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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera-Carbuccia
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
With Confidential Annexes 1-4**

Public redacted version of "Prosecution response to Defence request for disclosure (ICC-02/11-01/11-316-Conf)", 19 December 2012, ICC-02/11-01/11-335-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
Mr 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

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

INTRODUCTION

1. The Defence seeks an order from the Chamber to the Prosecution to disclose, pursuant to Article 67(2) or Rule 77, all records of written or oral communications with the authorities of Côte d'Ivoire ("CIV authorities"). The Defence further specifies that its broad request includes records concerning conversations with respect to 11 Prosecution witnesses that might be relevant to the credibility of these witnesses and the weight of their evidence, as well as any records that might be relevant to the admissibility of the case against Mr Gbagbo ("Defence Request").¹
2. The requested order is both unwarranted and unnecessary. The Prosecution has already fully met its disclosure duties pursuant to Article 67(2) and Rule 77 in relation to the Defence Request in response to a similar request that the Defence made directly to the Prosecution in May 2012.
3. According to the consistent jurisprudence of this Court, "the Chambers do not routinely oversee or review decisions taken by the prosecution as regards disclosure, but instead they will intervene *only* if there are good reasons for doubting that the prosecution's duties in this regard have been, or are being, properly fulfilled."² The Defence provides no reasons, let alone good reasons, to believe that "the Prosecution has failed to discharge its duties in this regard conscientiously".³ Instead, the Defence relies on speculation and conjecture, an insufficient basis for the Chamber to involve itself in the disclosure process. As a result, there is no need for the Chamber to intervene and the Defence Request should be rejected.

¹ ICC-02/11-01/11-316-Conf, see in particular paras. 2, 26, 36, 45, 46 and relief request.

² ICC-01/04-01/06-2625-Red, para.8, ICC-01/05-01/08-632, para.22; ICC-01/04-01/06-2656-Conf, para.11 (emphasis added).

³ ICC-01/05-01/08-632, paras.26-28.

4. Pursuant to Rule 23*bis*, the Prosecution files this document and its annexes as confidential because it responds to a document that is subject to the same classification and because it makes reference to confidential evidence.

ARGUMENT

(i) The Prosecution's approach to disclosure

5. The Prosecution has conducted its disclosure review in this case consistent with the jurisprudence cited in the Defence Request.⁴ Its approach with respect to Article 67(2) and Rule 77 has been guided by the language of the Appeals Chamber that "the term 'material to the preparation of the defence' must be interpreted broadly."⁵ Trial Chamber I stated that "the prosecution's disclosure obligations under Rule 77 of the Rules are wide, and they encompass, inter alia, any item that is relevant to the preparation of the defence, and including not only material that may undermine the prosecution case or support a line of argument of the defence but also anything substantive that is relevant, in a more general sense, to defence preparation. This means that the prosecution is to communicate to the defence any material in its possession that may significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case."⁶
6. The Prosecution notes that pursuant to Rule 81(1), its internal work product is not subject to disclosure,⁷ but it is aware of the principle that, "[l]etters sent to, or by, the prosecution fall outside this restriction".⁸ In this case, the Prosecution has not made a blanket assertion that its communications with Côte d'Ivoire represent automatically non-disclosable internal work product. To the contrary, it has reviewed those communications, as well as all of the

⁴ Defence Request, paras.13-18, 52.

⁵ ICC-01/04-01/06-1433 OA11, 77-78, 80-81.

⁶ ICC-01/04-01/06-2624, para.16.

⁷ As to the interpretation of Rule 81(1), see ICC-01/04-01/06-2656-Conf, para.17.

⁸ ICC-01/05-01/08-632, para.34, referred to in Defence Request, para.61.

material specified by the Defence, for information that is disclosable under the applicable rules.

7. 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 Rules, and in this case there are compelling reasons to allow the Prosecution to preserve confidentiality of all non-disclosable information. First, the Statute requires the Prosecution to conduct investigations through cooperation as set out in Part 9 of the Statute. The process of seeking and obtaining cooperation necessarily entails communications with States and ordinarily, requires and benefits from a presumption of confidentiality. This is foreseen in the reciprocal duties of confidential treatment outlined in both how States will treat requests from the Court,⁹ and the duty of the Court to ensure the confidentiality of documents and information received from States,¹⁰ except (in both instances) as required for the execution of the request. The Prosecution accepts that where confidential communications contain material that falls within Article 67(2) or Rule 77, it must disclose the material or provide an appropriate remedy, as indicated by the Appeals Chamber.¹¹ However, the Prosecution should not be required to surrender wholesale its communications with a State that fall outside of this scope simply because the Defence demands it. The Prosecution further notes that it is standard practice to limit access by others to State communications that are intended to be kept confidential, pursuant to the Court's Information Protection Policy, unless the documents are public or the State clarifies that they can be disclosed to external parties and/or made public.¹²

⁹ Article 87(3).

¹⁰ Article 93(8)(a). Chambers of the Court have a duty to provide for the protection of confidential information, pursuant to article 64(6)(c) and Rule 81.

¹¹ ICC-01/04-01/06-1486 OA13, paras. 44, 95: "There might be circumstances in which this tension [between confidentiality of information and the right to a fair trial] can be resolved by reverting to some or all of the measures referred to by the Prosecutor in his Document in Support of the Appeal [i.e. the identification of new, similar exculpatory material, providing the material in summarised form, stipulating the relevant facts, or amending or withdrawing the charges], in particular if only small numbers of documents are concerned."

¹² Administrative Instruction ICC/AI/2007/001, 19/06/2007, paras 3.3, 5.8-5.10, 17.

8. Second, the Prosecution is continuing its investigations in this case. Maintaining confidentiality of all of its 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.
9. Further, contrary to the contention by the Defence,¹³ the Prosecution has no duty to disclose any *documents* regarding its conversations with the CIV authorities to the Defence. If such documents contain disclosable information, then the Prosecution 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.¹⁴ The Prosecution's disclosure obligation relates to the relevant *information*, and not to the document that happens to contain the information.

(ii) *The Prosecution has fully complied with its disclosure obligations*

10. The Defence previously made similar requests to the Prosecution on 21 May 2012¹⁵ and on 25 May 2012.¹⁶ On 28 May 2012, the Prosecution sought further clarification regarding the scope of the requests,¹⁷ to which the Defence replied on 2 June 2012.¹⁸
11. Based on the prior requests by the Defence, as well as the Prosecution's awareness that the Defence was planning to file a challenge to the admissibility of the case against Mr Gbagbo,¹⁹ the Prosecution 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) or Rule 77. In so doing, the Prosecution applied the legal standards set out above.

¹³ Defence Request, para.28.

¹⁴ ICC-01/04-01/06-2656-Conf, paras.13, 18.

¹⁵ Defence Request, Annex 1.

¹⁶ Defence Request, Annex 3.

¹⁷ Defence Request, Annex 4.

¹⁸ Defence Request, Annex 5.

¹⁹ Defence Request, para.49; ICC-02/11-01/11-128, paras.13-14.

12. On 25 June 2012, the Prosecution responded to the Defence, informing the Defence that it had “reviewed its written and oral communications with the CIV authorities and has identified [...] information contained therein that could be deemed disclosable under Rule 77 or Article 67(2)”.²⁰ The Prosecution annexed a document that contained all the relevant information in a suitably usable and intelligible form.²¹
13. The Prosecution also conducted investigations pursuant to its duty under Article 54(1)(a) to seek further details in relation to the facts referred to in its communication of 25 June 2012. In particular, it interviewed witnesses [REDACTED],²² [REDACTED]²³ and [REDACTED]²⁴ in relation to their contacts with the CIV authorities regarding their cooperation with the Prosecution. In addition, the Prosecution met with Guillaume Soro, the former Prime Minister and Minister of Defence and current President of the General Assembly, to “clarify how contacts with witnesses [REDACTED] and [REDACTED] were made and message(s) conveyed”.²⁵ The Prosecution disclosed all the information obtained during this further investigation to the Defence.²⁶
14. As a result, the Prosecution has already fully met its disclosure duties pursuant to Article 67(2) and Rule 77 in relation to the Defence Request. It is not in possession of any additional disclosable information regarding communication with the CIV authorities. Should the Prosecution, during its ongoing investigations, obtain further disclosable information, then it will make it available to the Defence irrespective of a request by the Defence or an order by the Chamber.

(iii) There is no need for the Chamber to intervene

²⁰ Defence Request, Annex 6, p.5.

²¹ Defence Request, Annex 6, pp.5-6.

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ CIV-OTP-0028-0049-R01 (Annex 4).

²⁶ Defence Request, para.32-33, 39, footnote 45.

15. According to the consistent jurisprudence of this Court, “the twin duties of disclosure (Article 67(2) of the Statute) and permitting inspection (Rule 77 of the Rules) rest with the prosecution”²⁷ and “the Chambers do not routinely oversee or review decisions taken by the prosecution as regards disclosure, but instead they will intervene only if there are good reasons for doubting that the prosecution's duties in this regard have been, or are being, properly fulfilled.”²⁸
16. In order for the Defence to prompt the intervention of the Chamber, it must provide a “sustainable basis” and “*prima facie* credible” indications that “the Prosecution has failed to discharge its duties in this regard conscientiously”.²⁹
17. The Defence’s allegations that the Prosecution is withholding disclosable information are unsupported and speculative.
 - The Defence speculates that CIV authorities threatened Prosecution witnesses to urge them to cooperate³⁰ and suggests that the Prosecution is withholding relevant information in that respect.³¹ It also questions the authenticity of some of the evidence disclosed to the Defence.³² The Defence is free to pursue these arguments to challenge the credibility and weight of the Prosecution evidence and the Prosecution will address them in due course. Nevertheless, the Defence does not provide any basis whatsoever for its allegation that the Prosecution is violating its disclosure duties.
 - The Defence further contends that the Prosecution’s statement that it has “documents and/or confidential diplomatic correspondence, none of which is ordinarily subject to *inter partes* disclosure”,³³ demonstrates that the Prosecution is withholding disclosable material.³⁴ The Prosecution reiterates that the question is not whether it has documents and/or

²⁷ ICC-01/05-01/08-632, para.22.

²⁸ ICC-01/04-01/06-2625-Red, para.8, ICC-01/05-01/08-632, para.22; ICC-01/04-01/06-2656-Conf, para.11.

²⁹ ICC-01/05-01/08-632, paras.26-28.

³⁰ Defence Request, para.38.

³¹ Defence Request, para.39.

³² Defence Request, para.44.

³³ Annex 6, p.5.

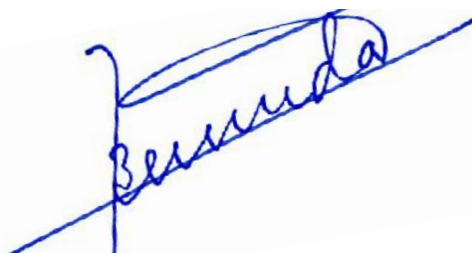
³⁴ Defence Request, paras.57, 62.

diplomatic correspondence that reflect communications with the CIV authorities, but whether the Prosecution is withholding information contained in those communications that falls within the scope of Article 67(2) or Rule 77. The Defence Request does not demonstrate the critical fact that the Prosecution is withholding disclosable information relating to its conversations with the CIV authorities.

- The Defence finally submits that the manner in which the Prosecution conducted its investigation and cooperated with the CIV authorities puts the independence and the impartiality of the Prosecution into question.³⁵ This allegation is unsupported and is not a basis for requiring the wholesale disclosure to the Defence of all of the Prosecution's communications with Côte d'Ivoire. Without elaborating further, the Defence suggests that the Document Containing the Charges is an indication that the CIV authorities dictated their choices to the Prosecution.³⁶ This argument is unsubstantiated and baseless.

CONCLUSION

18. For the reasons stated above, the Prosecution requests that the Pre-Trial Chamber reject the Defence Request.



Fatou Bensouda, Prosecutor

Dated this 22nd day of July 2016

At The Hague, The Netherlands

³⁵ Defence Request, para.44.

³⁶ Defence Request, para.44.