

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 9 March 2015

TRIAL CHAMBER I

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

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

Public Redacted Version of

**Decision on Prosecution's request for an extension of time to disclose certain
material**

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

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

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*, having regard to Articles 64(3) and 67(1) of the Rome Statute ('Statute'), Rules 76 and 77 of the Rules of Procedure and Evidence, and Regulation 35 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Prosecution's request for an extension of time to disclose certain material'.

I. Procedural history

1. On 17 November 2014, the Chamber issued its 'Order setting the commencement date for the trial and the time limit for disclosure',¹ in which it *inter alia* directed the Office of the Prosecutor ('Prosecution') to disclose to the Defence all Rule 76 and Rule 77 material on a rolling basis, to disclose all Article 67(2) material as soon as practicable, and in any event to provide full disclosure of all material to the Defence no later than 6 February 2015.
2. On 13 January 2015, the Chamber issued its 'Decision on the Prosecution's Request for Partial Suspension of the "Order setting the commencement date for the trial and the time limit for disclosure"'.² The Chamber suspended the deadline of 6 February 2015 for material that may become available to the Prosecution in ongoing investigations in the *Blé Goudé* case, pending a decision on the Joinder Request.
3. On 6 February 2015, the Prosecution made a request pursuant to Regulation 35 of the Regulations ('Request'), for an extension of time limit to disclose material to the defence of Mr Gbagbo ('Defence').³

¹ ICC-02/11-01/11-723.

² ICC-02/11-01/11-746.

³ Prosecution's request pursuant to regulation 35 for an extension of time to disclose certain material, ICC-02/11-01/11-760-Conf-Exp. A confidential redacted version was filed on that same date (ICC-02/11-01/11-760-Conf-Red) and a public redacted version was filed on 9 February 2015 (ICC-02/11-01/11-760-Red2).

4. On 16 February the legal representative for victims ('LRV') and the Defence filed their responses.⁴

II. Submissions

A. Prosecution

5. The Prosecution submits that this Request is made 'out of an abundance of caution', since the Chamber already suspended the disclosure deadline for material covered by the Request, as it is the result of ongoing investigations in the case of *The Prosecutor v. Charles Blé Goudé* ('*Blé Goudé* case').⁵ The Prosecution further submits that granting the Request will not cause undue prejudice to the Defence, who 'is now in possession of the near totality of the evidence on which the Prosecution intends to rely at trial'.⁶
6. The Prosecution states that in its ongoing investigations in the *Blé Goudé* case, it has recently collected additional material that is equally relevant in both the *Blé Goudé* case and this case.⁷
7. The Prosecution requests an extension of the deadline of 6 of February 2015 to disclose the following material to the Defence, pursuant to Rules 76 and 77 of the Rules: (a) transcripts of interviews of Prosecution witnesses conducted pursuant to Article 55(2) of the Statute; (b) statement of one Prosecution witness; (c) identity and statement of one Prosecution witness; (d) medical examination of one Prosecution witness; (e) documents obtained from the United Nations; (f) video footage obtained from the United Nations

⁴ Response to the Prosecution's request pursuant to regulation 35 for an extension of time to disclose certain material (ICC-02/11-01/11-760-Conf-Red), ICC-02/11-01/11-767-Conf. A public redacted version was filed on that same date (ICC-02/11-01/11-767-Red); Réponse de la Défense à la « Prosecution's request pursuant to regulation 35 for an extension of time to disclose certain material » (ICC-02/11-01/11-760-Conf-Red), ICC-02/11-01/11-769-Conf. The deadline for responses was shortened to 16 February 2015. See e-mail from Trial Chamber I Gbagbo Communications to the parties on 9 February 2015 at 14:23.

⁵ ICC-02/11-01/11-760-Red2, para. 2. The Prosecution refers to the Chamber's Decision on the 'Prosecution's Request for Partial Suspension of the "Order setting the commencement date for the trial and the time limit for disclosure"', 13 January 2015, ICC-02/11-01/11-746, para. 16.

⁶ ICC-02/11-01/11-760-Red2, para. 3.

⁷ ICC-02/11-01/11-760-Red2, para. 5.

Operation in Côte d'Ivoire ('UNOCI') and *Radiodiffusion Télévision Ivoirienne* ('RTI'); (g) exhumations of bodies of alleged victims; and (h) external examinations of bodies of alleged victims.⁸

8. The Prosecution submits that it has recently conducted interviews pursuant to Article 55(2) of the Statute with seven witnesses, one of which is a trial witness in this case (namely Witness P-0044), while the others are not in the list of witnesses for trial (Witnesses P-0477, P-0480, P-0520, P-0524, P-0544 and P-0545).⁹
9. As regards trial Witness P-0044, the Prosecution states that the first transcribed statement was disclosed to the Defence in April 2012, and what is now pending disclosure is the transcribed statement from his second interview, which was conducted in December 2014.¹⁰ The Prosecution plans to disclose this statement no later than 6 March 2015.¹¹
10. In relation to Witnesses P-0477 and P-0480, the Prosecution submits that it interviewed these two witnesses recently (October and November 2014) and does not intend to rely on them at trial. It thus seeks leave to disclose their statements pursuant to Rule 77 of the Rules.¹² The Prosecution plans to disclose these statements no later than 6 March 2015.¹³
11. With respect to Witnesses P-0520, P-0524, P-0544 and P-0545, the Prosecution informs that they were all interviewed in January 2015 and that it intends to

⁸ ICC-02/11-01/11-760-Red2. The Chamber notes that in the meantime, the Prosecution has already disclosed some of the evidence subject of its Request to the Defence. See: Prosecution's Communication of Evidence - Disclosed to the Defence on 27 February 2015, 2 March 2015, ICC-02/11-01/11-793; Prosecution's request for authorisation to redact two documents related to P-0114, 27 February 2015, ICC-02/11-01/11-787-Conf-Red. See also: e-mail from the Prosecution to Trial Chamber I Gbagbo Communications on 24 February 2015 at 16:18.

⁹ ICC-02/11-01/11-760-Red2, para. 9. See also: Prosecution's submission of its List of Witnesses and List of Evidence, ICC-02/11-01/11-759-Conf-AnxA.

¹⁰ ICC-02/11-01/11-760-Red2, para. 10.

¹¹ ICC-02/11-01/11-760-Red2, para. 12.

¹² ICC-02/11-01/11-760-Red2, para. 11.

¹³ ICC-02/11-01/11-760-Red2, para. 12.

disclose these statements 'as incriminating evidence' by the end of March 2015.¹⁴

12. The Prosecution submits that Witness P-0114 filmed the video CIV-OTP-0003-0716. The Prosecution states it intends to interview Witness P-0114 in order to address the questions raised by the Defence in the confirmation hearing. It should be able to disclose his statement by 6 March 2015.¹⁵ Although the witness is not a trial witness, the video is currently in the list of evidence.¹⁶
13. The Prosecution submits that it provided the anonymous statement of Witness P-0238 to the Defence in November 2013, albeit with redactions to his identity which were previously authorised by the Pre-Trial Chamber.¹⁷ Witness P-0238 is not in the list of witnesses the Prosecution intends to call during trial.¹⁸ The Prosecution states that it was able to contact the witness recently and that he was informed that his statement and his identity would be disclosed to the Defence pursuant to Rule 77 of the Rules. The witness consented to the disclosure and 'requested a few additional days to consider if he was to testify for the Prosecution or not'.¹⁹ Consequently, the Prosecution informs it 'may seek authorisation to add P-0238 to its list of witnesses and his statement to the list of evidence in the coming weeks'.²⁰ The Prosecution states that it disclosed the statement and identity of the witness on 6 February 2015.²¹
14. The Prosecution submits that P-0131 is a trial witness whose initial statement was provided to the Defence in November 2013. A second statement of the

¹⁴ ICC-02/11-01/11-760-Red2, para. 13.

¹⁵ ICC-02/11-01/11-760-Red2, paras 14-16.

¹⁶ ICC-02/11-01/11-759-Conf-AnxA and AnxB.

¹⁷ ICC-02/11-01/11-760-Red2, para. 17.

¹⁸ ICC-02/11-01/11-759-Conf-AnxA.

¹⁹ ICC-02/11-01/11-760-Red2, para. 18.

²⁰ ICC-02/11-01/11-760-Red2, para. 18.

²¹ ICC-02/11-01/11-760-Red2, para. 18.

witness was taken in January 2015, and was disclosed to the Defence on 6 February 2015.²² However, the Prosecution informs that it decided that a medical examination of the witness was necessary, which took place in February 2015. The Prosecution states that the medical report will be disclosed to the Defence by 6 March 2015.²³

15. The Prosecution informs that it received some material from the United Nations in January 2015.²⁴ The Prosecution states that it is currently reviewing the material and will be able to disclose it to the Defence by 6 March 2015.²⁵

16. The Prosecution submits that it received video material from UNOCI and RTI in January 2015. It informs that this material is currently being reviewed to be disclosed to the Defence by 6 March 2015, although part of the material will be disclosed at a later date, as it is currently being copied to DVD-Rs.²⁶ The Prosecution informs it disclosed to the Defence, on 6 February 2015, a report detailing the review and collection of this material.²⁷

17. The Prosecution informs that between January 2014 and January 2015, together with the Ivorian authorities, it 'conducted several forensic missions, including exhumations, in an attempt to identify bodies of victims of the 3 and 17 March 2011 incidents'.²⁸ The Prosecution informs that the DNA bio-samples of these missions were transferred to the Netherlands Forensic Institute, and that the DNA results will be available at the earliest in one month and will be disclosed to the Defence once they become available.²⁹

²² ICC-02/11-01/11-760-Red2, para. 19.

²³ ICC-02/11-01/11-760-Red2, para. 20.

²⁴ ICC-02/11-01/11-760-Red2, para. 21.

²⁵ ICC-02/11-01/11-760-Red2, para. 22.

²⁶ ICC-02/11-01/11-760-Red2, paras 23-24.

²⁷ ICC-02/11-01/11-760-Red2, para. 25.

²⁸ ICC-02/11-01/11-760-Red2, para. 26.

²⁹ ICC-02/11-01/11-760-Red2, para. 32.

18. [REDACTED].³⁰

B. The LRV

19. The LRV supports the Request in its entirety and submits that good cause exists pursuant to Regulation 35 of the Regulations.³¹ The LRV considers that the Request is objectively justified by the Prosecution's competing tasks and the amount of new material collected as a result of latest investigations, particularly as regards the [REDACTED].³² The LRV also submits the Request must be granted pursuant to Rule 86 of the Rules, as the personal interests of victims include 'finding the truth about what happened and seeing justice done for the harm they suffered'.³³ In particular, the autopsy reports and the external examination of bodies of alleged victims will satisfy these personal interests, as 'some of the participating victims have an interest in knowing whether some of the corpses referred to by the Prosecution are those of their loved ones'.³⁴ Finally, the LRV is of the view that the Request does not unduly affect the rights of the Defence, as this is minimised by the limited delay in the disclosure of the material to the Defence and the fact that some of the material relates to evidence already disclosed to the Defence.³⁵

C. The Defence

20. The Defence opposes the Request and considers it should be rejected. The Defence contends that the material covered by the Request goes to the heart of the charges in this case and the request thus demonstrates that the

³⁰ ICC-02/11-01/11-760-Red, para. 33.

³¹ ICC-02/11-01/11-767-Red, paras 8-9.

³² ICC-02/11-01/11-767-Conf, para. 11.

³³ ICC-02/11-01/11-767-Red, para. 12.

³⁴ ICC-02/11-01/11-767-Red, para. 13.

³⁵ ICC-02/11-01/11-767-Red, para. 14.

Prosecution is not ready.³⁶ The Defence argues that it is incomprehensible that the Prosecution is taking such significant investigative steps after four years of investigation, and just some few weeks before the deadline for disclosure.³⁷ Accordingly, the Prosecution has not shown good cause for its Request.³⁸

21. Alternatively, the Defence submits that the Chamber should conclude that the Defence should have all material disclosed, particularly the list of witnesses and the definitive list of evidence five months before the commencement of trial and accordingly, set a new date for the Prosecution to disclose the totality of its evidence in order to prepare for trial pursuant to Article 67 of the Statute.³⁹ The Defence requests that if the relevant material is disclosed on 6 March 2015, the date of commencement of trial should be delayed to 7 August 2015.⁴⁰

22. The Defence further contends that the Chamber had suspended the deadline for disclosure solely for material related to ongoing investigations in the *Blé Goudé* case, and ordered the Prosecution to comply with the 6 February 2015 deadline in respect of all material currently in its possession that is subject to disclosure obligations. In the view of the Defence, the Prosecution had to conclude investigations in this case well in advance to the date of 6 February 2015. Also, it submits that the Prosecution did not request leave to appeal that decision, and thus cannot use the Request to contest it.⁴¹

23. The Defence argues that the Request attempts to create the fiction that this material is related to the *Blé Goudé* case, in order to disclose evidence to the Defence in this case after the imposed deadline. The Defence argues that in

³⁶ ICC-02/11-01/11-769-Conf, paras 4-5 and 35-38.

³⁷ ICC-02/11-01/11-769-Conf, para. 8.

³⁸ ICC-02/11-01/11-769-Conf, para. 9.

³⁹ ICC-02/11-01/11-769-Conf, paras 6-7 and 64-78.

⁴⁰ ICC-02/11-01/11-769-Conf, para. 75.

⁴¹ ICC-02/11-01/11-769-Conf, paras 39-45.

recognising that this material also relates to this case, the Prosecution accepts that the evidence is in reality material resulting from investigations against Mr Gbagbo.⁴²

24. The Defence submits that the Prosecution did not comply with its obligations pursuant to Article 54(1)(b) of the Statute, which provides that the Prosecution shall take appropriate measures to ensure an 'effective investigation', particularly since the confirmation of charges phase lasted for three years and the Prosecution has presented three different documents containing the charges.⁴³ In the view of the Defence, and in accordance with the jurisprudence of the Court, the Prosecution should have finalised its investigations already at the confirmation stage.⁴⁴

25. The Defence also submits that the late disclosure of this material would unduly prejudice the Defence since the material adds up to hundreds of pages, dozens of videos and reports which are not corroborative in nature, as stipulated by the Prosecution. The Defence would thus need additional time to prepare for trial in light of this new material, which it repeats, goes to the heart of the case.⁴⁵

26. The Defence contends that the Prosecution does not justify why it interviewed these witnesses so recently, when it has had four years to conduct investigations. The Defence states that the Prosecution knew about the weaknesses and contradictions in its case at least since February 2013, when the Defence raised these issues at the confirmation of charges hearing.⁴⁶ The Defence also contends that the Prosecution did not give any justification as to why it could not transmit the evidence resulting of

⁴² ICC-02/11-01/11-769-Conf, paras 46-49.

⁴³ ICC-02/11-01/11-769-Conf, paras 50-52.

⁴⁴ ICC-02/11-01/11-769-Conf, paras 51 and 53.

⁴⁵ ICC-02/11-01/11-769-Conf, paras 57-63.

⁴⁶ ICC-02/11-01/11-769-Conf, paras 11-13.

- interviews that took place between October and December 2014 before the deadline of 6 February 2015.⁴⁷
27. The Defence argues that as regards P-0114, the Prosecution proves that it was not diligent, as the Defence raised issues in relation to the video during the confirmation of charges hearing in February 2013. However, it was not until September 2014 that the Prosecution sought to reinitiate contact with the witness. The Prosecution consequently has no excuse as to why it has not yet interviewed this individual.⁴⁸
28. The Defence contends that the Prosecution does not justify why it only ordered a medical examination of the witness in February 2015, when it had interviewed the witness in July 2013. The Defence submits it had raised this same issue in its observations in the confirmation of charges hearing. Moreover, the Defence argues that if the Prosecution knew since at least January 2015 that it would not be able to comply with the disclosure deadline, it should have requested an extension of time in advance.⁴⁹
29. The Defence submits that the Prosecution should have requested the material to the United Nations before 4 June 2014; as such investigations should have taken place before the confirmation of charges hearing.⁵⁰
30. The Defence submits that the Prosecution has not justified why it only requested the material to UNOCI in April 2014 and why it only planned a mission to complete this investigation in January 2015.⁵¹ As regards the material from RTI, the Defence contends that the Prosecution also does not justify why it planned a mission to RTI in January 2015, when the

⁴⁷ ICC-02/11-01/11-769-Conf, para. 14.

⁴⁸ ICC-02/11-01/11-769-Conf, paras 15-19.

⁴⁹ ICC-02/11-01/11-769-Conf, paras 21-25.

⁵⁰ ICC-02/11-01/11-769-Conf, para. 26.

⁵¹ ICC-02/11-01/11-769-Conf, paras 27-29.

Prosecution knew it would result in non-compliance with the 6 February 2015 deadline.⁵²

31. The Defence contends that the Prosecution gives no justification as to why it only carried this sort of missions in 2014-2015, and not earlier in 2011-2013.⁵³ The Defence argues that given these unjustified delays from the Prosecution, it cannot adequately prepare for trial to commence on 7 July 2015.⁵⁴

III. Analysis

32. The Chamber notes that in its Request, the Prosecution seeks leave to disclose certain material after the 6 February 2015 deadline and that its Request does not address whether the Prosecution will seek the admission of such disclosable material as incriminatory evidence at trial.
33. The Chamber is persuaded that the disclosure deadline of 6 February 2015 of items obtained in ongoing investigations in the *Blé Goudé* case, has effectively been suspended pending a decision on the joinder of the that case and the present case. Accordingly, insofar as the Request relates to (a) evidence that was not in the possession of the Prosecution by 13 January 2015 and (b) is the result of ongoing investigations in that case, such a request is both unnecessary and moot.
34. Regarding material identified more specifically as contained in its Request, the Chamber is persuaded that none of the subject material was in the possession of the Prosecution by 13 January 2015. In coming to this conclusion, the Chamber is satisfied that while the Prosecution had conducted interviews of persons prior to 13 January 2015, the Prosecution

⁵² ICC-02/11-01/11-769-Conf, para. 30.

⁵³ ICC-02/11-01/11-769-Conf, paras 31-33.

⁵⁴ ICC-02/11-01/11-769-Conf, para. 34.

did not have this information in a disclosable form (namely, transcribed statements) by this deadline.⁵⁵ Accordingly, this material is not covered by the 13 January 2015 deadline.

35. As to the ongoing investigations in the *Blé Goudé* case', the Chamber accepts that the 'items of evidence in question also relate to the investigations in the *Blé Goudé* case'.⁵⁶ One such example of these ongoing investigations is contained in the Prosecution's statement that it conducted a further interview of Witness P-0044 '[f]ollowing Mr Blé Goudé's confirmation hearing'.⁵⁷ While the Chamber accepts the position taken by the Defence that ongoing investigations in the *Blé Goudé* case should not be a 'fiction' or veil to investigate matters in the present case,⁵⁸ on the face of it, ongoing investigations in the *Blé Goudé* case may have a bearing in this case. It was on this basis that the Chamber suspended its 6 February 2015 deadline in relation to documents obtained in the *Blé Goudé* case investigations and *ex facie*, given the intertwined nature of both cases, ordered that material in that case also be disclosed to the Defence in this case.

36. Moreover, in suspending the deadline for disclosure of material obtained in ongoing investigations in the *Blé Goudé* case, the Chamber has recognised that investigative steps that are currently being pursued by the Prosecution ultimately will have an impact on both the *Blé Goudé* case and on this case. Consequently, the Chamber will not entertain the Defence's submissions as to the appropriateness of ongoing Prosecution investigations. As the Defence correctly noted, neither the Prosecution nor the Defence sought leave to

⁵⁵ See: case of the Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on request for additional time to disclose translations, 9 July 2013, ICC-01/09-01/11-807, paras 7-8; case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video (DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 27 July 2009, ICC-01/04-01/07-1336.

⁵⁶ ICC-02/11-01/11-760-Red, para. 2.

⁵⁷ ICC-02/11-01/11-760-Red, para. 10.

⁵⁸ ICC-02/11-01/11-769-Conf, paras 46-49.

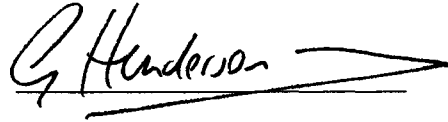
appeal the Chamber's decision suspending the deadline for disclosure for items emanating from investigations in the *Blé Goudé* case. Likewise, as regards the Defence's submissions on the prejudice these ongoing investigations may cause to the Defence, the Chamber considers that disclosure does not prejudice on any future decision of the Chamber on whether the Prosecution may rely on this material at trial and if so, any consequence this may have on the date of trial.

37. Accordingly, and given that the material included in the Request complies with the criteria identified in paragraph 33 above, the disclosure deadline of 6 February 2015 is suspended and thus disclosure beyond that date has already been authorised by the Chamber.

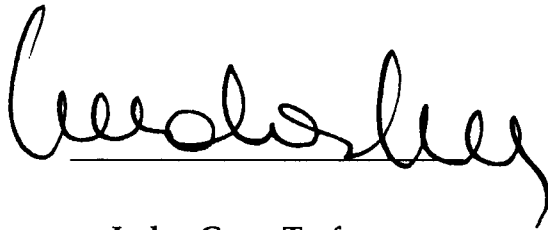
38. Notwithstanding the above, the Chamber reminds the Prosecution of its obligation to provide prompt, reliable and efficient disclosure. Particularly as regards the evidence related to witnesses the Prosecution has included in the list of witnesses it intends to call during trial (Witnesses P-0044 and P-0131) disclosure to the Defence should be effected without further delay. As regards other material in the Request, it appears that the Prosecution still needs to evaluate their nature and thus whether disclosure shall be done, if any, pursuant to Rule 76 or Rule 77 of the Rules. In this case, the Prosecution should also evaluate the evidence and effect disclosure to the Defence as soon as practicable.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request as unnecessary and moot.



Judge Geoffrey Henderson, Presiding Judge



Judge Cuno Tarfusser



Judge Olga Herrera Carbuca

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

Dated 9 March 2015

At The Hague, The Netherlands