

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/11-01/15
Date: 2 February 2018

TRIAL CHAMBER I

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

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

Public

Decision on the Prosecutor'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, dated 21 December 2017

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Eric MacDonald

Counsel for Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Geert-Jan Alexander Knoops
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Legal Representatives of Victims

Paolina Massidda

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber I of the International Criminal Court, in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to Regulation 35 of the Regulations of the Court, issues this decision on 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” dated 21 December 2017 (“Prosecutor’s Application”).¹

Procedural history

1. On 7 May 2015, the Chamber set 30 June 2015 as the final deadline for the Prosecutor to disclose all incriminating evidence (“disclosure deadline”) and “to file a list of evidence to be relied on at trial as well as a list of witnesses”.²
2. Since the list of evidence and list of witnesses were filed on 30 June 2015, the Prosecutor submitted a large number of requests for variation of time limit pertaining to late disclosure and subsequent amendments of the list of evidence. The Chamber granted these requests on 18 August 2015,³ 21 October 2015,⁴ 30 November 2015⁵ and 22 March 2016⁶.
3. On 24 March 2016, the Prosecutor filed her “certification of review of its case file”, where she confirmed that, to the best of her knowledge “and as of the date of filing, no disclosable materials remain undisclosed” other than a number of items falling under Rule 77 of the Rules, without prejudice to her ongoing obligations under article 67(2) and Rule 77, including the obligation to review

¹ ICC-02/11-01/15-1091.

² ICC-02/11-01/15-58.

³ ICC-02/11-01/15-183-Red.

⁴ ICC-02/11-01/15-306.

⁵ ICC-02/11-01/15-350-Conf.

⁶ ICC-02/11-01/15-467.

“any information and evidence that may be *received and/or collected* in the context of the case” (emphasis added).⁷

4. In its “Decision on request for leave to appeal the ‘Fourth decision on matters related to disclosure and amendments to the List of Evidence’ and other issues related to the presentation of evidence by the Office of the Prosecutor” dated 13 May 2016 (“13 May 2016 Decision”),⁸ the Chamber (i) noted that “[t]o the extent that the Defence has qualms about the cumulative effect of the Chamber’s four decisions allowing late disclosure, it should be clear that this practice will not be allowed to continue”; (ii) stated that it would “no longer allow the addition of any further incriminating evidence” and (iii) clarified that the only possible exception to this rule would be “for entirely new, non-duplicative, evidence which was obtained by the Prosecutor after the disclosure deadline”, and “only if it can be shown that this new evidence could not reasonably have been obtained by a diligent Prosecutor before the disclosure deadline”. In the same decision, the Chamber rejected the Prosecutor’s request to “re-disclose as incriminatory material and add to her list of evidence” two video items, noting that no justification had been provided as to the reasons why the Prosecutor had failed to disclose within the relevant time limit items which were available to her before its expiration.
5. In its oral ruling issued on 8 March 2017 (“8 March 2017 Decision”),⁹ the Chamber rejected the Prosecutor’s application to “reclassify as incriminatory material” and add to her list of evidence one document and an item consisting of a “quasi-duplicate of a better quality” of a video already included in the list. In

⁷ ICC-02/11-01/15-470.

⁸ ICC-02/11-01/15-524.

⁹ ICC-02/11-01/15-T-130-ENG, page 1 line 15 to page 5 line 16.

the same decision, the Chamber granted the Prosecutor's application to add to her list of evidence two documents received from the United Nations Commissioner of Human Rights relating to the testimony of Witness P-0010; whilst deploring the Prosecutor's delay in requesting these documents, the Chamber found their nature and content of such importance as to outweigh the fact that they could and should have been obtained at an earlier stage.

6. On 21 December 2017, the Prosecutor filed her Application. On 22 December 2017, by email, the LRV indicated she did not oppose the Application and would not file a response. On 22 January 2018, in accordance with the time limit set by email by the Chamber, the Defence for Mr Gbagbo¹⁰ and the Defence for Mr Blé Goudé¹¹ filed their responses, both requesting the Chamber to reject the Prosecutor's Application.

Determinations by the Chamber

7. The Prosecutor seeks authorisation "to re-disclose six documents as incriminatory material" and to add them to her list of evidence; in the alternative, she requests the Chamber to "allow submission" of these six items in the exercise of its own functions and powers under Articles 64(6)(d) and 69(3) of the Statute and "in furtherance of the determination of the truth". Two of these documents consist of legal texts relating to the Ivorian *Forces de Défense et Sécurité* ("FDS"), disclosed by the Defence for Mr Gbagbo ("First"¹² and "Second"¹³ Document"); the other four documents consist of two "lists of FDS recruits" ("Third"¹⁴ and "Fourth"¹⁵ Document"), "one list of members of an FDS unit"

¹⁰ ICC-02/11-01/15-1104.

¹¹ ICC-02/11-01/15-1106.

¹² CIV-D15-0001-6210.

¹³ CIV-D15-0001-6536.

¹⁴ CIV-OTP-0048-0108.

¹⁵ CIV-OTP-0048-0878.

(“Fifth Document”)¹⁶ and “one FDS order” (“Sixth Document”)¹⁷, all previously disclosed by the Prosecutor as material to the Defence under Rule 77 of the Rules.

8. The Chamber notes that, with the only exception of the Fifth, all these documents were known by and available to the Prosecutor well in advance of the disclosure deadline, in one case as early as in 2013; the Fifth Document was disclosed on 4 March 2016, prior to the 13 May 2016 Decision. More specifically, as indicated by the Prosecutor,¹⁸ the First and the Second Documents were disclosed and made available to her by the Gbagbo Defence as early as 17 March 2014; the Third Document was first disclosed by her on 6 June 2014; the Fourth on 15 October 2013; the Sixth on 15 February 2015.
9. Regulation 35(2) of the Regulations stipulates that an extension of a time limit can only be granted if the party seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside of his or her control.
10. The Chamber notes that the Prosecutor does not even try to explain why she was unable to meet the time limit (at least in respect of those documents available to her at the time of its expiration), or to identify one or more reasons outside her control which would warrant its extension at this late stage. Instead, she acknowledges that “the criterion under the second sentence of regulation 35(2) may not be met” and petitions the Chamber to resort to its own statutory powers to order the submission of evidence.
11. Having carefully considered the Application, and the specific submissions made by the Prosecutor in respect of each of the documents, the Chamber is not

¹⁶ CIV-OTP-0048-1082.

¹⁷ CIV-OTP-0071-0627.

¹⁸ Prosecutor’s Application, paragraph 4.

satisfied that the Prosecutor has demonstrated the existence of good reasons either to extend the disclosure deadline or to use its own powers in respect of any of the documents for which she seeks late inclusion in her list of evidence. Statements to the effect that a document which has been in her possession for at least a year and a half (and, in the case of the First, Second and Third Document, for longer than three years) is now considered “important” by the Prosecutor,¹⁹ or suitable to “corroborate” or “contribute to a better understanding”²⁰ of a particular point (including as a result of her looking back to some of the testimonies), cannot be regarded as adequate justification to the disruptive effects that any amendment to the list of evidence, no matter how apparently limited, is suitable to have on the preparation of the Defence; similar considerations can be made in respect of the justification adduced in support of the application to include in the list of evidence the Fourth Document, namely that one page of it was “inadvertently” included in another document previously submitted²¹. As a whole, the Prosecutor’s Application seems to originate from an ongoing process of review of her file, a “*re melius perpensa*” exercise resulting in the wish to modify the approach taken in respect of a number of issues, of varying degrees of importance; while this exercise may be internally appropriate (and possibly necessary with a view to adequately preparing for the subsequent stages of the proceedings), it can certainly not become a basis to deprive of any meaningful content a parameter as crucial to the preparation of the Defence and as instrumental to the overall fairness of the proceedings as the disclosure deadline set by the Chamber.

¹⁹ See paragraphs 9 and 10 of the Prosecutor’s Application for the First and Second Documents.

²⁰ See paragraph 12 of the Prosecutor’s Application for the Third and Fifth Document; paragraph 14 for the Sixth Document.

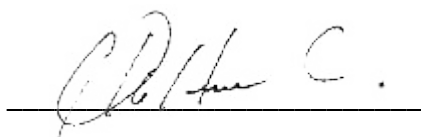
²¹ See paragraph 17 of the Prosecutor’s Application for the Fourth Document.

12. As stated in the 8 March 2017 Decision, the wish of the Prosecutor to use a document in a way other than originally foreseen is certainly not a factor beyond her control within the meaning of Regulation 35(2). Moreover, allowing the Prosecutor to modify her list of evidence simply on the basis of the fact that her appreciation of a given item changes over time would be tantamount to depriving not only the disclosure deadline, but even the list of evidence of any meaningful content, and would significantly compromise its very usefulness for the purposes of the preparation of the Defence.
13. The Chamber stands by the principles set forth in its 13 May 2016 and 8 March 2017 Decisions.
14. As regards the Prosecutor's alternative request, having analysed the six documents in the exercise of its own functions and powers, in particular Article 64(6)(d) and 69(3) of the Statute, and without now making any determination as to their admissibility, relevance or probative value, the Chamber finds that it cannot be said at this stage that any of them is necessary for the determination of the truth. Accordingly, the exercise of the Chamber's powers to order the production of evidence is not warranted.

**FOR THE FOREGOING REASONS, THE CHAMBER, HEREBY
REJECTS** the Prosecutor's Application.



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuca



Judge Geoffrey Henderson

Dated 2 February 2018

At The Hague, The Netherlands