

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 13 May 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

Decision on request for leave to appeal the 'Fourth decision on matters related to disclosure and amendments to the List of Evidence' and other issues related to the presentation of evidence by the Office of the Prosecutor

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 and 82(1)(d) of the Rome Statute of the International Criminal Court ('the Statute'); rules 134; 140, and 155 of the Rules of Procedure and Evidence ('the Rules'), and regulations 35 and 54 of the Regulations of the Court ('the Regulations'), hereby issues the following decision and order:

I. PROCEDURAL BACKGROUND

1. On 7 May 2015, the Chamber set 30 June 2015 as the final deadline for disclosing all incriminating evidence ('disclosure deadline') and "to file a list of evidence to be relied on at trial as well as a list of witnesses".¹
2. On 30 June 2015, the Prosecutor submitted her list of witnesses and list of incriminating evidence² and informed the Chamber that she intended to call 138 witnesses, but hoped to reduce this number in light of any future agreements on the facts it might reach with the Defence.³
3. Since the disclosure deadline, the Prosecutor submitted a large number of requests for variation of time limit pertaining to late disclosure, which the Chamber granted on 18 August 2015, 21 October 2015, 30 November 2015, and 22 March 2016, respectively.⁴

¹ 'Order setting the commencement date for trial', 7 May 2015, ICC-02/11-01/15-58, at para. 22.

² Office of the Prosecutor, 'Prosecutor's submission of its List of Witnesses and List of Evidence', 30 June 2015, ICC-02/11-01/15-114.

³ Ibid., at para. 6.

⁴ Decision on the Prosecution requests for the variation of time limit of disclosure of certain documents, 18 August 2015, ICC-02/11-01/15-183-Conf. (A public redacted version has been filed on the same day: 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, 21 October 2015, ICC-02/11-01/15-306; Third decision on disclosure related matters and amendments to the List of Evidence, 30 November 2015, ICC-02/11-01/15-350-Conf; Fourth decision on matters related to disclosure and amendments to the List of Evidence, 22 March 2016, ICC-02/11-01/15-467.

4. In its 'Fourth decision on matters related to disclosure and amendments to the List of Evidence' of 22 March 2016 ('22 March 2016 Decision'), the Chamber granted, *inter alia*, the request of the Prosecutor to re-disclose as incriminatory a forensic expert report of a video and nine related video excerpts (collectively, the report and the video excerpts, 'Expert Report') and to add them to the list of evidence.⁵
5. On 24 March 2016, the Prosecutor confirmed that she had reviewed her case file and that "[t]o the best of [the Prosecutor's] knowledge and as at the date of filing, no disclosable materials remain undisclosed" other than a number of specific items falling under rule 77 of the Rules of Procedure and Evidence.⁶ The Prosecutor also stated that she would "continue to review any information and evidence that may be received and/or collected in the context of the case and disclose as necessary as part of its ongoing obligations under article 67(2) of the Statute and rule 77 of the Rules." Furthermore, the Prosecutor announced that she will "continue to review the case file as necessary in accordance with [...] any other relevant developments in the case that may affect the relevance and disclosure of information in the Prosecutor's possession and control."
6. On 29 March 2016, the Defence for Mr Laurent Gbagbo ('Gbagbo Defence') requested leave to appeal the 22 March 2016 Decision ('Gbagbo Defence Request').⁷
7. On 1 April 2016, the Prosecutor responded to the Defence Request ('Prosecutor's Response').⁸

⁵ Fourth decision on matters related to disclosure and amendments to the List of Evidence, 22 March 2016, ICC-02/11-01/15-467.

⁶ Office of the Prosecutor, 'Prosecutor's certification of review of its case file', 24 March 2016, ICC-02/11-01/15-470, at para. 3.

⁷ Defence request for leave to appeal the 'Fourth decision on matters related to disclosure and amendments to the List of evidence', 29 March 2016, ICC-02/11-01/15-477-Conf.

8. On 3 May 2016, the Office of the Prosecutor requested an extension of time limit to re-disclose two videos as incriminatory material and add them to her list of evidence, according to regulation 35 of the Regulations ('Prosecutor's Request').⁹
9. On 12 May 2016, the Defence for Mr Gbagbo and the Defence for Mr Blé Goudé filed separate responses to the Prosecutor's Request.¹⁰

II. REQUEST FOR LEAVE TO APPEAL

A. Submissions

Gbagbo Defence Request

8. The Gbagbo Defence first submits, in general terms, that the disclosure of evidence after the commencement of the trial would not accord the Defence with sufficient time to evaluate the Prosecutor's evidence and carry out the necessary investigations. The Gbagbo Defence emphasizes that late disclosure would create a situation of uncertainty for the Defence and encroach upon the fairness of the trial.
9. The Gbagbo Defence identifies three appealable issues that allegedly have a significant impact on the fair and expeditious conduct of the proceedings or the outcome of the trial, the immediate appellate resolution of which would materially advance the proceedings ('Issues').

⁸ Prosecution's response to Laurent Gbagbo's application for leave to appeal the 'Fourth decision on matters related to disclosure and amendments to the List of evidence', 1 April 2016, ICC-02/11-01/15-479-Conf.

⁹ Prosecution's Request for an extension of time to re-disclose two videos for the purposes of in-court use, 3 May 2016, ICC-02/11-01/15-497-Conf.

¹⁰ Blé Goudé Defence, Defence Response to the "Prosecution's Request for an extension of time to re-disclose two videos for the purposes of in-court use" (ICC-02/11-01/15-497-Conf), 12 May 2016, ICC-02/11-01/15-522-Conf; Gbagbo Defence, Réponse à la «Prosecution's Request for an extension of time to re-disclose two videos for the purposes of in-court use» (ICC-02/11-01/15-497-Conf), 12 May 2016, ICC-02/11-01/15-523-Conf.

10. First, the Gbagbo Defence argues that the Chamber failed to give reasons for accepting that the Prosecutor had been diligent in requesting the Expert Report and in disclosing it only after the disclosure deadline ('First Issue'). The decision would consequently lack a legal basis.
11. Second, the Gbagbo Defence submits that the Trial Chamber provided insufficient reasoning for accepting the Prosecutor's submission that the Expert Report corroborates other material that had already been disclosed to the Defence ('Second Issue').
12. Third, the Gbagbo Defence avers that the Chamber committed an error of law in its manner of assessing the prejudice caused to the Defence ('Third Issue'). The three factors which the Trial Chamber relied upon when assessing whether the late disclosure of the Expert Report was prejudicial to the Defence would not be "pertinent".
13. Finally, the Gbagbo Defence argues that the three abovementioned issues would have a significant impact on the fair and expeditious conduct of the proceedings or the outcome of the trial, and that immediate appellate resolution would materially advance the proceedings.

Prosecutor's Response

14. The Prosecutor submits that none of the issues raised by the Gbagbo Defence are appealable, as they are merely disagreements with, misrepresentations of, or do not arise from the 22 March 2016 Decision. The Prosecutor further submits that none of the issues raised by the Defence would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, in particular because the Defence disregarded the broad safeguards adopted by the Chamber to ensure that it has time to prepare. The Prosecutor also avers that appellate intervention at this stage would not materially advance the proceedings.

B. Analysis

15. The Chamber recalls the applicable law relating to article 82(1)(d) of the Statute, as expounded in previous decisions.¹¹ For its request for leave to appeal to be successful, the Defense must satisfy this Chamber that the two requirements of article 82(1)(d) have been met. This requires an analysis of the issues raised by the 22 March 2016 Decision in the context of the specific circumstances of this case. The result of such an analysis serves as the basis for this Chamber's consideration on whether to grant leave to appeal.¹²

16. The Chamber notes that the Gbagbo Defense Request argues, in general terms, that the disclosure of evidence by the Prosecution after the disclosure deadline had expired would encroach upon the fairness of the proceedings. The Chamber reiterates, in this regard, that only distinct and identifiable issues arising from the 22 March 2016 Decision qualify as appealable issues.¹³ It is not the duty of the Chamber to identify specific issues to appeal from broadly formulated requests.¹⁴ A broad reference to the fundamental rights of the accused and how the alleged violation necessarily has an impact on the

¹¹ See for example Decision on request for leave to appeal the 'Decision on objections concerning access to confidential material on the case record', 10 July 2015, ICC-02/11-01/15-132, at para. 3 and the decisions cited in footnote 5.

¹² See Decision on Defence requests for leave to appeal the 'Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents', 18 September 2015, ICC-02/11-01/15-228, at para. 24.

¹³ See Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, Appeals Chamber, 13 July 2006, para. 9.

¹⁴ See *The Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges, 31 July 2013, ICC-02/11-01/11-464, at para. 70.

fairness of the proceedings, without more, cannot satisfy the leave to appeal requirements.¹⁵

17. The Chamber considers that the First and Second Issues can appropriately be considered together. Complaint is made that in arriving at its decision the Chamber had not given explanations on why it accepted the Prosecutor's submissions that (1) she had acted diligently and (2) the Expert Report merely corroborated previously disclosed material. The Chamber finds that the submissions of the Defense on the First and Second Issue amount to little more than criticisms of the Chamber's reasoning. This is not sufficient to constitute an appealable issue, as the Defence has failed to specifically demonstrate how the alleged inadequate reasoning of the 22 March 2016 Decision negatively impacts on the fairness of the proceedings.

18. In relation to the Third Issue, the Chamber finds that the Defence focuses primarily on the general impact of late disclosure on the preparation of its defence but has failed to identify an appealable error. Indeed, the Gbagbo Defence does not adequately explain why the criteria applied by the Chamber in the 22 March 2016 Decision are not appropriate in relation to the Expert Report, or how their application has the potential to negatively affect the fairness of the proceedings *in concreto*.

19. In sum, the Chamber is not persuaded that either individually or cumulatively, the aforesaid Issues satisfy the first limb of Article 82(1)(d) of the Statute as the Defense has failed to show specifically how the identified issues have actually – rather than speculatively – affected the fair and expeditious conduct of the current proceedings in a significant manner. The references to

¹⁵ See Decision on Defence requests for leave to appeal the 'Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents', 18 September 2015, ICC-02/11-01/15-228, at para. 24.

the fairness of the proceedings made by the Defense remain too general and too broad to support any argument as to a significant effect on the fairness.

20. To the extent that the Defense has qualms about the cumulative effect of the Chamber's four decisions allowing late disclosure, it should be clear that this practice will not be allowed to continue as the next section of the present decision will make clear.

III. FURTHER DISCLOSURE OF INCRIMINATING EVIDENCE

21. The Chamber takes note of the Prosecutor's confirmation of 24 March 2016 that she has now disclosed all the evidence in its possession that should be disclosed. Without prejudice to the Prosecutor's ongoing obligations under article 67(2) of the Statute and rule 77 of the Rules, the Chamber will no longer allow the addition of any further incriminating evidence. As the Chamber noted in its fourth decision on late disclosure, whereas there was some scope for flexibility and adjustment before the start of the trial,¹⁶ now that the trial has started, The Defence has the right to know the content of the Prosecutor's evidentiary case in its entirety. The Chamber has the obligation to ensure the fairness of the proceedings and especially the Defence's rights under article 67(1) of the Statute to have adequate time to prepare its defence and to be tried without undue delay.

22. The only possible exception is for entirely new, non-duplicative, evidence which was obtained by the Prosecutor after the disclosure deadline, but only if it can be shown that this new evidence could not reasonably have been obtained by a diligent Prosecutor before the disclosure deadline.

¹⁶ ICC-02/11-01/15-467.

IV. AGREED FACTS

23. The Chamber has considered the list of agreed facts.¹⁷ It regrets that the parties have failed to reach agreement on a more meaningful number of facts pertaining to the merits of the case. Nevertheless, the Chamber will henceforth consider the agreed facts as proven in accordance with rule 69 of the Rules and will not permit the parties to present further evidence in this regard.

V. DECISION ON PROSECUTOR'S REQUEST FOR AN EXTENSION OF TIME TO RE-DISCLOSE TWO VIDEOS FOR THE PURPOSES OF IN-COURT USE

24. The Chamber notes the Prosecutor's request to be granted permission to re-disclose two videos (CIV-OTP-0011-0321 and CIV-D25-0001-0894) as incriminatory material and to add them to her list of evidence. The Prosecutor seeks to use these videos when examining upcoming witnesses. Both videos had already been disclosed under rule 77 of the Rules, but had not been added to the Prosecutor's list of evidence by 30 June 2015, when the disclosure deadline expired. The Prosecutor requests an extension of the time limit pursuant to regulation 35(2) of the Regulations.¹⁸

25. Both the Defence for Mr Blé Goudé and the Defence for Mr Gbagbo oppose the Prosecutor's Request. They argue that the criteria set out in regulation 35(2) of the Regulations are not met and claim they would be prejudiced in case the Chamber were to allow the Prosecutor to re-disclose the videos as incriminatory material.¹⁹

¹⁷ Office of the Prosecutor, Defence of Laurent Gbagbo and Defence of Charles Blé Goudé, 'Second Joint Report on Agreements on Evidence', 2 March 2016, ICC-02/11-01/15-456-AnxA.

¹⁸ Prosecutor's Request, ICC-02/11-01/15-497-Conf.

¹⁹ Blé Goudé Defence Response, ICC-02/11-01/15-522-Conf; Gbagbo Defence Response, ICC-02/11-01/15-523-Conf.

26. Regulation 35(2) of the Regulations sets out explicit criteria for extending a time limit. It specifies that '(a)fter the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.'
27. The Prosecutor's Request merely outlines the nature of the material and submits reasons why the Prosecutor considers the extension of the time limit to be conducive to the truth-finding mandate of the Chamber. In the opinion of the Prosecutor, the extension would also not cause undue prejudice to the Defence. However, the Prosecutor failed to provide any justification as to why the application could not be made within the prescribed time limit. The Chamber notes, in this regard, that the videos were available to the Prosecutor before 30 June 2015.²⁰ The reasons provided by the Prosecutor in support of an extension of the deadline therefore fail to comply with the requirements of regulation 35(2) of the Regulations.

²⁰ Prosecutor's Request, ICC-02/11-01/15-497-Conf, at paras 5, 9 and 12.

FOR THE FOREGOING REASONS, THE CHAMBER, HEREBY

ORDERS the Registrar to reclassify the Gbagbo Defence Request²¹ and the Prosecutor's Response²² as 'public';

REJECTS the Gbagbo Defence Request;

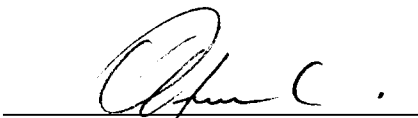
REJECTS the Prosecutor's Request; and

INFORMS the parties that it considers the agreed facts referred to in this decision as being proven.

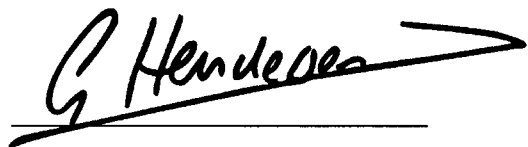
Done in both English and French, the English version being authoritative



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuccion



Judge Geoffrey Henderson

Dated 13 May 2016

At The Hague, The Netherlands

²¹ Defence request for leave to appeal the "Fourth decision on matters related to disclosure and amendments to the List of evidence", 29 March 2016, ICC-02/11-01/15-477-Conf.

²² Prosecution's response to Laurent Gbagbo's application for leave to appeal the "Fourth decision on matters related to disclosure and amendments to the List of evidence", 1 April 2016, ICC-02/11-01/15-479-Conf.