

**Cour
Pénale
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**International
Criminal
Court**

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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

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

Confidential

**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**

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

The Office of the Prosecutor

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REGISTRY

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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber I ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to Articles 64(2), 64(3)(c) and 67(1) of the Rome Statute ('Statute') and Regulation 35 of the Regulations of the Court ('Regulations'), issues the following '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'.

I. Procedural History

1. On 7 May 2015, the Chamber issued the 'Order setting the commencement date for trial, directing, *inter alia*, the Office of the Prosecutor ('Prosecution') to: (i) disclose to the defence teams for Mr Gbagbo and Mr Blé Goudé (respectively 'Gbagbo Defence' and 'Blé Goudé Defence', collectively 'Defence') all incriminatory material in the form of witness statements and any other material to be relied on at trial, as well as all Article 67(2) and Rule 77 material in its possession for inspection on a rolling basis and no later than 30 June 2015 ('Disclosure Deadline'); and (ii) file, by the same date, the list of witnesses ('List of Witnesses') and evidence ('List of Evidence') that it intends to rely on at trial.¹
2. On 30 June 2015, the Prosecution filed its List of Witnesses and the List of Evidence.²
3. On 18 August 2015, the Chamber issued a decision granting, *inter alia*, the Prosecution's request to disclose as incriminating evidence materials pertaining to Witness P-0483 no later than 30 September 2015.³ It further considered that

¹ Order setting the commencement date for trial, ICC-02/11-01/15-58.

² Annex A and C to Prosecution's submissions of its List of Witnesses and List of Evidence, ICC-02/11-01/15-114-Conf-AnxA and ICC-02/11-01/15-114-Conf-AnxC. A corrigendum to Annex A was filed on 24 July 2015 (ICC-02/11-01/15-114-Conf-AnxA-Corr).

³ Decision on the Prosecution requests for the variation of time limit of disclosure of certain documents, ICC-02/11-01/15-183-Conf, in particular at para. 29 (A public redacted version has been filed on the same day: ICC-02/11-01/15-183-Red).

the Prosecution's request for extension of the time limit to disclose additional, not yet available, expert reports was premature ('First Disclosure Decision').⁴

4. On 2 September 2015, the Prosecution requested an extension of time to disclose one document under Rule 77 of the Rules ('First Request').⁵
5. On 7 September 2015, the Prosecution requested an extension of time to disclose copies of three logbooks, previously disclosed under Rule 77 of the Rules, as incriminatory material ('Second Request').⁶
6. On 15 September 2015, the Prosecution filed a request to add expert witness P-0606 to the List of Witnesses ('Third Request').⁷
7. On 22 September 2015, the Prosecution filed a request seeking permission to: (i) disclose two reports as incriminatory material and to add them to the List of Evidence; and (ii) disclose one report under Rule 77 of the Rules ('Fourth Request').⁸
8. On 25 September 2015, the Blé Goudé Defence responded to the First Request, opposing it ('Blé Goudé Defence Response to First Request').⁹
9. On 29 September 2015, the Gbagbo Defence¹⁰ and the Blé Goudé Defence¹¹ responded to the Second Request, opposing it as well ('Gbagbo Defence Response to Second Request' and 'Blé Goudé Defence Response to Second Request', respectively).

⁴ First Disclosure Decision, ICC-02/11-01/15-183-Red, paras 36-39.

⁵ Prosecution's request for an extension of time to disclose a document under rule 77 of the rules of procedure and evidence, ICC-02/11-01/15-203.

⁶ Prosecution's request pursuant to regulation 35 for an extension of time to re-disclose three documents as incriminatory material, ICC-02/11-01/15-207-Conf.

⁷ Prosecution's request to add expert witness P-0606 to its list of evidence, ICC-02/11-01/15-220.

⁸ Prosecution's Request for an extension of time to disclose and add to its list of evidence two expert reports and to disclose a related report under rule 77, ICC-02/11-01/15-234-Conf.

⁹ Defence Response to Prosecution's Request pursuant to regulation 35 seeking permission to disclose a document under rule 77 (ICC-02/11-01/15-203), ICC-02/11-01/15-244.

¹⁰ *Réponse de la Défense à la « Prosecution's Request pursuant to regulation 35 for an extension of time to re-disclose three documents as incriminatory material »* (ICC-02/11-01/15-207-Conf), ICC-02/11-01/15-250-Conf.

¹¹ Defence's response to "Prosecution's Request pursuant to regulation 35 for an extension of time to re-disclose three documents as incriminatory material" (ICC-02/11-01/15-207), ICC-02/11-01/15-251-Conf.

10. On 6 October 2015, the Blé Goudé Defence responded to Third Request, opposing it ('Blé Goudé Defence Response to Third Request').¹²
11. On 7 October 2015, the Blé Goudé Defence responded to the Fourth Request, opposing it ('Blé Goudé Defence Response to Fourth Request').¹³
12. On that same date, the Gbagbo Defence responded to the Third Request and to the Fourth Request ('Gbagbo Defence Response to Third Request and Fourth Request'), opposing them in part.¹⁴ In this consolidated filing, the Gbagbo Defence also addressed a further request by the Prosecution for an extension of time to disclose materials ('Prosecution Further Disclosure Request'),¹⁵ which will be addressed by the Chamber in a separate decision.
13. Upon instruction of the Chamber,¹⁶ on 15 October 2015, the Prosecution filed the list of the first 20 witnesses it intends to call at trial ('List of First 20 Witnesses').¹⁷

II. Submissions and analysis

14. The Chamber recalls the applicable law relating to requests for extension of time for disclosure of materials as set out in the First Disclosure Decision.¹⁸

¹² Defence Response to "Prosecution's request to add expert witness P-0606 to its list of witnesses" (ICC-02/11-01/15-220), ICC-02/11-01/15-272-Conf.

¹³ Defence Response to "Prosecution's Request for an extension of time to disclose and add to its list of evidence two expert reports and to disclose a related report under rule 77", (ICC-02/11-01/15-234-Conf), ICC-02/11-01/15-277-Conf.

¹⁴ *Réponse consolidée de la Défence à – la « Prosecution's request to add expert witness P-0606 to its list of evidence »* ICC-02/11-01/15-220; – *la « Prosecution's Request for an extension of time to disclose and add to its list of evidence two expert reports and to disclose a related report under rule 77 »* (ICC-02/11-01/15-234-Conf) *et – l' « omnibus request for an extension of time pursuant to regulation 35 of the Regulations of the Court* (ICC-02/11-01/15-262-Conf) », ICC-02/11-01/15-279-Conf.

¹⁵ Prosecution's omnibus request for an extension of time pursuant to regulation 35 of the Regulations of the Court, 1 October 2015, ICC-02/11-01/15-262-Conf.

¹⁶ Order setting the commencement date for trial, ICC-02/11-01/15-58, para. 25.

¹⁷ Prosecution's list of the first 20 witnesses it intends to call at trial, ICC-02/11-01/15-294, with confidential Annex A and confidential *ex parte* Annexes B and C, Prosecution and Legal Representative of Victims only.

¹⁸ First Disclosure Decision, ICC-02/11-01/15-183-Red, paras 17-20.

a) First Request

15. The Prosecution seeks an extension of time to disclose under Rule 77 of the Rules a two-page investigation report of a medical appointment and medical expenses pertaining to Witness P-0483 dated 11 June 2015 ('Document'). The Document was not disclosed before the Disclosure Deadline due to an oversight.¹⁹ The Prosecution acknowledges that the criteria of Regulation 35(2) do not apply but submits that, by virtue of the Prosecution's ongoing obligation to disclose materials falling under Rule 77 of the Rules and Article 67(2) of the Statute, the Document must nonetheless be disclosed.²⁰ The Prosecution further indicates that it disclosed the Document on 20 August 2015 and that the Defence will therefore suffer little, if any, prejudice from late disclosure.²¹

16. In its response, the Blé Goudé Defence opposes the First Request, arguing that the late disclosure of the Document cannot be said to result from reasons outside the Prosecution's control and should therefore be rejected.²² It further submits that late disclosure of the Document does prejudice the Defence as: (i) any materials pertaining to Witness P-0483 are relevant to the preparation of the Defence; (ii) the nature of the Document requires medical expertise; and (iii) it contains information that the Defence will need to investigate in order to prepare for cross-examination of Witness P-0483.²³ The Gbagbo Defence did not respond to the First Request.

17. The Chamber recalls that the purpose of the Disclosure Deadline was to provide the Defence with sufficient time to prepare for trial.²⁴ However, the Chamber notes that, in accordance with Rule 77 of the Rules and Article 67(2) of the Statute, the Prosecution has an ongoing obligation to disclose any items that

¹⁹ First Request, ICC-02/11-01/15-203, para. 10.

²⁰ First Request, ICC-02/11-01/15-203, paras 13-15.

²¹ First Request, ICC-02/11-01/15-203, paras 15-18.

²² Blé Goudé Defence Response to First Request, ICC-02/11-01/15-244, paras 17-18.

²³ Blé Goudé Defence Response to First Request, ICC-02/11-01/15-244, paras 20-23.

²⁴ See First Disclosure Decision, ICC-02/11-01/15-183-Red, para. 17.

may be considered material to the preparation of the defence or as potentially exculpatory.

18. Accordingly, the Chamber considers that the Prosecution shall disclose any material falling under Rule 77 of the Rules or Article 67(2) of the Statute as soon as it comes into its possession or as soon as it is assessed as disclosable, without seeking leave of the Chamber. However, the Chamber reminds the Prosecution of its obligation to be diligent in effecting disclosure in a thorough and timely manner.
19. In the future, when disclosing items under Rule 77 of the Rules or Article 67(2) of the Statute, the Prosecution shall clearly indicate the reason for the late disclosure in the Prosecution's communications of disclosure, as well as the date on which the disclosed material came into its possession.
20. Upon receipt of any future late disclosure, the Defence may file a notice indicating that it challenges the disclosure. Should such a notice be filed, the burden of establishing that late disclosure does not cause undue prejudice to the Defence remains on the Prosecution, which shall set out its reasons for disclosure by way of a filing. In doing so, the Prosecution shall ensure that the Chamber has access to the disputed materials. The Defence may file a response to the Prosecution's filing.
21. In the case at hand, the Chamber notes: (i) the limited length of the Document; (ii) that, in accordance with the First Disclosure Decision,²⁵ Witness P-0483 – about whom the Document pertains – is not included in the List of First 20 Witnesses;²⁶ and (iii) the fact that the Document was already disclosed

²⁵ First Disclosure Decision, ICC-02/11-01/15-183-Red, para.31.

²⁶ List of First 20 Witnesses, ICC-02/11-01/15-294-Conf-AnxA.

on 20 August 2015.²⁷ Accordingly, the Chamber considers that no undue prejudice arises to the Defence.

b) Second Request

22. The Prosecution seeks authorisation to re-disclose copies of three logbooks ('Original Logbooks') previously disclosed under Rule 77 of the Rules, as incriminatory material,²⁸ as well as authorisation to rely on these at trial.²⁹ The Prosecution indicates that they were not disclosed as 'incriminatory' as a result of an oversight and indicates that parts of the Original Logbooks were already disclosed as incriminating items as an attachment to the statement of Witness P-0501 – who authenticated the Original Logbooks – and were included on the List of Evidence.³⁰ Further portions of the Original Logbooks were disclosed as incriminating material to the Defence in 2014 and early 2015 and also included on the List of Evidence.³¹ The Prosecution avers that the Original Logbooks are a better and more complete version of the copies already disclosed.³² The Prosecution submits that the Defence will not suffer any prejudice from late disclosure as the Original Logbooks were already disclosed in full under Rule 77 of the Rules and partial versions of them were placed on the List of Evidence on 30 June 2015 and – for the first logbook – are referred to in the Pre-Trial Brief.³³

23. The Gbagbo Defence opposes the Second Request, arguing that a mere oversight is not a valid reason for late disclosure to be granted. It recalls that the Prosecution referred many times to the Original Logbooks since their disclosure under Rule 77 of the Rules in 2014 and questions how the Prosecution could have overlooked the fact that they were not disclosed under the appropriate

²⁷ Prosecution's Communication of Evidence Disclosed to the Defence, ICC-02/11-01/15-190-Conf-AnxB and ICC-02/11-01/15-190-Conf-AnxD, item 2.

²⁸ Second Request, ICC-02/11-01/15-207-Conf, paras 1-2 and 10.

²⁹ Second Request, ICC-02/11-01/15-207-Conf, paras 4, 10 and 34.

³⁰ Prosecution Second Request, ICC-02/11-01/15-207-Conf, paras. 4, 17-18, 22, 27 and 30.

³¹ Prosecution Second Request, ICC-02/11-01/15-207-Conf, paras 3, 16, 21, 25-26 and 29.

³² Prosecution Second Request, ICC-02/11-01/15-207-Conf, paras 5 and 15.

³³ Prosecution Second Request, ICC-02/11-01/15-207-Conf, paras 31-32.

category.³⁴ The Gbagbo Defence submits that disclosure of the Original Logbooks as 'incriminating' items would be prejudicial to the Defence as: (i) the Original Logbooks are three times longer than the partial copies that were disclosed, totalling 510 additional pages;³⁵ and (ii) the Defence did not analyse the Original Logbooks in the same way as it would have if they had been disclosed as 'incriminating' items.³⁶

24. The Blé Goudé Defence submits that the Second Request should be rejected, arguing that the reasons underlying the request are not outside the control of the Prosecution as failure to disclose the Original Logbooks is the consequence of an oversight.³⁷ The Blé Goudé Defence further argues that the disclosure sought is prejudicial to the Defence as it cannot be said that the Defence was on notice of the Prosecution's intention to rely on the Original Logbooks considering that only part of them was disclosed as incriminating evidence.³⁸ Further, the Blé Goudé Defence indicates that it will need time to familiarise itself with the Original Logbooks and to prepare for Witness P-0501's cross-examination.³⁹ Finally, the Blé Goudé Defence argues that the cumulative impact of the late disclosure sought should be taken into account when assessing the prejudice to the Defence.⁴⁰

25. The Chamber notes that: (i) the Original Logbooks were already disclosed – although under Rule 77 of the Rules – before the Disclosure Deadline; ⁴¹ (ii) partial copies of substantial length of the Original Logbooks were disclosed as incriminating items well ahead of the Disclosure Deadline, namely in late

³⁴ Gbagbo Defence Response to Second Request, ICC-02/11-01/15-250-Conf, paras 28-30.

³⁵ Gbagbo Defence Response to Second Request, ICC-02/11-01/15-250-Conf, paras 33-37.

³⁶ Gbagbo Defence Response to Second Request, ICC-02/11-01/15-250-Conf, paras 38-41. See also Gbagbo Defence Response to Third Request and Fourth Request, ICC-02/11-01/15-279-Conf, paras 71-72.

³⁷ Blé Goudé Response to Second Request, ICC-02/11-01/15-251-Conf, paras 20-23.

³⁸ Blé Goudé Response to Second Request, ICC-02/11-01/15-251-Conf, paras 24-26.

³⁹ Blé Goudé Response to Second Request, ICC-02/11-01/15-251-Conf, paras 27-29.

⁴⁰ Blé Goudé Response to Second Request, ICC-02/11-01/15-251-Conf, para. 15.

⁴¹ See ICC-02/11-01/11-747-Conf-AnxA, items 57-59; ICC-02/11-02/11-109-Conf-AnxA.

2014 and early 2015;⁴² and (iii) portions of the Original Logbooks were annexed to Witness P-0501's statement which was disclosed on time, thus at least indicating to the Defence the relevance of the Original Logbooks in the Prosecution's case.⁴³ In light of the above, the Chamber considers that re-disclosure of the Original Logbooks as incriminatory material will not create any undue prejudice to the Defence and that it is in the ultimate interest of all parties, and ultimately of the Chamber, in order to evaluate the evidence, to grant the Prosecution's request to re-disclose a more complete and better quality version of the Original Logbooks. Accordingly, the Prosecution shall re-disclose them forthwith as incriminatory material.

26. Additionally, the Chamber notes that the Prosecution does not intend to call P-0501 for a few more months⁴⁴ and considers that this time lapse will be sufficient for the Defence to analyse the Original Logbooks, conduct the necessary investigations and prepare for cross-examination of Witness P-0501.

27. The Chamber further directs the Prosecution to amend its List of Evidence so as to include the Original Logbooks. The Chamber stresses that any amendments to the List of Evidence shall be made in a manner that enables the Defence and the Chamber to clearly identify the changes made. The Chamber further clarifies that, going forward, once a request for late disclosure is granted, the Prosecution shall promptly ensure that this is reflected in the List of Evidence.

c) Third Request

28. In the Third Request, the Prosecution seeks leave to add Witness P-0606 to the List of Witnesses. While acknowledging that there is no reason outside its control to justify the addition of Witness P-0606, the Prosecution submits that

⁴² CIV-OTP-0018-1313; CIV-OTP-0018-1191 and CIV-OTP-0018-1178.

⁴³ CIV-OTP-0071-0920; CIV-OTP-0071-0962 and CIV-OTP-0071-0965.

⁴⁴ List of First 20 Witnesses, ICC-02/11-01/15-294-Conf-AnxA. See also Witness Summaries Covering Main Facts, 30 June 2015, ICC-02/11-01/15-114-Conf-AnxB-Corr for the time estimate of witnesses' examination-in-chief.

the circumstances of the omission of this witness from the List of Witnesses justify doing so.⁴⁵ Witness P-0606 was not included on the List of Witnesses filed on 30 June 2015 by error, but Witness P-0606's report was included on the List of Evidence and it is referred to in the Pre-Trial Brief, thus putting the Defence on notice of the Prosecution's intention to rely on P-0606's evidence at trial.⁴⁶ The Prosecution submits that the addition of P-0606 would not unduly prejudice the Defence and undertakes not to call the witness as one of the first 20 witnesses or during the first half of 2016.⁴⁷

29. The Gbagbo Defence objects to the addition of Witness P-0606 to the List of Witnesses, arguing that the Prosecution fails to further justify why it overlooked this witness when compiling the list.⁴⁸ It further argues that the Defence was not on notice of the Prosecution's intention to call P-0606.⁴⁹

30. The Blé Goudé Defence argues that the Third Request should be rejected on the basis of the cumulative impact of the late disclosure sought so far by the Prosecution.⁵⁰ It further notes that the Prosecution's request does not meet the criteria of Regulation 35(2) of the Regulations as the addition of P-0606 to the List of Witnesses is sought at this stage because of the Prosecution's negligence.⁵¹ Further, the Blé Goudé Defence considers that the Prosecution did not advance any other valid justification for its request, and that any justification is in any case outweighed by the prejudice that the addition of P-0606 to the List of Witnesses would cause to the Defence.⁵² In particular, the Blé Goudé Defence submits that the Prosecution's argument that P-0606's evidence is essential to the Prosecution's case is inapposite as the witness's report is already on the List of

⁴⁵ Third Request, ICC-02/11-01/15-220, para. 10

⁴⁶ Third Request, ICC-02/11-01/15-220, para. 2.

⁴⁷ Third Request, ICC-02/11-01/15-220, para. 18.

⁴⁸ Gbagbo Defence Response to Third Request and Fourth Request, ICC-02/11-01/15-279-Conf, paras 18 and 25-26.

⁴⁹ Gbagbo Defence Response to Third Request and Fourth Request, ICC-02/11-01/15-279-Conf, para. 27.

⁵⁰ Blé Goudé Response to Third Request, ICC-02/11-01/15-272-Conf, para. 12, see also paras 24 and 26.

⁵¹ Blé Goudé Response to Third Request, ICC-02/11-01/15-272-Conf, paras 13-14.

⁵² Blé Goudé Response to Third Request, ICC-02/11-01/15-272-Conf, paras 15-21.

Evidence and that, in any case, it is of limited importance.⁵³ Moreover, the Blé Goudé Defence recalls that the deadline for the submission of any challenge to the qualification of experts and/or expert reports was set as 1 December 2015 and they submit that granting the Prosecution's Third Request would cause prejudice to the Defence as the addition of P-0606 to the List of Witnesses would require the Defence to conduct further investigations into the expert's background and methodology.⁵⁴ Finally, the Blé Goudé Defence stresses that it was not given notice of the Prosecution's intention to call P-0606 but only of the fact that a report was being prepared.⁵⁵

31. The Chamber notes that, in its written submissions of 14 April 2015 made in preparation of the 21 April 2015 status conference and during the hearing itself,⁵⁶ the Prosecution indicated that it had sought the expertise of a video enhancement expert whose report, along with the enhanced version of the video, would be disclosed. The Chamber further observes that the enhanced version of the video,⁵⁷ as well as P-0606's report⁵⁸ and curriculum vitae ('CV'),⁵⁹ were disclosed in June 2015 and were included on the List of Evidence.⁶⁰ However, the Chamber considers that the Defence cannot be said to have fully been on notice of the Prosecution's intention to call Witness P-0606 as the witness does not appear on the List of Witnesses.

32. The Chamber notes: (i) the Prosecution's submission that the witness will give highly relevant and probative evidence,⁶¹ as substantiated by the summary of

⁵³ Blé Goudé Response to Third Request, ICC-02/11-01/15-272-Conf, paras 19-20.

⁵⁴ Blé Goudé Response to Third Request, ICC-02/11-01/15-272-Conf, para. 23.

⁵⁵ Blé Goudé Response to Third Request, ICC-02/11-01/15-272-Conf, para. 25.

⁵⁶ Prosecution's submissions on the provisional agenda for the 21 April status conference, 14 April 2015, ICC-02/11-01/15-35-Red, para. 13; Transcript of hearing dated 24 April 2015, ICC-02/11-01/15-T-1-CONF-ENG ET, pages 10-11.

⁵⁷ CIV-OTP-0082-0357.

⁵⁸ CIV-OTP-0082-0350.

⁵⁹ CIV-OTP-0082-0352.

⁶⁰ List of Evidence, 30 June 2015, ICC-02/11-01/15-114-Conf-AnxC.

⁶¹ Third Request, ICC-02/11-01/15-220, para. 3.

main facts P-0606 is expected to testify about;⁶² (ii) that P-0606's report⁶³, CV⁶⁴ and enhanced version of the video⁶⁵ were disclosed in June 2015 and included on the List of Evidence, thus giving notice to the Defence that the Prosecution intends to rely on that evidence at trial; and (iii) that P-0606 does not appear on the List of First 20 Witnesses.⁶⁶ The Chamber therefore considers that the Defence will not be unduly prejudiced by the addition of P-0606 to the List of Witnesses and that it is in the interests of justice to grant the Third Request. Accordingly, the Prosecution is directed to add Witness P-0606 to its List of Witnesses and to include the information contained in Annex A to the Third Request in its document entitled 'Witness Summaries covering Main Facts'⁶⁷.

d) Fourth Request

33. The Prosecution seeks authorisation to disclose two reports from P-0601 as incriminating items and to add them to the List of Evidence. The Prosecution recalls that P-0601's main report and amendment thereto ('Initial Reports') were timely disclosed, ahead of the Disclosure Deadline. It indicates that, in May 2015, after analysing the Initial Reports, the Prosecution requested P-0601 – in his capacity of DNA analyst of the Netherlands Forensic Institute ('NFI') – to conduct further analyses. The results thereof are presented in two reports ('Supplemental Reports'), which were obtained on 6 July 2015 and 16 September 2015, respectively.⁶⁸ The Prosecution submits that these circumstances constitute good cause within the meaning of Regulation 35(2) of the Regulations.⁶⁹

34. The Prosecution further seeks leave to disclose a two-page long autopsy report ('Autopsy Report') that was in its possession before the Disclosure Deadline. It

⁶² Witness Summary, ICC-02/11-01/15-220-Conf-AnxA.

⁶³ CIV-OTP-0082-0350.

⁶⁴ CIV-OTP-0082-0352.

⁶⁵ CIV-OTP-0082-0357.

⁶⁶ See ICC-02/11-01/15-294-Conf-AnxA ; Third Request, ICC-02/11-01/15-220, para. 3.

⁶⁷ ICC-02/11-01/15-114-Conf-AnxB-Corr.

⁶⁸ Fourth Request, ICC-02/11-01/15-234-Conf, paras 7-8 and 20-21.

⁶⁹ Fourth Request, ICC-02/11-01/15-234-Conf, paras 22-24.

argues that it was only in a position to assess the relevance of the Autopsy Report after having analysed the Supplemental Reports.⁷⁰ Noting its ongoing disclosure obligation under Rule 77 of the Rules, the Prosecution seeks authorisation to disclose it and argues that the Defence will suffer little, if any, prejudice as a result of this disclosure.⁷¹

35. The Gbagbo Defence objects to the disclosure of the Supplemental Reports arguing that it is irrelevant that the Prosecution formulated requests for further analyses prior to the Disclosure Deadline and questions the diligence of the Prosecution in requesting authorisation from the Chamber for this late disclosure.⁷² The Gbagbo Defence further stresses that the prejudice caused to the Defence by late disclosure should be assessed in light of their cumulative impact on the Defence's preparation⁷³ and emphasises that the Defence can only prepare when in possession of the entirety of the Prosecution's evidence.⁷⁴ The Gbagbo Defence does not oppose disclosure of the Autopsy Report under Rule 77 of the Rules but stresses that 'staggered' disclosure renders its work difficult and is not justified because it was in the Prosecution's possession for many months.⁷⁵

36. The Blé Goudé Defence argues that the Fourth Request should be rejected on the basis of the cumulative impact of the late disclosure sought so far by the Prosecution.⁷⁶ It further argues that the Prosecution's request does not meet the criteria of Regulation 35(2) of the Regulations as the inability of the NFI to provide the reports before the Disclosure Deadline was not outside the Prosecution's control – the Prosecution, knowing the NFI's time constraints, should have directed its request for further analyses to another forensic

⁷⁰ Fourth Request, ICC-02/11-01/15-234-Conf, paras 26-27.

⁷¹ Fourth Request, ICC-02/11-01/15-234-Conf, para. 28.

⁷² Gbagbo Defence Response to Third Request and Fourth Request, ICC-02/11-01/15-279-Conf, paras 29-32.

⁷³ Gbagbo Defence Response to Third Request and Fourth Request, ICC-02/11-01/15-279-Conf, paras 53-56.

⁷⁴ Gbagbo Defence Response to Third Request and Fourth Request, ICC-02/11-01/15-279-Conf, paras 60-69.

⁷⁵ Gbagbo Defence Response to Third Request and Fourth Request, ICC-02/11-01/15-279-Conf, paras 14-15.

⁷⁶ Blé Goudé Response to Fourth Request, ICC-02/11-01/15-277-Conf, para. 12, see also para. 24.

institute.⁷⁷ The Blé Goudé Defence further submits that authorising the disclosure of the Supplemental Reports would prejudice the Defence as it would need to re-investigate the 3 March 2011 incident in light of this allegedly corroborative evidence.⁷⁸ With regard to the disclosure of the Autopsy Report, the Blé Goudé Defence submits that as such an autopsy report is necessarily useful for the preparation of the Defence and should therefore have been disclosed prior to the Disclosure Deadline.⁷⁹

37. As a preliminary matter, the Chamber emphasises that, contrary to the Prosecution's submission, it does not consider that the criteria of Regulation 35(2) of the Regulations are met, noting in particular that the requests for further analyses were made in May 2015, *i.e.* more than a month after receipt of P-0601's amended report which triggered such requests and, in any case, less than two months prior to the Disclosure Deadline. Additionally, the Chamber notes that, at least one of the Supplemental Reports was obtained months before the Third Request was made, namely on 6 July 2015. The Chamber therefore notes with concern that the request for late disclosure was filed at such a late stage, namely more than two months after receipt of one of the Supplemental Reports.

38. Notwithstanding this, the Chamber recalls that in the First Disclosure Decision, it indicated that it would decide whether to authorise late disclosure and the addition of one of the Supplemental Reports⁸⁰ to the List of Evidence only when in possession of the report and taking into consideration concrete factors such as: '(i) what findings will be presented in these reports; (ii) whether or not the

⁷⁷ Blé Goudé Response to Fourth Request, ICC-02/11-01/15-277-Conf, paras 15-16.

⁷⁸ Blé Goudé Response to Fourth Request, ICC-02/11-01/15-277-Conf, paras 22-24.

⁷⁹ Blé Goudé Response to Fourth Request, ICC-02/11-01/15-277-Conf, paras 19-19.

⁸⁰ The Chamber notes that the Prosecution's notice at the time only extended to one of the Supplemental Reports, the other one being absent from the notice (See Prosecution's request pursuant to Regulation 35 in relation to a limited number of documents, 30 June 2015, ICC-02/11-01/15-115-Conf, paras 24-26 referring only to the request for further analysis made on 12 May 2015; see also Third Request, ICC-15/11-01/15-234-Conf, para 8 indicating that a separate request for further analyses was also made on 8 May 2015).

findings made therein will go far beyond the existing body of evidence; or (iii) the length of these reports'.⁸¹

39. The Chamber notes: (i) the limited length of the Supplemental Reports which are respectively 5 and 8 pages long;⁸² and (ii) their content, namely the fact that they – in the Prosecution's submission – provide further positive DNA matches to relatives of one victim from the 3 March 2011 incident.⁸³ The Chamber therefore considers that, given their length, the Defence will not be unduly prejudiced by the late disclosure of the materials requested and that it is in the interests of all parties, and ultimately of the Chamber to grant the Fourth Request.

40. With regard to the disclosure of the Autopsy Report, the Chamber refers to the procedure set out at paragraphs 19-20 above and accordingly instructs the Prosecution to disclose it forthwith. The Chamber, noting the limited length of the document⁸⁴ as well as the Prosecution's submission that the 'relevance' of the report could only be assessed after the receipt of Supplemental Report received on 16 September 2015,⁸⁵ considers that the late disclosure does not give rise to undue prejudice to the Defence.

e) Conclusion

41. The Chamber has 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. The Chamber considers that, cumulatively, the delayed disclosure granted in the present decision and in the First Disclosure Decision as well as the amendments to the List of Witnesses and List of Evidence authorised do not unduly prejudice the accused persons. In reaching this conclusion, the Chamber has given due

⁸¹ First Disclosure Decision, ICC-02/11-01/15-183-Red, para. 38.

⁸² ICC-02/11-01/15-234-Conf-AnxA, pages 1-16.

⁸³ Third Request, ICC-02/11-01/15-234-Conf, para. 24. See also,

⁸⁴ ICC-02/11-01/15-234-Conf-AnxA, pages 17-19.

⁸⁵ Fourth Request, ICC-02/11-01/15-234-Conf, para. 27.

regard to the specific circumstances of the case including, notably, the commencement date for the evidentiary stage of trial and the volume of material sought to be disclosed after the Disclosure Deadline. Furthermore, the Chamber has also considered the counter-balancing measures provided for in the present decision, to remedy any prejudice that may be caused to the Defence as a result of the Prosecution's late disclosure and amendment of its List of Evidence and List of Witnesses.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the First Request;

ORDERS the Prosecution to, going forward, disclose forthwith any materials falling under Rule 77 of the Rules or Article 67(2) of the Statute in accordance with paragraphs 19-20 of the present decision;

GRANTS the Second Request, in accordance with the conditions set out in paragraph 27 above;

GRANTS the Third Request, in accordance with paragraph 32;

GRANTS the Fourth Request, in accordance with the conditions set out in paragraph 19-20 and 39-40 above;

DIRECTS the Prosecution to file an amended version of its List of Witnesses within two days of notification of the present decision;

DIRECTS the Prosecution to, within two days of notification of the present decision, file an amended version of its List of Evidence, including – in a clearly identifiable manner – any items for which late disclosure was granted by way of the present decision and of the First Disclosure Decision;

DIRECTS the Prosecution to file a public redacted version of the First Request (ICC-02/11-01/15-203-Conf), Second Request (ICC-02/11-01/15-207-Conf) and Fourth Request (ICC-02/11-01/15-234-Conf) within ten days of notification of the present decision;

DIRECTS the Gbagbo Defence to file public redacted versions of the Gbagbo Defence Response to Second Request (ICC-02/11-01/15-250-Conf) and of the Gbagbo Defence Response to Third Request and Fourth Request (ICC-02/11-01/15-279-Conf) within 15 days of notification of the present decision; and

DIRECTS the Blé Goudé Defence to file public redacted versions of the Blé Goudé Defence Response to Third Request (ICC-02/11-01/15-272-Conf) and of the Blé Goudé Defence Response to Fourth Request (ICC-02/11-01/15-277-Conf) within 15 days of notification of the present decision.


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



Judge Geoffrey Henderson, Presiding Judge



Judge Olga Herrera Carbuccia



Judge Bertram Schmitt

Dated 21 October 2015

At The Hague, The Netherlands