

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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. LAURENT GBAGBO**

Public redacted

Decision on the “*Requête aux fins de divulgation de documents et d’éléments indispensables à la préparation de la défense, en vertu des articles 17, 54(1)(a), 57(3)(b), 67(1)(b) et 67(2) du Statut et des règles 77 et 84 du Règlement de Procédure et de Preuve*”

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

The Office of the Prosecutor
Fatou Bensouda

Counsel for the Defence
Emmanuel Altit
Agathe Bahi Baroan

Legal Representatives of the Victims

Legal Representatives of the 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 & Deputy Registrar
Silvana Arbia
Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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,¹ hereby issues the decision on the Defence “*Requête aux fins de divulgation de documents et d’éléments indispensables à la préparation de la défense, en vertu des articles 17, 54(1)(a), 57(3)(b), 67(1)(b) et 67(2) du Statut et des règles 77 et 84 du Règlement de Procédure et de Preuve*” (the “Request”).²

1. On 10 December 2012, the Defence filed the Request, asking the Chamber to:

ORDONNER au Procureur, en vertu de l’article 67(2), de divulguer à la Défense :

- l’ensemble des « written and oral communications » du Procureur avec les autorités ivoiriennes concernant les témoins [REDACTED];
- l’ensemble des « written and oral communications » du Procureur avec les autorités ivoiriennes concernant les témoins [REDACTED] et les déclarations assermentées y afférentes;
- tout document, lettre, email, compte-rendu ou procès-verbal de conversation ou de réunion et la liste des interlocuteurs ivoiriens du Bureau du Procureur ainsi que l’historique des rapports du Bureau du Procureur avec les Autorités gouvernementales de l’époque d’une part, Alassane Ouattara, ses proches notamment Guillaume Soro, d’autre part ;

et

ORDONNER au Procureur, en vertu de la règle 77, de permettre à la Défense de prendre connaissance de :

- l’ensemble des procès-verbaux ou compte-rendus de conversations ou de réunions pouvant être utilisés dans le cadre de l’irrecevabilité de l’affaire, au moins à partir du mois de novembre 2010, de la liste des interlocuteurs ivoiriens du Procureur, l’historique des rapports avec les Autorités gouvernementales ivoiriennes (comprenant la liste des missions en Côte d’Ivoire, leur date et leur durée);
- toute correspondance (lettre, email, procès-verbal etc.) entre le Bureau du Procureur et les Autorités gouvernementales ivoiriennes pouvant

¹ ICC-02/11-01/11-61.

² ICC-02/11-01/11-316-Conf and annexes.

être utile dans le cadre de l'irrecevabilité de l'affaire, au moins à partir du mois novembre 2010.³

2. The Defence explains that it contacted the Prosecutor by email on 21 May 2012, and asked to obtain "*tout document, lettre, email, compte-rendu ou procès-verbal de conversation ou de réunion et la liste des interlocuteurs ivoiriens [du Bureau du Procureur] ainsi que l'historique [des rapports du Bureau du Procureur] avec les deux parties*". On the same day, the Prosecutor acknowledged receipt of the email. On 25 May 2012, the Defence reiterated its request, and on 28 May 2012, the Prosecutor requested the Defence to specify the exact topics for which it was seeking disclosure of the Prosecutor's contacts with the Ivorian authorities as well as the relevance of these topics. The Defence responded on 2 June 2012.⁴

3. The Prosecutor responded to its request on 25 June 2012 by way of email, stating that "none of the [documents sought by the Defence] are ordinarily subject to *inter partes* disclosure and [the Defence] fails to show why these broad categories of requested materials are relevant or should exceptionally be disclosed" and declining to provide the requested documents.⁵

4. In support of the Request, the Defence relies primarily on article 67(2) of the Rome Statute (the "Statute") and rule 77 of the Rules of Procedure and Evidence (the "Rules"). With respect to the latter, the Defence refers to jurisprudence of the Appeals Chamber stating that "the term 'material to the preparation of the defence' should be understood as referring to all objects that are relevant for the preparation of the defence".⁶

³ Request, pp. 18-19.

⁴ *Ibid.*, paras 2-4 and annexes 1-5.

⁵ *Ibid.*, annex 6.

⁶ *Ibid.*, paras 13-14.

5. The Defence emphasises that the Prosecutor does not deny that she is in possession of documents falling within the ambit of article 67(2) of the Statute or rule 77 of the Rules, but appears to consider that her disclosure obligations do not extend to such documents.⁷ The Defence notes that the Prosecutor provided certain information in her written and oral communications with the Ivorian authorities that could be deemed disclosable but did not identify or disclose the documents in question.⁸

6. The Defence provides submissions as regards the importance of the communications between the Prosecutor and the Ivorian authorities for its investigation and preparation for any future proceedings in the case. In particular, the Defence submits that the said communications may be relevant: (i) for a determination as to the credibility of certain witnesses of the Prosecutor; (ii) for an assessment as to whether the methods of the Prosecutor's investigation in Côte d'Ivoire affect the probative value of the evidence collected; and (iii) for a potential challenge to the admissibility of the case.⁹

7. On 19 December 2012, the Prosecutor filed the "Prosecution response to Defence request for disclosure (ICC-02/11-01/11-316-Conf)" (the "Response").¹⁰ She argues for rejection of the Request, stating that it is "both unwarranted and unnecessary", as "[t]he Prosecution has already fully met its disclosure duties pursuant to Article 67(2) and Rule 77 [...] in response to a similar request that the Defence made directly to the Prosecution in May 2012".¹¹

⁷ *Ibid.*, para. 26.

⁸ *Ibid.*, paras 5 and 28-30.

⁹ *Ibid.*, paras 28-63.

¹⁰ ICC-02/11-01/11-335-Conf.

¹¹ Response, para. 2.

8. Laying out her “approach to disclosure”, the Prosecutor submits that she has “reviewed [communications with Côte d’Ivoire], as well as all of the material specified by the Defence, for information that is disclosable”. She continues:

At the same time, the Prosecution has no obligation to share materials with the Defence beyond that which it is required to disclose under the Statute and the Rules, and in this case there are compelling reasons to allow the Prosecution to preserve confidentiality of all non-disclosable information. [...] The process of seeking and obtaining cooperation necessarily entails communications with States and ordinarily, requires and benefits from a presumption of confidentiality. [...] The Prosecution accepts that where confidential communications contain material that falls within Article 67(2) of Rule 77, it must disclose the material or provide an appropriate remedy, as indicated by the Appeals Chamber.¹²

9. In addition, the Prosecutor submits that she is continuing investigations in the case and that “[m]aintaining confidentiality of [her] non-disclosable communications with Côte d’Ivoire is essential to maintain cooperation with that State as well as to preserve the integrity and confidentiality of the ongoing investigation”.¹³

10. Finally, the Prosecutor avers that she “has no duty to disclose any *documents* regarding [her] conversations with the CIV authorities to the Defence” but argues, invoking a decision by Trial Chamber I, that “if such documents contain disclosable information, [she] can extract the relevant information, place it in a separate document in a ‘suitably usable and intelligible form’, and disclose that separate document to the Defence”. In the view of the Prosecutor, her disclosure obligation “relates to the relevant *information*, and not to the document that happens to contain the information”.¹⁴

¹² *Ibid.*, paras 6-7.

¹³ *Ibid.*, para. 8 (footnote omitted).

¹⁴ *Ibid.*, para. 9 (emphasis in original, footnotes omitted).

11. According to the Prosecutor, the document provided to the Defence on 25 June 2012 “contained all the relevant information in a suitably usable and intelligible form” and, as such, constituted proper discharge of her disclosure obligations.¹⁵

12. The Prosecutor also submits that she has conducted further investigations pursuant to article 54(1)(a) of the Statute in relation to the facts referred to in its communication of 25 June 2012, and has disclosed to the Defence all the information obtained during this further investigation.¹⁶

13. Finally, the Prosecutor states that she “is not in possession of any additional disclosable information regarding communication with the CIV authorities”, and argues that the Defence provides no reasons to believe that the Prosecutor has failed to discharge her disclosure obligations conscientiously, but instead “relies on speculation and conjecture, an insufficient basis for the Chamber to involve itself in the disclosure process”.¹⁷

14. The Single Judge notes article 67(2) of the Statute and rule 77 of the Rules, which place related but separate disclosure obligations on the Prosecutor. Pursuant to article 67(2) of the Statute, “the Prosecutor shall [...] disclose to the Defence evidence in his or her possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.”

15. Rule 77 of the Rules regulates the inspection of material in possession or control of the Prosecutor, stating that the Prosecutor shall permit the Defence

¹⁵ *Ibid.*, para. 12.

¹⁶ *Ibid.*, para. 13.

¹⁷ *Ibid.*, paras 3, 14-17.

to inspect documents in the possession or control of the Prosecutor, which are *inter alia* material to the preparation of the Defence.

16. The Chamber recalls that the Prosecutor's disclosure obligations under rule 77 of the Rules must be interpreted broadly. The Appeals Chamber determined that the term "material to the preparation of the defence" should be understood "as referring to all objects that are relevant for the preparation of the defence".¹⁸

17. It is the duty of the Prosecutor to provide disclosure of exculpatory material and to allow the inspection of documents in her possession which are material to the preparation of the Defence in a scrupulous, fair and comprehensive manner. Concerning the role of the Chamber in such disclosure, the Single Judge shares the view previously expressed by Trial Chamber III:

[T]he Chamber will not routinely oversee or review the decisions taken by the prosecutor in fulfilment of [the duties of disclosure pursuant to article 67(2) of the Statute and rule 77 of the Rules]. They are important prosecutorial obligations, which must be discharged scrupulously and fairly. The Chamber will only intervene if there are other good reasons for doubting that the duty has been properly fulfilled.¹⁹

18. In the present instance, the Single Judge notes that the Defence presents a far-reaching request, identifying a broad list of topics for which it demands disclosure by the Prosecutor. The Prosecutor submits that she has already fully met her disclosure duties and states that she has "reviewed all available records of oral and written communications that it had with the CIV authorities to determine whether they included any information that falls within the scope of article 67(2) and Rule 77". As a result, she submits that she

¹⁸ Appeals Chamber, "Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008", 11 July 2008, ICC-01/04-01/06-1433, paragraph 77.

¹⁹ Trial Chamber III, "Decision on the defence application for additional disclosure relating to a challenge on admissibility", 2 December 2009, ICC-01/05-01/08-632, para. 22.

is “not in possession of any additional disclosable information regarding communication with the CIV authorities”.²⁰

19. The Single Judge has not been provided with enough reasons to doubt that the duty of disclosure has been properly fulfilled by the Prosecutor. The Single Judge is thus of the view that, save for a specific issue of communications with the Ivorian authorities addressed below, judicial interference in the disclosure process is not justified and that the Request must in this part be rejected.

20. The broad request referred to above needs to be distinguished from the issue of communications between the Prosecutor and the Ivorian authorities, from which the information provided to the Defence on 25 June 2012 was extracted. The intervention of the Single Judge with regard to this material is necessary as the Prosecutor recognizes that it contains disclosable information but the parties are in dispute as to whether provision by the Prosecutor of information extracted from these communications between the Prosecutor and the Ivorian authorities, *in lieu* of the communications themselves, constitutes proper discharge of the Prosecutor’s disclosure obligations.

21. The Single Judge is not in a position to decide this matter in the abstract. Before taking a decision on whether additional disclosure regarding such communications is required, it is necessary for her to receive the relevant documents. Therefore, the Single Judge considers it appropriate to order the Prosecutor to transmit to the Chamber, in a confidential *ex parte* filing, the communications for which the Prosecutor has determined that they include information falling under article 67(2) of the Statute and rule 77 of the Rules. In addition, the Prosecutor is directed to provide any further explanations as to the applicability of article 67(2) of the Statute and rule 77 of the Rules and

²⁰ Response, paras 11 and 14.

exceptions thereto and to highlight the information already communicated to the Defence.

FOR THESE REASONS, THE SINGLE JUDGE

ORDERS the Prosecutor to file in the record of the case, as confidential *ex parte*, no later than Friday, 18 January 2012, the communications for which she has determined that they include information falling under article 67(2) of the Statute and rule 77 of the Rules; and

REJECTS the remainder of the Request.

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

[signed]

Judge Silvia Fernández de Gurmendi

Single Judge

Dated this 15 January 2013

At The Hague, The Netherlands