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PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

Public redacted version of Prosecution's response to Defence requests that Chamber order an expertise in relation to a ballistic report (ICC-02/11-01/11-600-Conf) and an expertise in relation to videos related to 3 March 2011 women's march (ICC-02/11-01/11-602-Conf), 10 February 2014, ICC-02/11-01/11-615-Conf

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Introduction

1. On 3 February 2014, the Defence filed its “*Requête afin que la Chambre ordonne qu’ait lieu une expertise portant sur la méthode de travail utilisée et les éléments pris en compte par l’auteur du rapport intitulé « on the alleged shelling sites within Abidjan, the Ivory Coast – Mission date 8-12 July 2013 » (CIV-OTP-0049-0048) divulgué par le Procureur »*.”¹ On 4 February 2014, the Defence also filed its “*Requête afin que soit ordonnée une expertise portant sur les pièces vidéographiques suivantes : CIV-OTP-0002-1059, CIV-OTP-0002-1060, CIV-OTP-0002-1061, CIV-OTP-0002-1062, CIV-OTP-0003-0716, CIV-OTP-0003-0717, CIV-OTP-0003-0718, CIV-OTP-0037-0387, CIV-OTP-0043-0267, CIV-OTP-0032-0053, CIV-OTP-0042-0587, CIV-OTP-0040-0342, CIV-OTP-0040-0426, CIV-OTP-0041-0229, CIV-OTP-0039-0141 et CIV-OTP-0044-0738*”.”²
2. The Defence, in both requests, challenges the admissibility of a ballistic report and a number of videos the Prosecution is relying on for the purposes of the confirmation of the charges.³ The Defence further argues that if both requests are rejected, the Defence will not be in a position to “*« contester les éléments de preuve produits par le Procureur » et la procédure de confirmation des charges, protectrice des droits de la défense, serait vidée de son sens*”.”⁴
3. The Prosecution provides a joint response to both requests and submits that they should be rejected. First, the legal basis invoked by the Defence, Articles 57(3)(b) and 56(2)(c), is flawed since it applies to unique investigative opportunities. Second, the Chamber should not exercise its discretion pursuant to Regulation 44(4) of the Regulations of the Court, in light of the limited scope and purpose of the confirmation hearing, the calendar of the proceedings established by the Chamber and, the current circumstances of the case, including the timing of the

¹ ICC-02/11-01/11-600-Conf.

² ICC-02/11-01/11-602-Conf and ICC-02/11-01/11-602-Red.

³ See para. 3, *supra*, in both Defence requests.

⁴ See para. 3, *supra*, in both Defence requests.

requests. Third, notwithstanding the absence of such expertise, the Defence is in a position to challenge the Prosecution's evidence.

Confidentiality

4. The Prosecution files its response as Confidential, since it relates to evidence that is currently treated as confidential. A public redacted version will be filed as soon as practicable.

Submissions

5. The Prosecution submits that, in an attempt to justify the requested expertise, the Defence goes into the merits of the evidence prior to the submission of its arguments on the Prosecution's Amended Document Containing the Charges (Amended DCC).⁵ In the process, the Defence comments and misrepresents the Prosecution's evidence. While the Prosecution disagrees with the factual arguments of the Defence, the Prosecution will refrain from responding to all of these inaccuracies since it is not necessary for the Chamber to consider those arguments in order to determine the Defence requests. Further, the Parties and Participants will have an opportunity to file final submissions on the evidence at a later stage of the proceedings. Nevertheless, in order to illustrate the type of factual inaccuracies and misrepresentations argued by the Defence, the Prosecution will present two such examples below.

The ballistic report

6. The Defence argues that in relation to the 17 March 2011, the Amended DCC largely relies on the same arguments as the previous DCC: "*mais encore, n'apporte-t-il aucun élément nouveau véritablement probant concernant la réalité d'un bombardement*".⁶ According to the Defence, the only "new technical element" is

⁵ ICC-02/11-01/11-576. The Defence did seek an extension of time, ICC-02/11-01/11-603.

⁶ ICC-02/11-01/11-600, para. 19.

the report of the Prosecution's ballistic expert.⁷ The Prosecution invites the Chamber to review the list of additional evidence such as witness statements, photographs, medical records and [REDACTED] documents, amongst others, that have been submitted as further evidence of the 17 March incident.⁸ The Prosecution also recalls that, contrary to the Defence assertion,⁹ during the confirmation hearing it presented evidence that at least six shells were fired and exploded in the area of the Siaka Kone market, SOS Village and Derrière Rails.¹⁰ In light of the additional evidence collected since then, the Prosecution is now able to establish that at least seven sites were hit within these three areas previously identified.¹¹ Finally, the Prosecution also draws the attention of the Chamber to [REDACTED] the damage and marks caused by the shelling which unequivocally demonstrate that the area was bombarded.¹² The [REDACTED] now sourced to the Amended DCC were not available at the confirmation hearing since they were obtained on 21 June 2013.¹³

The videos

7. In relation to the incident of 3 March 2011, the Defence also argues that the Prosecution largely relies on the same arguments advanced in its previous DCC: *« il n'apporte aucun élément nouveau – contrairement aux instructions de la Chambre – véritablement probant concernant la réalité de cette « fusillade », le fait que des « manifestantes non armées » auraient été visées et concernant les prétendues victimes de la fusillade »*.¹⁴ Again this statement is inaccurate; the Prosecution invites the Chamber to review the list of additional sources it submitted such as the

⁷ ICC-02/11-01/11-600, para. 33, « le seul élément technique transmis depuis le 3 juin 2013 concernant cet événement est un « report on the alleged shelling sites within Abidjan, the Ivory Coast – Mission date 8-12 July 2013 » ».

⁸ See Amended DCC, paras. 122 and following (footnotes 403 to 413) and corresponding Amended LoE.

⁹ « concernant le site même du bombardement allégué, il semble, sans réellement le formuler expressément, avoir changé d'avis : il est passé du marché « Siaka Koné et ses environs » à de nouveaux endroits jusqu'à compter sept sites différents », ICC-02/11-01/11-600, para. 19.

¹⁰ ICC-02/11-01/11-T-16-CONF-ENG ET, p. 39, lns 6 to 9.

¹¹ See Amended DCC, para. 123.

¹² See CIV-OTP-0044-1617.

¹³ For a list of the relevant [REDACTED] that corroborate that the shelling incident did take place in Abobo on 17 March 2011, see footnote 407 of the Amended DCC.

¹⁴ ICC-02/11-01/11-602-Conf, para. 20.

statements of witnesses CIV-OTP-P-0189, P-0217, P-0293, P-0321 and P-0330. The additional documents include amongst others, a government report about the incident “*Rapport d’enquête/tuerie de sept (07) femmes à Abobo en mars 2011: implication supposée ou réelle des Forces de Défenses et de Sécurité (FDS)*” (CIV-OTP-0048-1574) and the four videos disclosed to the Defence since the confirmation hearing and submitted to support the 3 March incident.¹⁵

The legal basis invoked by the Defence (Articles 57(3)(b) and 56)

8. The Prosecution submits that the legal basis invoked by the Defence is flawed and both requests should be rejected on the grounds that they do not qualify as unique investigative opportunities.
9. The Defence argues that the suspect “*ne dispose pas toujours des moyens nécessaires et comme il ne lui pas (sic) toujours possible de faire valoir des moyens de défense, le Statut prévoit qu’il est possible que la défense fasse appel à l’assistance de la Chambre* ».¹⁶ The Defence relies on the portion of Article 57(3)(b) which refers to Article 56. The Defence argues that the Chamber could appoint an expert pursuant to Article 56(2)(c).
10. The Prosecution submits that Article 57(3)(b) is clear. By referring to Article 56 (and Part 9 of the Statute for that matter), Article 57(3)(b) provides the same ability to the Defence to file a request for a unique investigative opportunity as the Prosecution. It is an application of the concept of equality of arms.
11. The Prosecution submits that the expertise sought by the Defence does not fall within the category of a unique investigative opportunity. A unique investigative opportunity will be ordered by a Chamber in order to take a

¹⁵ See Amended DCC, paras. 119 and following (footnotes 387 to 402) and corresponding Amended LoE. The four videos are CIV-OTP-0042-0587, CIV-OTP-0043-0267, CIV-OTP-0044-0738 and CIV-OTP-0040-0342.

¹⁶ See para. 12, *supra*, in both Defence requests.

statement, examine, collect or test evidence which may not be subsequently available at trial.¹⁷

12. The ballistic expertise sought by the Defence is for the sole purpose of reviewing the report of the Prosecution ballistic expert.¹⁸ The report has been available to the Defence for four months, and will remain available, thus the possibility of having it reviewed by another expert will remain open. Neither does the expertise sought for the videos falls within the ambit of Article 56.¹⁹ The videos are available, have been available for many months and will also remain available. Thus, the possibility of having them reviewed by an expert will remain open. Consequently, in no manner does either request qualify as a unique investigative opportunity.

Regulation 44(4) of the Regulations of the Court

13. Pursuant to Regulation 44(4), the Chamber has the power to “*proprio motu* instruct an expert.” The Prosecution submits that in the present instance, the Chamber should not exercise its discretion to instruct an expert. First, the Defence requests were filed at an unduly late stage in the confirmation proceedings and without any cogent reasons for such lateness. If granted, the requests would result in further delays of the proceedings. Second, there is no reason to invoke Regulation 44(4), since the Defence could instruct its own experts. Third, the Chamber does not require the expert evidence sought by the Defence to determine the admissibility and the weight of the expert reports and videos challenged by the Defence.

Lateness of the Defence requests

14. As advanced, the Defence requests, if granted, would necessarily result in a significant delay of the further proceedings. This is compounded by the lateness

¹⁷ Article 56(1)(a).

¹⁸ ICC-02/11-01/11-600-Conf, conclusion, page 20.

¹⁹ ICC-02/11-01/11-602-Conf, conclusion, page 20.

of the filings, which is inconsistent with the Defence's duty to act expeditiously and not to undermine the efficient conduct of the proceedings. The Chamber should deny the Defence requests, bearing in mind its duty to ensure that the proceedings are fair and expeditious.

15. The Prosecution recalls that it disclosed to the Defence the report of the ballistics expert (CIV-OTP-0049-0048) on 3 October 2013, just over three months prior to the submission of the Amended DCC.²⁰ The Defence is requesting an expertise of 16 videos to be ordered a little more than one week prior to their deadline to file their observations in relation to the Prosecution's evidence.²¹ The Prosecution notes the tardiness of the request given that only four videos out of the 16 videos were disclosed to the Defence after the confirmation hearing held in February 2013 and submitted to support the 3 March incident.²² The last of these videos (CIV-OTP-0044-0738) was disclosed on 3 October 2013.²³ The Prosecution highlights that while the Defence may refer to videos CIV-OTP-0002-1059, CIV-OTP-0041-0229 and CIV-OTP-0039-0141, these three videos are not on the Prosecution's Amended LoE.²⁴

16. The Defence has been aware of the schedule for the further conduct of the confirmation proceedings and its deadline to present further evidence since 3 June 2013, the date of the Adjournment Decision.²⁵ This deadline was later postponed by the Pre-Trial Chamber when issuing an updated calendar.²⁶ Bearing in mind the timely disclosure by the Prosecution to the Defence of the challenged expert report and videos, there is no justifiable reason why the

²⁰ ICC-02/11-01/11-524, INCRIM Package 19.

²¹ According to the current calendar the Defence is to submit its evidence and observations to the Prosecution's Amended DCC by 13 February 2014, ICC-02/11-01/11-576. The Defence did seek an extension of time, see ICC-02/11-01/11-603.

²² The four videos are CIV-OTP-0042-0587, CIV-OTP-0043-0267, CIV-OTP-0044-0738 and CIV-OTP-0040-0342.

²³ ICC-02/11-01/11-524, Pre-confirmation INCRIM Package 19.

²⁴ See ICC-02/11-01/11-592-Conf-Anx3-Corr.

²⁵ ICC-02/11-01/11-432, page 24.

²⁶ ICC-02/11-01/11-576.

Defence could not have made these requests earlier, especially since it now states how important the additional evidence is for its case and the exercise of Laurent GBAGBO's rights under Article 67(1). If the Defence requests were to be granted, this would necessarily lead to a delay in the confirmation hearing and significantly affect the expeditiousness of the proceedings. As stated by the Appeals Chamber, "expeditiousness is [...] an independent and important value in the Statute to ensure the proper administration of justice, and is therefore more than just a component of the fair trial rights of the accused."²⁷

17. The Appeals Chamber further stated that "[t]he Statute and the Rules of Procedure and Evidence place an onus on all those involved in the trial to act in a diligent and expeditious manner in the performance of their obligations. The duty applies to the Chambers of the Court, the parties and participants. As regards the accused person, where he or she is represented by counsel, the Code of Professional Conduct for counsel enjoins counsel to represent him or her "expeditiously with the purpose of avoiding unnecessary delay in the conduct of the proceedings".²⁸ It is true that the Defence has some discretion to organise and conduct its case in a manner that he or she deems appropriate. However, that discretion is not absolute.²⁹ In particular, it does not "override the [...] Chamber's [...] obligation [to regulate the proceedings to ensure that the trial is fair and expeditious under article 64 (2) of the Statute.]. The defence strategy must respect both the procedural framework established by the Court's legal instruments and the overall interests of the administration of justice."³⁰

The Defence's ability to instruct its own experts

18. The Defence has the ability to conduct its own investigation and it has been given the necessary means to that effect by the Registrar. In particular, the

²⁷ ICC-01/04-01/07-2259 OA10, para.47.

²⁸ ICC-01/04-01/07-2259 OA10, para.43.

²⁹ ICC-01/04-01/07-2259 OA10, para.77.

³⁰ ICC-01/04-01/07-2259 OA10, para.77.

Defence can instruct its own experts to challenge the Prosecution's evidence, which was fully disclosed by 3 October 2013. If the evidence sought was as important as claimed by the Defence in its requests, it would be expected that the Defence would have taken steps to ensure that experts were adequately instructed in time. If the Defence did not have the means to do so, the natural course of action would have been to make a timely and reasoned showing to that effect to the Registrar. However, the Defence requests are silent on this matter. If indeed the Defence failed, in a timely manner, to exhaust all other avenues to instruct its own experts, it cannot at this late stage in the proceedings appeal to the Chamber by making requests for the Chamber to use its *proprio motu* powers under Regulation 44(4).

The Defence requests are not warranted on their merits

19. The Prosecution submits that in relation to the ballistic report, the Defence is seeking an expertise that would examine the methodology applied by the Prosecution's expert and to evaluate the probative value of his report.³¹ While an expert may assist a Chamber in a particular matter of fact or law, it is the Chamber's sole prerogative to determine the admissibility and the weight to be given to certain pieces of evidence. As submitted by the Prosecution earlier in this case, this is a judicial process that requires the Chamber to cumulatively look at all the evidence that the Prosecution provided in support of the material facts charged.³² It is not apparent how the requested expertise would assist the chamber at this stage of the proceedings.

20. Additionally, the Chamber is very much in a position to evaluate, on its face, the report of the expert, the methodology he applied, the conclusions he may have drawn and ultimately the appropriate weight that it should receive. The views of

³¹ ICC-02/11-01/11-600-Conf, conclusion, page 20.

³² ICC-01/04-01/06-803-tENG, para.39. See Prosecution's broader arguments on this topic in ICC-02/11-01/11-474 OA5, paras.41-47.

third persons will not materially assist the Chamber in that respect at this stage of the proceedings.

The Defence is in a position to challenge the Prosecution's evidence

21. The Prosecution submits that notwithstanding the absence of the requested expertise, the Defence is in a position to challenge the Prosecution's evidence.
22. The Defence argues that if its requests are not granted, the Defence will not be in a position to "*« contester les éléments de preuve produits par le Procureur » et la procédure de confirmation des charges, protectrice des droits de la défense, serait vidée de son sens*".³³
23. The Defence went at great lengths in both requests to draw the attention of the Chamber to purported factual inconsistencies and contradictions in the Prosecution's case in relation to the ballistic report and videos. While the Prosecution does not agree with the arguments of the Defence on the quality of the Prosecution's evidence, the arguments of the Defence are in and of themselves a demonstration that the Defence is in a position to challenge the admissibility or the weight to be given to the ballistic report and/or the videos on the Prosecution's list of evidence.
24. In their request related to the ballistic report, the Defence challenges the "quality" of the report,³⁴ the methodology followed by the expert, including the chain of custody,³⁵ and comments on the possible contradictions between the report and other evidence of the Prosecution.³⁶ The same can be said for the requested expertise of the videos. The Defence puts forth arguments in relation

³³ See para. 3, *supra*, in both Defence requests.

³⁴ ICC-02/11-01/11-600-Conf, paras. 34 to 45.

³⁵ ICC-02/11-01/11-600-Conf, paras. 46 to 74.

³⁶ ICC-02/11-01/11-600-Conf, paras. 75 to 79.

to the provenance of the videos, their authenticity and reliability, claiming that they would be a “montage” and comments the quality of the images.³⁷

25. Regarding the documents inspected by the ballistic expert that were not disclosed to the Defence, the Prosecution recognises that document CIV-OTP-0042-0002, a screening note of Witness P-0131 was not disclosed since the statement, CIV-OTP-0046-1244-R01, was disclosed instead. The statement was taken after the conclusion of the forensic mission. Therefore, the expert was only given the screening note and not the statement of P-0131. The Prosecution undertakes to disclose the screening note (CIV-OTP-0042-0002) to the Defence as soon as practicable.
26. Document CIV-OTP-0042-0012 is the screening note of a witness who lost a family member on 17 March by the shelling in Village SOS. The Prosecution had withheld the disclosure of the screening pending further investigative steps. The Prosecution undertakes to provide a copy of the screening of the witness to the Defence.
27. The reference to document CIV-OTP-0028-0024 is indeed a typo, as indicated by the Defence. It should read CIV-OTP-0028-0524 (instead of 0024).
28. The Prosecution submits that as demonstrated above and considering the limited scope and purpose of the confirmation of the charges, coupled with the demonstrated Defence’s ability to challenge the Prosecution’s evidence on the matter, the “*procédure de confirmation des charges, protectrice des droits de la défense*”,³⁸ contrary to the Defence assertion, is not vitiated.

³⁷ ICC-02/11-01/11-602-Conf, paras. 31 to 59.

³⁸ Para. 3, *supra*, in both Defence requests.

Conclusion

29. The Prosecution submits that for the above reasons, both Defence requests should be rejected.



Fatou Bensouda, Prosecutor

Dated this 4th day of March 2014

At The Hague, The Netherlands