicated that, by 3 March 2016, she would be in a position to certify that the case file had been reviewed and that no disclosable materials remained undisclosed.¹⁰ The Chamber notes that, as of today, this certification has not yet been filed. Accordingly, the Chamber instructs the Prosecutor to indicate as soon as feasible by what date she will be in a position to provide such certification. Whilst – as said above – the breadth and current timing of this trial do still allow for some adjustments and flexibility, the provision of this certification cannot be postponed beyond reasonable limits.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DISMISSESS the First Request as moot;

GRANTS the Second Request;

DIRECTS the Prosecutor to submit an updated version of her List of Evidence within five days of notification of the present decision;

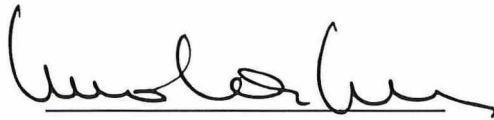
DIRECTS the Prosecutor to submit an updated version of her List of Witnesses within five days of notification of the present decision;

¹⁰ Transcript of hearing of 17 February 2016, ICC-02/11-01/15-T-24-CONF-ENG, page 28, lines 16-19 and page 29, lines 3-4.

DIRECTS the Prosecutor to indicate, as soon as feasible, by what date she will be in a position to certify that it has reviewed her file; and

DIRECTS the Blé Goudé Defence to file a public redacted version of its response within five days of notification of this decision.

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



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuca



Judge Geoffrey Henderson

Dated 22 March 2016

At The Hague, The Netherlands