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

Date: 19 June 2014

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Single Judge

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

Public

Decision on the "Prosecution's request to disclose material in a related proceeding pursuant to Regulation 42(2)"

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

James Stewart, Deputy Prosecutor

Counsel for the Defence

Emmanuel Altit

Agathe Bahi Baroan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Silvia Fernández de Gurmendi, Single Judge for Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”), responsible for carrying out the functions of the Chamber in relation to the situation in the Republic of Côte d’Ivoire and the cases emanating therefrom,¹ hereby issues the decision on the “Prosecution’s request to disclose material in a related proceeding pursuant to Regulation 42(2)” (the “Request”).²

1. On 30 May 2014, the Prosecutor filed the Request, asking for authorisation to disclose material disclosed by the Defence in this case to the Defence in the case against Charles Blé Goudé.³ The Prosecutor submits that because the two cases are closely related, all material disclosed by the Defence is material that should be disclosed to the Defence in the case against Charles Blé Goudé pursuant to article 67(2) of the Rome Statute (the “Statute”) or rule 77 of the Rules of Procedure and Evidence (the “Rules”).⁴ The Prosecutor points out that the Defence in the case against Charles Blé Goudé is bound by the same protocol on handling confidential information, and requests authorisation to disclose the material concerned with the same confidentiality level and protective measures.⁵ The Prosecutor appends a list of 113 items that were disclosed by the Defence as confidential.⁶

2. On 11 June 2014, the Defence filed a response (the “Response”),⁷ asking that the Request be denied and that the Prosecutor be ordered not to disclose confidential documents obtained in one case in another case without having to justify for each item the reasons for its disclosure and having obtained the authorisation of the Defence with regard to each item, including when such

¹ “*Décision portant désignation d’un juge unique*”, 16 March 2012, ICC-02/11-01/11-61.

² ICC-02/11-01/11-652 and ICC-02/11-01/11-652-Conf-Anx1.

³ Request, paras 1; 6.

⁴ *Ibid.*, para. 3.

⁵ *Ibid.*, paras 5-6.

⁶ ICC-02/11-01/11-652-Conf-Anx1.

⁷ ICC-02/11-01/11-655.

authorisation is conditioned on additional protective measures.⁸ The Defence submits that the Prosecutor fails to show how the cases against Laurent Gbagbo and Charles Blé Goudé are “closely related” or to provide any legal basis for the Request.⁹ The Defence argues that it falls within the exclusive competence of the Defence as disclosing party to determine whether material disclosed as confidential to the Prosecutor can be disclosed by the Prosecutor to a party in a different case, that the nature of some of the material disclosed as confidential may exclude, as such, disclosure to any other party, and that disclosure of confidential material to a party other than the Prosecutor would put witnesses which provided evidence to the Defence at risk.¹⁰

3. The Single Judge notes articles 57(3)(c), 67(2) and 68(1) of the Statute, rule 77 of the Rules, regulations 23 *bis* and 42(2) of the Regulations of the Court (the “Regulations”), and article 8 of the Code of Professional Conduct for counsel.

4. The Single Judge notes that, contrary to the argument of the Defence,¹¹ the cases against Laurent Gbagbo and Charles Blé Goudé are closely related, as is evident from the warrant of arrest for Charles Blé Goudé¹² and as indicated by the Prosecutor.¹³ Therefore, the Single Judge acknowledges that the Prosecutor may be bound by similar disclosure obligations in both cases.

5. The Single Judge considers that it is in principle for the Prosecutor to assess whether material in her possession or control is to be disclosed pursuant to article 67(2) of the Statute or rule 77 of the Rules. According to the

⁸ Response, p. 17.

⁹ *Ibid.*, paras 3-8; 18-41; 64; 66; 68.

¹⁰ *Ibid.*, paras 7; 9-17; 42-58.

¹¹ *Ibid.*, paras 6; 39-41.

¹² Pre-Trial Chamber III, “Warrant Of Arrest For Charles Blé Goudé”, 21 December 2011, ICC-02/11-02/11-1; see also *id.*, “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Charles Blé Goudé”, 6 January 2012, ICC-02/11-02/11-3.

¹³ Request, para. 3.

Prosecutor's own determination, the material disclosed by the Defence should be disclosed, pursuant to article 67(2) of the Statute or rule 77 of the Rules, to the Defence in the case against Charles Blé Goudé.¹⁴ Therefore, the Single Judge is not convinced by the argument of the Defence that the Prosecutor fails to provide any legal basis for the Request.¹⁵

6. In addition, and contrary to the argument of the Defence,¹⁶ evidence disclosed and communicated to the Chamber as part of the proceedings before the Court does not remain within the exclusive competence of the disclosing party. Rather, the evidence comes within the authority of the Chamber which may reclassify the material as it deems appropriate, bearing in mind articles 57(3)(c) and 68(1) of the Statute. Therefore, the Single Judge considers that the Prosecutor in the present case properly turns to the Chamber to seek permission to disclose to the Defence in the case against Charles Blé Goudé the material confidentially disclosed by the Defence in the present case.

7. Accordingly, the Single Judge must determine whether there are any reasons that prevent the disclosure of the confidential evidence subject to the Request to the Defence in the case against Charles Blé Goudé. In this regard, the Defence argues that the disclosed material includes, *inter alia*, documentation which is covered by medical secrecy and thus cannot be provided to any other Defence team.¹⁷ The Single Judge notes that the material disclosed as confidential includes documents which contain information of a sensitive and personal nature.¹⁸ In the view of the Single Judge, the Prosecutor should reassess whether there are compelling grounds

¹⁴ Request, paras 1; 3.

¹⁵ Response, paras 18-38.

¹⁶ *Ibid.*, paras 9-17.

¹⁷ *Ibid.*, paras 44-45.

¹⁸ Items 7-9 in ICC-02/11-01/11-652-Conf-Anx1 (CIV-D15-0001-0935; CIV-D15-0001-0942; CIV-D15-0001-0948).

to disclose these documents to the Defence in the case against Charles Blé Goudé and, if this is found to be the case, provide the reasons for which disclosure is deemed necessary despite the nature of the information contained in this documentation.

8. With regard to the remainder of the disclosed material, the Single Judge notes that the Prosecutor does not request that material which was disclosed as confidential by the Defence be released to the public. Rather, the Prosecutor requests authorisation to disclose any material disclosed by the Defence with the same confidentiality level and protective measures.¹⁹ Indeed, the Single Judge notes that the Defence in the case against Charles Blé Goudé is bound by the same protocols on handling confidential information received through disclosure²⁰ as the Defence in the instant case.²¹ Similarly, the Defence in the case against Charles Blé Goudé is bound by the same code of conduct.²² Therefore, the Single Judge is not convinced by the argument of the Defence that disclosure of confidential material to the Defence in the case against Charles Blé Goudé, with the same confidentiality level and protective measures as in the present case, would give rise to risk for the witnesses concerned or would otherwise endanger the purpose of the level of confidentiality initially attributed to the material by the Defence.²³

¹⁹ Request, paras 5-6.

²⁰ Pre-Trial Chamber I, "Second decision on issues related to disclosure of evidence", 5 May 2014, ICC-02/11-02/11-67, para. 16. See also ICC-02/11-02/11-T-4-CONF-ENG, p. 21, lines 2-10.

²¹ Pre-Trial Chamber III, "Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations", 6 March 2012, ICC-02/11-01/11-49 and ICC-02/11-01/11-49-Anx.

²² See, in particular, article 8 of the Code of Professional Conduct for counsel.

²³ Response, paras 47-50.

FOR THESE REASONS, THE SINGLE JUDGE

AUTHORISES the Prosecutor to disclose to the Defence in the case against Charles Blé Goudé all material disclosed by the Defence in the present case with the same confidentiality level and protective measures, with the exception of the documents referred to in paragraph 7 above, without prejudice to the Prosecutor reassessing the need for their disclosure and providing reasons for which disclosure is deemed necessary.

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



Judge Silvia Fernández de Gurmendi
Single Judge

Dated this Thursday, 19 June 2014

At The Hague, The Netherlands