Cour
Pénale
Internationale

International
Criminal
Court

Original: **French**

No.: **ICC-02/11-01/15**
Date: **22 January 2018**

TRIAL CHAMBER I

Before: **Judge Cuno Tarfusser, Presiding Judge**
Judge Olga Herrera-Carbuccia
Judge Geoffrey Henderson

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

Public Document

Defence Response to the "Prosecution's request for an extension of time pursuant to regulation 35 of the Regulations of the Court and application to submit six documents under paragraph 43 of the Directions on the conduct of the proceedings" filed on 21 December 2017, ICC-02/11-01/15-1091

Source: **Defence Team for Laurent Gbagbo**

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

Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart

Counsel for the Defence of Laurent Gbagbo
Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for the Defence of 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/Reparations

Office of Public Counsel for Victims

Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Herman Von Hebel

Counsel Support Section

Victims and Witnesses Section

Detention Section

Victims Participation and Reparations Section

Other

I. Procedural history

1. On 7 May 2015, the Chamber ordered the Prosecutor to provide full disclosure of all material in its case to the Defence "on a rolling basis and no later than 30 June 2015";[1] set the trial commencement date for 10 November 2015 and the start of the Prosecution's presentation of its evidence in January 2016, and noted that:

> as a result, the Defence will have more than four months between the date of full disclosure by the Prosecution and the opening statements. Thereafter, it will have two additional months before the commencement of the presentation of evidence, which the Chamber considers will afford the Defence sufficient time to carry out all necessary preparations.[2]

2. On 30 June 2015, the Prosecutor disclosed or re-disclosed to the Defence (a less redacted version of) 575 items of evidence in addition to the evidence already disclosed, and submitted a list of evidence containing 4,790 items of evidence[3] as well as a list of 138 witnesses she intended to call at trial.[4]

3. On 2 July 2015,[5] 7 September 2015,[6] 22 September 2015,[7] 1 October 2015[8] and 23 October 2015,[9] the Prosecutor sought permission to disclose new incriminating evidence and to add it to her list of evidence.

4. On 28 January 2016, the trial of Laurent Gbagbo and Charles Blé Goudé commenced before the International Criminal Court.

5. On 22 February 2016, the Prosecutor sought permission to disclose new incriminating evidence and to add it to her list of evidence,[10] including an expert report.[11]

---

[1] ICC-02/11-01/15-58, para. 22.
[2] ICC-02/11-01/15-58, para. 16.
[3] ICC-02/11-01/15-114-Conf-AnxC.
[4] ICC-02/11-01/15-114-Conf-AnxA-Corr.
[5] ICC-02/11-01/15-118.
[6] ICC-02/11-01/15-207-Conf.
[7] ICC-02/11-01/15-234-Conf.
[8] ICC-02/11-01/15-262-Conf.
[9] ICC-02/11-01/15-312-Conf.
[10] ICC-02/11-01/15-449-Conf.
[11] CIV-OTP-0089-1030.

6. On 22 March 2016, the Chamber issued the "Fourth decision on matters related to disclosure and amendments to the List of Evidence"[12] wherein it granted the request and directed the Prosecutor to submit her list of evidence within five days of notification of that decision.

7. On 24 March 2016, the Prosecutor filed the "Prosecution's certification of review of its case file"[13] whereby she informed the Chamber and Defence that it had:

> concluded the review of its case file for certification. In conducting its review, the Prosecution adopted a comprehensive and careful approach designed to ensure *bona fide* disclosure compliance. Although the Prosecution is satisfied that there are no disclosable documents remaining undisclosed at present, as in all complex processes, there is potential for human error, which the Prosecution has sought to minimize through multiple layers of review.[14]

8. On 3 May 2016, the Prosecutor filed the seventh request seeking permission to disclose new items of incriminating evidence and add them to her list of evidence.[15]

9. On 13 May 2016, the Trial Chamber issued a decision[16] rejecting, *inter alia*, the Prosecution's seventh request to disclose new incriminating evidence. The Trial Chamber provided the following reasons for its decision:

> 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, 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.

10. On 9 February 2017, during the re-examination of Witness P-0045, the Prosecutor sought permission to enter into the record of the case a video bearing the reference

[12] ICC-02/11-01/15-467.
[13] ICC-02/11-01/15-470.
[14] ICC-02/11-01/15-470, para. 6.
[15] ICC-02/11-01/15-497-Conf.
[16] ICC-02/11-01/15-524.

number CIV-OTP-0095-0368.[17] The Defence submitted that, according to the rules governing the introduction of items into the record of the case, the Prosecution should first seek permission to add that item to its list of evidence before seeking to submit it into the record, but that, on an exceptional basis, it did not oppose the introduction of this evidence into the case record.[18] The Chamber directed the Prosecution not to make an oral application in such an instance but to submit a written request.[19]

11. On 24 February 2017, the Prosecutor filed the "Prosecution's request for an extension of time pursuant to regulation 35 of the Regulations of the Court relating to Witness P-0011's testimony"[20] in order to add new items of incriminating material to her list of evidence.

12. On 3 March 2017, the Prosecutor filed the "Prosecution's request for an extension of time pursuant to regulation 35 of the Regulations of the Court relating to Witness P-0010's testimony"[21] in order to add new items of incriminating material to her list of evidence.

13. On 3 April 2017, during the Prosecution's re-examination of Witness P-0010, the Prosecutor sought permission from the Chamber to question the witness about a decree bearing the reference number CIV-D15-0001-6610.[22] The Defence objected to the request.[23] The Chamber then directed the Prosecutor to submit a written request.[24]

14. On 6 April 2017, the Prosecutor filed the "Prosecution's request for an extension of time pursuant to regulation 35 of the Regulations of the Court and application to submit documentary evidence under paragraph 43 of the Directions on the conduct of the proceedings relating to the testimony of Witness P-0045"[25] wherein she sought permission from the Chamber, first, to add the video CIV-OTP-0095-0368 to her list of

[17] ICC-02/11-01/15-T-119-CONF-FRA ET, p. 101, line 26 - p. 102, line 9.
[18] ICC-02/11-01/15-T-119-CONF-FRA ET, p. 102, lines 13-28.
[19] ICC-02/11-01/15-T-119-CONF-FRA ET, p. 103, lines 10-12.
[20] ICC-02/11-01/15-828-Conf.
[21] ICC-02/11-01/15-834-Conf.
[22] ICC-02/11-01/15-T-142-CONF-FRA ET, p. 34, line 24 - p. 35, line 6; p. 36, lines 16-26.
[23] ICC-02/11-01/15-T-142-CONF-FRA ET, p. 36, lines 7-13; p. 37, lines 1-9.
[24] ICC-02/11-01/15-T-142-CONF-FRA ET, p. 37, line 23 - p. 38, line 1.
[25] ICC-02/11-01/15-869.

evidence and disclose it as incriminating material and, second, to file into the record of the case the same video CIV-OTP-0095-0368 pursuant to paragraphs 43 and 44 of the Directions on the conduct of the proceedings.

15. On 12 April 2017, the Prosecutor submitted the "Prosecution's request for an extension of time pursuant to regulation 35 of the Regulations of the Court and application to submit documentary evidence under paragraph 43 of the Directions on the conduct of the proceedings relating to the testimony of Witness P-0010"[26] wherein she sought permission to add to her list of evidence a decree bearing the reference number CIV-D15-0001-6610 (previously disclosed by the Defence) and to disclose it as incriminating material.

16. On the same day, the Prosecutor submitted the "Prosecution's application to submit video evidence related to the Bar le Baron speech, to present fullest possible reading of the speech"[27] wherein she sought permission to:

- Add list of evidence a video (CIV-D15-0001-0586, disclosed by the Defence) to her list of evidence and to disclose it as incriminating material;
- File that same video and the corresponding transcript into the record of the case, pursuant to paragraphs 43 and 44 of the Directions on the conduct of the proceedings;
- Lastly, to file another video (CIV-OTP-0074-0083, already disclosed) in the record of the case, in accordance with paragraphs 43 and 44 of the Directions on the conduct of the proceedings.

17. On 28 April 2017, the Prosecutor submitted the "Prosecution's application for the introduction of documentary evidence under paragraphs 43-44 of the directions on the conduct of the proceedings"[28] seeking permission to add 13 statements and 3 reports to her list of evidence 987 documents.

18. On 15 May 2017, Trial Chamber I issued a "Consolidated decision on three Prosecutor's Applications for extension of time limits and submission of evidence

[26] ICC-02/11-01/15-874-Conf.
[27] ICC-02/11-01/15-875.
[28] ICC-02/11-01/15-895.

(filing 869, 874 and 875)"[29] rejecting the Prosecutor's request to re-classify video CIV-OTP-0095-0368 and the corresponding transcript (CIV-OTP-0097-0136) originally disclosed under rule 77. The Chamber considered that the Prosecutor's reasons did not meet the requirements set forth in regulation 35.[30] In that decision, the Chamber also permitted that item CIV-D15-0001-06610 should be introduced into the record of the case but rejected its reclassification as incriminating material.[31] Lastly, the Chamber granted the Prosecutor's request regarding Charles Blé Goudé's speech at Bar le Baron (CIV-D15-0001-0586) on the ground that the complete video is germane and conducive to the determination of the truth.[32]

19. On 31 July 2017, the Prosecutor filed the "Prosecution's application for the introduction of video evidence under paragraphs 43-44 of the directions on the conduct of the proceedings and notice that it will not call Witness P-0541 to testify,"[33] seeking the admission of 246 videos.

20. On 12 September 2017, the Chamber acting by majority – Judge Henderson partially dissenting – issued the "Decision on the request for leave to appeal the 'Decision on the "Prosecution's consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution's application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088.""[34]

21. On 15 September 2017, the Defence for Laurent Gbagbo filed the "*Réponse de la Défense à la* 'Prosecution's application for the introduction of documentary evidence under paragraphs 43-44 of the directions on the conduct of the proceedings' *déposée le 28 avril 2017 (ICC-02/11-01/15-895).*"[35]

---

[29] ICC-02/11-01/15-921.
[30] ICC-02/11-01/15-921, paras. 5-10.
[31] ICC-02/11-01/15-921, paras. 12- 14.
[32] ICC-02/11-01/15-921, paras. 17- 19.
[33] ICC-02/11-01/15-998.
[34] ICC-02/11-01/15-1023.
[35] ICC-02/11-01/15-1029-Conf.

22. On 15 December 2017, the Prosecutor filed the "Prosecution's supplemental submission of transcriptions of video evidence under paragraphs 43-44 of the directions on the conduct of the proceedings, 31 July 2017, ICC-02/11-01/15-998"[36] seeking the admission of 930 transcripts of video.

23. On 15 January 2017, the Defence filed the "Defence Response to the 'Prosecution's application for the introduction of video evidence under paragraphs 43-44 of the directions on the conduct of the proceedings and notice that it will not call Witness P0541 to testify' filed on 13 July 2017 (ICC-02/11-01/15-998)."[37]

II. Applicable law

24. Article 67(1)(b) provides that the Accused must "have adequate time and facilities for the preparation of the defence". Article 64(2) provides that "[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused […]". Lastly, article 64(3)(c) provides that the Chamber shall "provide for disclosure of documents" […] sufficiently in advance of the commencement of the trial to enable adequate preparation for trial".

25. Under regulation 35(1) of the Regulations of the Court (RoC), "[a]pplications to extend or reduce any time limit as prescribed in these Regulations or as ordered by the Chamber shall […] [set] out the grounds on which the variation is sought". According to regulation 35(2) of the RoC:

> The Chamber may extend or reduce a time limit if **good cause** is shown and, where appropriate, after having given the participants an opportunity to be heard. After 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**.

26. In the instant case, Trial Chamber I expressly stated in its "Decision on the Prosecution requests for variation of the time limit for disclosure of certain

[36] ICC-02/11-01/15-1089.

[37] ICC-02/11-01/15-1098-Conf-tENG.

documents" of 18 August 2015 that "[r]egulation 35(2), last sentence, provides a strict standard affording only a few exceptions."[38]

III. Submission

27. In the decision of 13 May 2016, the Chamber restricted, in a clear and precise manner, the occasions when the Prosecution would be allowed to add documents to its list of evidence after the deadline for the disclosure of incriminating evidence: the Prosecutor can only be authorized to add evidence to her list of evidence if the documents are "**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."[39]

28. In the Chamber's view, every effort must be made to afford the Defence the opportunity to know sufficiently in advance the details of the Prosecution's case, in particular the incriminating evidence to be relied on, so that it can mount an effective defence:

> **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.[40]

29. It is thus to ensure that the rights of the defence are respected and the proceedings retain their fairness that the late addition of items to the Prosecutor's list of evidence and the disclosure of those items must be strictly circumscribed.

30. Yet, the Prosecution has repeatedly, since 30 June 2015, and even since the commencement of the trial on 28 January 2016, submitted applications to add new incriminating material to its list of evidence, thereby preventing the Defence from knowing the details of the Prosecutor's case.

[38] ICC-02/11-01/15-183-Conf, para. 19.
[39] ICC-02/11-01/15-524, para. 21.
[40] ICC-02/11-01/15-524, para. 22.

31. The Prosecution has attempted to add new incriminating material not only by way of regulation 35 but also through its examination-in-chief. Indeed, the Prosecution has on several occasions attempted to add to its evidence by including in the list of evidence it intends to use during the examination of its witnesses documents or material that are not included in its list of evidence.

32. Moreover, the Prosecutor confuses the issue further by submitting applications which systematically combine applications under regulation 35 and applications under paragraph 43, which in effect diminishes the impact of an application to add new material to her list of evidence, placing it on par with an application to tender material already disclosed in the case record. Consequently, if the Prosecutor's application was granted and she were to add new piece of evidence to her list of evidence, it follows that she would also have to disclose it as incriminating evidence and – using paragraph 43 of the Directions on the conduct of proceedings – have it added to the record of the case without it having been discussed.

33. However, at no point does the Prosecutor justify – pursuant to the criteria set forth in regulation 35 and the additional criteria determined by the Chamber – her applications to add material. She has not complied with any of the Chamber's criteria established on 13 May 2016. Moreover, analysis shows that the Prosecutor was in possession of the six documents she is now attempting to add to her list of evidence well before 30 June 2015.

34. Cognisant of not meeting the criteria determined by the Chamber – as she herself concedes[41] – the Prosecutor is attempting to circumvent the difficulty in two ways:

35. First, the Prosecutor claims that allowing her to disclose these documents – even tardily – will help in the "determination of the truth",[42] without ever explaining how this notion – on which she does not elaborate – allows her to circumvent the criteria established by the Chamber and to undermine the Defence. There is a conflation here.

[41] ICC-02/11-01/15-1091, para. 5.
[42] ICC-02/11-01/15-1091, para. 6.

The Prosecutor brings a Prosecution case which is then discussed by the Defence; subsequently, the Defence presents its own defence case. From the assessment of the different narratives developed from different perspectives, the Bench makes its findings and issues its ruling. Its ruling becomes judicial truth. Accordingly, neither party, Prosecution or Defence, can claim to hold the truth or even to be on the right side as long as the Bench has not issued a ruling. Moreover, this will be a judicial truth and not a historical or ontological truth. In other words, during the trial, the Prosecutor advances a narrative anchored on a case file composed of evidence. The case file does not hold the truth by the mere fact that it is the Prosecutor's; additionally, the Prosecutor's case is not of a different nature to that of the Defence. In other words, the Prosecution is not inherently different from the Defence. On the contrary, for proceedings to be fair, the Prosecution and the Defence have to be on a completely equal footing, on the same level, which means that their arguments must be reviewed in exactly the same way by the Bench, otherwise, the trial will be unfair. If the truth exists, it will gradually be established by comparing the different perspectives, not because one of the parties so expresses. This is the principle on which modern democratic proceedings are founded. Given that the Prosecution case is grounded on a certain point of view and that it is important for the Bench to hear an alternative point of view – the accused's – the case construction is regulated and a deadline is set for the case to be filed so that the Defence can respond to it. By definition, a Prosecution case that is continually under construction would not be a case but work in progress on which it would be impossible to make a decision. It is irrelevant that the Prosecutor is now of the view that her case is deficient and wishes to add to it; that is not an adequate reason to authorize the continual transformation of the case. To agree with the Prosecutor would be antithetical to the very concept of a Prosecution case and ultimately prevent the Defence from having access to a real case file on which to base its challenge. The Defence should not be penalized for the Prosecutor's lack of diligence. In other words, the "determination of the truth" does not exist in the abstract outside existent judicial procedure, the objective of which is to preserve the fairness of the trial. On the contrary, judicial truth can only be legitimately established through adherence to procedure.

36. Secondly, the Prosecutor invites the Bench to rule on the admission of documents referred to in her application, into the case record, on the basis of its vested authority to "order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties."[43] Although the Statute of the Court authorizes Judges to request the production of additional evidence, the objective of this discretion is not to assist the Prosecutor to redress the shortcomings in her investigation or to enable her to circumvent the guidelines issued by the Bench regarding the production and disclosure of incriminating evidence. Moreover, to agree with the Prosecutor would render her obligation to disclose all her incriminating evidence before the commencement of the trial superfluous because the Bench could assume the Prosecutor's role to produce incriminating evidence throughout the trial. Thus, the entire balance of the proceedings - and hence the fairness of the trial – would be called into question.

37. In the circumstances, the Chamber should reiterate firmly the principles set out in its decision of 13 May 2016.

1. Late disclosure of evidence

1.1 <u>The Prosecutor provides no reason or good cause for the late disclosure of the evidence she wishes to disclose</u>

38. First, it is worth noting that the Prosecutor does not explain, at any point, in her application why she "was unable to file the application within the time limit for reasons outside […] her control" and nor does she submit any good cause to justify late disclosure.

39. The Prosecutor should have shown the Chamber good cause for each piece of evidence she wished to disclose especially as she had been warned by the Bench that in the absence of such justification applications to add items to her list of evidence

[43] Article 64(6)(d) of the Statute.

would be rejected. The Trial Chamber was very explicit on this matter on 13 May 2016: "the Prosecutor failed to provide any justification as to why the application could not be made within the prescribed time limit."[44]

40. The Chamber also unequivocally stated that, under the circumstances, it would not accept the new disclosure of incriminating evidence[45] and that:

> **[t]he 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.[46]

1.1.1 *Official Journals with ERN nos. CIV-D15-0001-6210 and CIV-D15-0001-6536*

41. The Prosecutor wishes to add to her list of evidence and disclose as incriminating documents:

- CIV-D15-0001-6210, which is a copy of page 778 of the *Journal Officiel de Côte d'Ivoire* of 30 July 1960 citing law no. 60-209 of 27 July 1960 "[TRANSLATION] on the establishment of the national Armed Forces".
- CIV-D15-0001-6536, which is a copy of part of the *Journal Officiel de Côte d'Ivoire* of 22 August 1996, citing on page 822, Decree no. 96-603 of 9 August 1996 "[TRANSLATION] on the establishment of the leadership of the national Armed Forces".

42. It should be noted that the Defence disclosed these documents to the Prosecutor on 17 March 2014, that is, nearly four years ago.

43. The Defence notes that the Prosecutor does not bother to explain why she did not add these documents onto her list of evidence notified on 30 June 2015.

44. Finally, it is worth noting that the Prosecutor wishes to add to her list of evidence two Defence items which, despite having been disclosed to the Prosecution, were not used by the Defence or entered into the record of the case. Under the

[44] ICC-02/11-01/15-524, para. 27 and ICC-02/11-01/15-874-Conf, para. 13.
[45] ICC-02/11-01/15-524, para. 21.
[46] ICC-02/11-01/15-524, para. 22.

circumstances, the Prosecutor cannot be authorized to choose documents of interest to her from among the Defence items not entered into the record of the case so she can submit them herself after the disclosure deadline. Disclosing evidence to the Prosecutor does not amount to giving her free rein to use the piece of evidence in an incriminating manner by shirking her shirk her obligation to comply with the timeframe set by the Chamber.

45. Accordingly, the Prosecutor's application to add document CIV-D15-0001-6210 to her list of evidence should be rejected.

1.1.2 Lists CIV-OTP-0048-0108 and CIV-OTP-0048-1082

46. The Prosecutor wishes to add to her list of evidence and disclose as incriminating documents two lists of names (CIV-OTP-0048-0108 and CIV-OTP-0048-1082) that she is presenting as names of "FDS recruits".[47]

47. It should be noted that the Prosecutor apparently obtained these documents on 19 August 2013[48] and disclosed them to the Defence – CIV-OTP-0048-0878 on 15 October 2013 and CIV-OTP-0048-0108 on 6 June 2013 – **pursuant to rule 77 and not as incriminating evidence**.

48. Once again, the Prosecutor does not even bother to explain or justify why this evidence was not added to her list of evidence disclosed on 30 June 2015, even though she obtained it two years earlier.

49. The Prosecutor contends that, as these documents have already been disclosed to the Defence, the Defence will not suffer prejudice:

> Granting an extension of time to re-disclose and add the six items to the Prosecution's LoE and/or their submission into evidence would not be prejudicial to the Accused, would have already been in a position to investigate the evidence for a period of one-and-a-half to four years.[49]

---

[47] ICC-02/11-01/15-1091, para. 12.
[48] CIV-OTP-0051-0166-R02.
[49] ICC-02/11-01/15-1091, para. 6.

50. However, the Defence has always been clear during discussion of late disclosure that:

- The Prosecutor disclosed more than 7,000 items of incriminating evidence comprising more than 620,000 pages. The Defence therefore spent thousands of hours of work analysing, verifying and cross-checking the evidence. Clearly, the Defence did not dedicate its scarce resources to similar work relating to R77 and PEXO evidence, of which there were more than 5,000 items at the time of the commencement of the trial.

- The classification of evidence under rules 76 or 77 or article 67(2) affects the work of the Defence, as differences in classification will logically result in the adoption of different approaches by the Prosecution with respect to these documents. It is evident that based on the classification chosen and adopted by the Prosecutor, the Defence will not "investigate" evidence disclosed by the Prosecutor as incriminating evidence and rule 77 evidence in the same way.

- The Defence needs to be informed at the earliest opportunity of the incriminating evidence that the Prosecutor intends to rely on at trial, as each new incriminating document changes the Defence's potential perception of the Prosecution case and increases its workload.

51. Furthermore, with respect to the obtaining of those documents, the Prosecutor asserts that

> [t]he Prosecution obtained these documents from Witness P-0381, who testified at trial that these lists were obtained from the premises of Camp Galliéni after Gbagbo's arrest, and that they drew his attention because they were documents relating to the recruitment of youth from different places.[50]

52. It is, however, worth recalling that the Prosecutor did not show these documents to Witness P-0381 during examination at trial. In fact, during examination of the witness, the Prosecutor's representative merely asked the witness whether he recognized the documents that were shown to him during his familiarization, without even quoting their ERN numbers. The witness's response was therefore vague and

[50] ICC-02/11-01/15-1091, para. 13.

general: "[TRANSLATION] These are documents which, I think, erm […] a decree, and then certain documents that refer to the battle order, the organizational chart, I think, of the military headquarters and then certain documents relating to […] I believe, the recruitment of certain young people".[51] The witness therefore never confirmed that he actually found the two lists at issue after the crisis and sent to them to the Office of the Prosecutor.

53. It must be noted that the Defence for Laurent Gbagbo raised the issue during the examination of P-0381, and requested that the representative of the Office of the Prosecutor show the witness each of the documents so that the witness could express a view, thereby leaving no room for doubt. Having ignored the Defence and declined to ask the witness those questions at the opportune time, the Prosecutor cannot now rely on what Witness P-0381 said since the witness was not specifically questioned about the two lists at any time.

54. With regard to the lists themselves, it should be pointed out that they are neither dated nor signed. They do not bear the army's letterhead or official stamp. Under the circumstances, there is now no evidence to suggest that these lists were drawn up by an authority of any kind. Nothing in the documents suggests that these are "FDS recruits" as the Prosecutor claims. In fact, the first list (CIV-OTP-0048-0108) is titled "*Etat des volontaires pour le recrutement au titre de l'année 2010*" and the second list (CIV-OTP-0048-1082) is titled "*Etat des volontaires au recrutement aptes*". A list of **volunteers** cannot be equated to a list of **recruits**.

1.1.3 Document CIV-OTP-0071-0627

55. The Prosecutor wishes to add document CIV-OTP-0071-0627, which she presented as "an operational FDS order from 18 February 2011 on operational measures to reinforce security in Abidjan,"[52] to her list of evidence and disclose it as an incriminating document.

[51] ICC-02/11-01/15-T-207-CONF-FRA, page 40, lines 3-6.
[52] ICC-02/11-01/15-1091, para. 14.

56. It should be noted that the Prosecutor apparently obtained the document on 11 December 2014[53] and disclosed it to the Defence on 19 February 2015 **pursuant to rule 77 and not as incriminating evidence**.

57. Once again, the Prosecutor has not even bothered to explain or justify why this evidence was not included to her list of evidence submitted on 30 June 2015, even though she obtained it seven months earlier.

58. The Prosecutor contends that, as this document has already been disclosed to the Defence, the Defence would suffer no prejudice:

> Granting an extension of time to re-disclose and add the six items to the Prosecution's LoE and/or their submission into evidence would not be prejudicial to the Accused, would have already been in a position to investigate the evidence for a period of one-and-a-half to four years.[54]

59. However, the Defence has always been clear during discussion about late disclosure that:

- The classification of evidence under rules 76 or 77 or article 67(2) affects the work of the Defence, as differences in classification will logically result in the adoption of different approaches by the Prosecution with respect to these documents. It is evident that based on the classification chosen and adopted by the Prosecutor, the Defence will not "investigate" in the same way what is disclosed by the Prosecutor as incriminating evidence or disclosed under rule 77.
- The Defence needs to be informed at the earliest opportunity of the incriminating evidence that the Prosecutor intends to rely on at trial, as each new incriminating document changes the Defence's potential perception of the Prosecution case and increases its workload.

[53] CIV-OTP-0073-0756-R01.
[54] ICC-02/11-01/15-1091, para. 6.

1.1.4 Document CIV-OTP-0048-0878

60. The Prosecutor wishes to add document CIV-OTP-0048-0878 titled "*Compagnie de Commandement et de Logistique*" to her list of evidence and disclose it as an incriminating document.

61. It is worth noting that the Prosecutor apparently obtained the document on 19 August 2013[55] and disclosed it to the Defence – **pursuant to rule 77 and not as incriminating evidence** – on 15 October 2013.

62. Once again, the Prosecutor does not even take the trouble to explain or justify why these items were not added to her list of evidence submitted on 30 June 2015, even though she had obtained them two years earlier.

63. The Prosecutor asserts that since this document has already been disclosed to the Defence, the Defence would suffer no prejudice:

> Granting an extension of time to re-disclose and add the six items to the Prosecution's LoE and/or their submission into evidence would not be prejudicial to the Accused, would have already been in a position to investigate the evidence for a period of one-and-a-half to four years.[56]

64. However, the Defence has always been clear during discussion of late disclosure that:

- The classification of evidence under rules 76 or 77 or article 67(2) affects the work of the Defence as, differences in classification will logically result in the adoption of different approaches by the Prosecution with respect to these documents. It is evident that based on the classification chosen and adopted by the Prosecutor, the Defence will not "investigate" in the same way what is disclosed by the Prosecutor as incriminating evidence or disclosed under rule 77.
- The Defence needs to be informed at the earliest opportunity of the incriminating evidence that the Prosecutor intends to rely on at trial, as each new incriminating document changes the Defence's potential perception of the Prosecution case and increases its workload.

[55] CIV-OTP-0073-0756-R01.
[56] ICC-02/11-01/15-1091, para. 6.

65. Regarding the authenticity of the document, it should be noted once more that the Prosecutor did not bother to get the witnesses who could have confirmed the authenticity of the document to do so. Thus, even though P-0156 might have signed the document, the Prosecutor did not take advantage of her examination to perform the simple exercise of showing him the document and asking questions. The Prosecutor claims that the list has probative value because it features the name of a soldier P-0316, but anyone could have created this list; the names on the list are of little relevance. Although the Prosecutor could have questioned the soldier concerned during his examination about the other names on the list, she never did, which makes it impossible now to attach any value whatsoever to the list. Finally, the Prosecutor claims to have obtained this document from P-0381.[57] Why was he neither shown the document during his examination nor questioned about its authenticity, chain of custody and contents?

66. It should therefore be noted that the Prosecutor had the opportunity on several occasions to present the document through her witnesses and systematically refused to do so. The Prosecutor cannot now attempt to introduce a document which she did not have authenticated when it was possible to do so.

1.2 <u>Prejudice suffered by the Defence on account of the Prosecutor's request</u>

67. In the "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" of 21 October 2015, the Chamber stated that it "considered the Defence submissions that the cumulative impact of late disclosure and addition to the List of Evidence must be taken into account when assessing the overall prejudice that it may cause to the Defence."[58]

[57] ICC-02/11-01/15-1091, para. 18.
[58] ICC-02/11-01/15-306-Conf, para. 41.

68. On 30 November 2015, the Chamber noted once more that "the cumulative impact of late disclosure and additions to the List of Evidence must be taken into account when assessing the overall prejudice that it may cause to the Defence".[59]

69. The Defence submits that, in order to assess the harm it suffers whenever there is late disclosure, specifically in this instance, consideration should be given to the total number of requests submitted by the Prosecutor, the number and length of the documents she intends to disclose late and the impact of the late disclosure and the work it entails on the ability of the Defence – with its limited resources – to present its defence. As this is a process, it is necessary to assess its impact of this process on the preparation of the Defence.

70. Even though it is still possible to discuss item by item the impact of each of these delays on the preparation of the defence, the overall impact of the process, that is the serious consequences of all these applications for late disclosure taken as a whole on the preparation of the defence cannot be ignored. Their cumulative effect is compounded because on each occasion the Defence must reassess the entire body of the Prosecutor's evidence in the light of the late disclosure. As stated by Judge Blattman "while it may seem harmless to make small concessions which erode the rights of the accused, there can be a cumulative effect which does, in fact, put in grave jeopardy the right of the accused to a fair trial."[60].

71. In this instance, the cumulative effect of these delays, the time it takes to analyse, understand, respond to the Prosecutor's requests and then integrate the new evidence into the Defence's work schedule, concretely and significantly affects the Defence's preparation for the trial, especially considering its limited resources.

Conclusion

72. Consequently, the Chamber should reject the Prosecutor's application insofar as it seeks the Chamber's authorization to add six items to her list of evidence and

[59] ICC-02/11-01/15-350-Conf, para. 58.

[60] ICC-01/04-01/06-1131-Anx3, para. 10. See also in this regard: ICTR, *Prosecutor v. Barayagwiza*, Judgment on the Appeals, 3 November 1999, para. 73 and ECtHR, *Barbera, Messegué and Jabardo v. Spain*, Judgment, Application no. 10588/83.

insofar as it asks the Bench, in the alternative, to include this evidence in the record of the case.

2. **Submission of evidence into the record of the case pursuant to paragraphs 43 and 44 of the "Decision adopting amended and supplemented directions on the conduct of the proceedings"**

73. Since the Defence objects to the addition of the six items – as requested in the application – to the Prosecutor's list of evidence, it also objects to their submission into the record of the case.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I to:

Noting articles 21(3), 54(1)(b), 64(2) and 67(1)(b) of the Statute, rules 76, 77 and 101 of the RPE and regulation 35(d) of the RoC,

Noting paragraphs 43 and 44 of the "Decision adopting amended and supplemented directions on the conduct of the proceedings" ICC-02/11-01/15-498-AnxA,

- **Reject** the Prosecutor's application.

[Signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Done this 22 January 2018

At The Hague, Netherlands