



Original: English

No.: ICC-02/11-01/11
Date: 15 November 2013

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

With Annex 1 – Confidential and Annex 2 – Confidential, *ex parte*, only available to the Office of the Prosecutor

Prosecution's notification of its intention to rely on 18 documents previously disclosed pursuant to Rule 77 or Article 67(2) for the purposes of the confirmation of charges; and Request for authorization to maintain redactions previously made; and additional request to disclose one document as incriminating evidence

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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Introduction

1. On 3 June 2013, Pre-Trial Chamber I adjourned the hearing on the confirmation of charges and requested the Prosecution to provide further evidence or conduct further investigations and adopted for that purpose a new disclosure calendar (“the Decision”).¹ In the Decision, the Chamber also directed, *inter alia*, the Prosecutor to “submit by no later than Friday, 15 November 2013² the Amended DCC, amended list of evidence and updated consolidated Element Based Chart”.

2. The Decision had also ordered the Prosecution to submit all redaction requests by 15 October 2013.³ After this deadline, the Prosecution turned its focus to the task of reviewing and amending the DCC, which included continuing to review its collection of evidence. During this process a number of documents previously disclosed pursuant to Rule 77, or Article 67(2) and one document never previously disclosed were identified as being material and relevant to the upcoming Amended DCC.

3. The Prosecution seeks the Chamber’s authorization to rely on these documents and for some, to maintain the redactions that were applied *proprio motu* when they were previously disclosed to the Defence.

Confidentiality

4. Pursuant to Regulation 23*bis* of the Regulations of the Court and the instruction of the Single Judge in her Decision establishing a disclosure system, the

¹ ICC-02/11-01/11-432.

² This deadline was extended and will be re-established by the Chamber pursuant to its decision: ICC-02/11-01/11-557.

³ ICC-02/11-01/11-432, at page 23, paragraph c)(iv)(v)&(vi).

Prosecution files Annex 1 as confidential as it pertains to evidentiary matters, and Annex 2 as confidential, *ex parte*, only available to the Prosecution, as knowledge by the Defence of the redactions would defeat the purpose of that aspect of this submission.

Submissions

5. Rule 77 specifically permits the use of that category of evidence for the purposes of the confirmation hearing. The Prosecution hereby notifies the Chamber and the Defence that it wishes to rely on the following 17 documents, previously disclosed pursuant to Rule 77, for the purposes of the confirmation of charges. The following is a list of the ERNs for these documents and the date that each document was previously disclosed.

CIV-OTP-0002-0136 - (03 February 2012)

CIV-OTP-0018-0985 - (25 April 2012)

CIV-OTP-0018-1069 - (25 April 2012)

CIV-OTP-0018-0687 - (25 April 2012)

CIV-OTP-0018-0690 - (25 April 2012)

CIV-OTP-0018-0311 - (25 April 2012)

CIV-OTP-0018-0693 - (25 April 2012)

CIV-OTP-0025-0334 - (12 July 2012)

CIV-OTP-0025-0162 - (12 July 2012)

CIV-OTP-0027-0090 - (17 August 2012)

CIV-OTP-0027-0304 - (09 November 2012)

CIV-OTP-0048-0104 - (15 October 2013)

CIV-OTP-0048-0497 - (15 October 2013)

CIV-OTP-0048-0748 - (15 October 2013)

CIV-OTP-0048-1146 - (15 October 2013)

CIV-OTP-0047-0794 - (15 October 2013)

CIV-OTP-0047-0792 - (15 October 2013)

6. All of the above listed documents were disclosed without any redactions to the documents themselves. With respect to two of these documents the metadata was also disclosed without any redactions. With respect to the other 15 documents the metadata was disclosed with redactions. The redactions previously applied to the metadata of these documents have been reviewed in advance of this submission and the Prosecution believes that the redactions should be maintained with respect to 14 of the 15 documents.
7. The redactions to the metadata are no longer required for document CIV-OTP-0027-0304 since the investigator whose name was previously redacted is no longer employed with the Office of the Prosecutor. Thus, the metadata for this document can be re-disclosed without redactions.
8. Documents CIV-OTP-0002-0136 and CIV-OTP-0045-0973 were previously disclosed without redactions.
9. The Prosecution requests that documents CIV-OTP-0027-0304, CIV-OTP-0002-0136 and CIV-OTP-0045-0973 be reclassified as incriminating so they can be accommodated within the established "eCourt protocol"⁴.

Maintaining redactions previously applied to Rule 77 documents

10. The remaining 14 documents from the above list were previously disclosed with redactions to the metadata only. These redactions were applied by the Prosecution in accordance with the procedure established by the Single Judge in

⁴ ICC-02/11-01/11-18 and ICC-02/11-01/11-18-Anx1.

her Decision establishing a disclosure system and a calendar for disclosure.⁵ It is of course important to note that the Decision restricted the application of redactions in this manner to “items...on which he does not intend to rely for the purposes of the confirmation hearing.”⁶ This decision did not set out a specific procedure to be followed in the event of a “re-categorization” of such evidence.⁷

11. Now wishing to rely on these items for the purposes of the confirmation of charges, the Prosecution seeks the authorization of the Chamber to do so, and requests that the Chamber review and authorize the continuation of the redactions previously applied.
12. Seeking the Chamber’s approval to rely on Rule 77 material and to maintain redactions previously made is not a step in the procedure that was contemplated or addressed in the Single Judge’s decision establishing a disclosure system and a calendar for disclosure⁸; nor was it contemplated or addressed in the Chamber’s decision to adjourn the Confirmation Hearing⁹. Thus, it is arguable that the Prosecution has not exceeded any time limit imposed by the Chamber.
13. Notwithstanding the foregoing, in the event that the Chamber determines that a time limit has been exceeded the Prosecution then requests an extension of time to include these documents as material to be relied upon for the purposes of the confirmation of charges. The requirements of Regulation 35(2) are met. For the reasons stated in paragraph 2, and because these documents were only recently identified as being material and relevant to aspects of the DCC that are being amended, it was not possible to make this application earlier.

⁵ ICC-02/11-01/11-30.

⁶ ICC-02/11-01/11-30, at paragraph 51.

⁷ It appears that this possibility was not raised by the parties and as such was not addressed in the decision.

⁸ ICC-02/11-01/11-30.

⁹ ICC-02/11-01/11-432.

14. The Prosecution also requests that these 14 documents be reclassified as incriminating so that they can be accommodated within the established “eCourt protocol”.
15. Reclassifying these documents as incriminating and permitting the Prosecution to rely on them for the purposes of the confirmation of charges will not prejudice the Defence. With respect to the documents previously disclosed to the Defence pursuant to Rule 77, they have been available to the Defence for a significant period of time, and the Defence has not requested any clarifications or additional information from the Prosecution about the redactions to the metadata. The Defence will have sufficient time to re-analyse these documents as material the Prosecution intends to rely on for the purposes of the confirmation of charges.

One document previously disclosed pursuant to Article 67(2)

16. Document CIV-OTP-0045-0973, is a 2-page Côte d’Ivoire government report. A copy of the document was obtained by the OTP on 11 July 2013. It was disclosed on 15 October 2013. The document contains some incriminating information, some “Rule 77” information, and some “Article 67(2)” information. After its initial review it was disclosed, without redactions, to the Defence pursuant to Article 67(2).
17. During the process of preparing to amend the DCC, as mentioned above, this document was again reviewed and the incriminating information was deemed material and relevant. The Prosecution wishes to rely on this document for the purposes of the confirmation of charges and seeks the authorization of the Chamber to do so.

18. There would be no prejudice to the Defence because this document has already been disclosed without redactions, and no time limit for the disclosure of incriminating evidence has been exceeded. Additionally, the Defence is aware of other incriminating evidence with similar content, such as reports from the UNOHCHR¹⁰ and Human Rights Watch¹¹, which have already been disclosed to the Defence.

One document not previously disclosed

19. Document CIV-OTP-0002-0725, is a public report dated 2005, which is still available on the Internet. It was registered in the Prosecution Ringtail database in 2011. It was not previously disclosed because it was not considered relevant at that time. A copy of this document is attached as Annex 1.

20. During the recent review of evidence and drafting of the Amended DCC, including addressing the six questions of the Chamber¹², this document was identified as being relevant to the issue of the historical context or “earlier conflict” which involved similar or related participants to the post-election violence of 2010-2011.

21. The Prosecution now wishes to rely on this document for the purposes of the confirmation of charges; and intends to disclose it as incriminating evidence without redactions to the document or its metadata. Since the document was in the Prosecution’s possession prior to 3 June 2013 the Prosecution requests an extension of the time limit¹³, pursuant to Regulation 35, and permission to

¹⁰ CIV-OTP-0002-0072.

¹¹ CIV-OTP-0004-0072.

¹² ICC-02/11-01/11-432, at paragraph 44.

¹³ ICC-02/11-01/11-432, at page 22, paragraph c)(i).

formally disclose¹⁴ this document as incriminatory evidence. The requirements of Regulation 35(2) are met. For the reasons stated above, and specifically because this document was only recently identified as being material and relevant to aspects of the DCC that are being amended, it was not possible to make this application prior to the 5 July 2013 time limit.

22. Permitting disclosure of this item as incriminating evidence will not prejudice the Defence. The Chamber's recent decision to suspend the calendar for the remaining stages of the Confirmation Hearing has the effect of providing a significant amount of additional preparation time to both parties. Thus the Defence will have time to review and respond to this document.

Request for Redactions pursuant to Rule 81(2)

23. All redactions previously made to the metadata of the documents were appropriately made pursuant to Rule 81(2) and the Prosecution seeks the Chamber's approval of these redactions and an order from the Chamber that these redactions can be continued.

24. Annex 2 to this filing contains a table that identifies the exact redactions previously applied to the metadata of these documents, for which the Chamber's approval is now requested, and identifies the factual and legal basis for the redactions.

25. As detailed in Annex 2, for all 15 documents the redactions to the metadata included redactions of the investigators' names; and for 6 of the documents the

¹⁴ The document itself is presented to the Defence as an Annex to this submission, and in that sense knowledge of its content is 'disclosed' to the Defence. The Prosecution intends to disclose the metadata, without redactions, upon receipt of the Chamber's decision.

redactions to the metadata also included the name of the source of each document.

26. Approval of the Chamber to maintain these redactions is sought pursuant to Rule 81(2) to protect further and ongoing investigations. Revealing to the Defence any of the information previously redacted could impact on the Prosecution's ability to conduct its investigations, as it may unduly attract attention to the movement of Prosecution staff and by extension to (potential) witnesses and also impact on their security.¹⁵ These redactions also ensure that the Prosecution can conduct its investigations using a limited number of OTP staff. This precludes the necessity to replace staff, which would have a negative impact, both on the expeditious conduct of its investigations and the resources required to conduct such investigations.

27. Investigators within the OTP can work on different investigations at once, and when they finish working on one investigation they are assigned to another. In this respect, they will always be moving from one investigation to another and will therefore be repeatedly facing potential security issues requiring that their identities be kept confidential. When the identities of investigators are revealed in one case, it makes it significantly more difficult to maintain confidentiality in subsequent cases. Thus absent some showing of a specific need or justification for the disclosure of the identities of the investigators, the Prosecution will seek as a matter of practice to maintain the confidentiality of investigator identities. For these reasons, pertaining both to the present case and to the overall practice of the Prosecution, the redactions of the identities of the investigators should be maintained.

¹⁵ Although these redactions are sought pursuant to Rule 81(2), they also have security implications for victims and witnesses and they can therefore equally be justified under Rule 81(4).

28. The investigations of the OTP are also conducted confidentially. The Prosecution noted above that the Chamber in its Decision requested the Prosecution to consider the submission of additional evidence or the conduct of further investigations.¹⁶ The Prosecution has done so, and continues to investigate the situation in Côte d'Ivoire. In order to maintain the confidentiality of its investigation and protect the reliability of its ongoing evidence collection, the Prosecution seeks to redact investigative leads, including the names of sources.

29. The redactions being reviewed in this submission were applied only to the metadata of the documents. Maintaining these redactions would not result in unfairness to the suspect at the confirmation of charges, since they do not relate to information that is relevant for the preparation of the case of the Defence. The Prosecution will also periodically review the need to maintain redactions and, if they are no longer required, request their lifting. The redactions previously applied were appropriate under Rule 81(2). And pursuant to Rule 81(2) it is requested that the Chamber authorize these same redactions. Such an authorization would be consistent with prior Decisions of the Chamber that authorized similar redactions.¹⁷

No impact on the fairness of the proceedings

30. In addition to the specific submissions above, the Prosecution states that granting all of the relief requested in this submission will have no impact on the fairness of these proceedings, and the Defence will not suffer from any prejudice.

¹⁶ The Chamber has made public the topics on which it wishes the Prosecution to submit or collect further evidence. In this context, keeping confidential the identity of possible lead information becomes all the more essential.

¹⁷ ICC-02/11-01/11-74-Red, ICC-02/11-01/11-106, ICC-02/11-01/11-294, ICC-02/11-01/11-465, ICC-02/11-01/11-466-Conf-Red, ICC-02/11-01/11-514, ICC-02/11-01/11-520, ICC-02/11-01/11-549, ICC-02/11-01/11-554-Conf-Red, and ICC-02/11-01/11-556.

31. There is only one document that will be “new” to the Defence. It is attached as Annex 1 and is thus immediately available to the Defence. They will have sufficient time to review and respond to it, and to the reclassification of the other documents.

Conclusion

32. For the reasons set out above, the Prosecution requests the Chamber to:

- a. Grant, pursuant to Regulation 35, the extension of time for the Prosecution to maintain redactions already applied to the metadata of the documents previously disclosed pursuant to Rule 77;
- b. Authorize the maintenance of the redactions already applied to the metadata of the documents previously disclosed pursuant to Rule 77;
- c. Authorize the Prosecution to rely on the documents previously disclosed pursuant to Rule 77 and the one document previously disclosed pursuant to Article 67(2) for the purposes of the confirmation of charges;
- d. Authorize these documents to be reclassified as incriminating evidence as established by the “eCourt protocol”; and,

- e. Authorize the Prosecution to rely on document CIV-OTP-0002-0725 for the purposes of the confirmation of charges; and to disclose it as incriminating evidence in eCourt compatible format.



Fatou Bensouda, Prosecutor

Dated this 15th day of November 2013

At The Hague, The Netherlands