

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **15 September 2015**

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

Public

With confidential Annex A

Prosecution's request to add expert witness P-0606 to its list of witnesses

Source: Office of the Prosecutor

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

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Introduction

1. The Office of the Prosecutor ("Prosecution") seeks authorisation to add Expert Witness P-0606 to its List of Witnesses¹ pursuant to articles 64(6)(f) and 69(3) of the Statute, rule 76(2) of the Rules of Procedure and Evidence and/or regulation 35(2) of the Regulations of the Court ("RoC"). P-0606 is the expert who authenticated and enhanced a key video of the 3 March 2011 incident recorded in high definition by Witness P-0114.

2. The Prosecution's List of Witnesses was filed on 30 June 2015.² P-0606 was not, in error, included on the list,³ although his three-page expert report was disclosed as incriminatory material on 8 June 2015,⁴ then included on the Prosecution's List of Evidence filed on 30 June,⁵ and relied upon in the Prosecution's Pre-Trial Brief, filed on 16 July 2015.⁶ The Defence has thus been on notice of the Prosecution's intention to rely upon the evidence of P-0606 at trial. Indeed, in written submissions on 14 April,⁷ and oral submissions on 21 April 2015,⁸ the Prosecution informed both the Chamber and Parties that an expert report was being prepared and finalised by P-0606.

3. P-0606's evidence is highly relevant and probative. His addition to the List of Witnesses is in the interests of justice and would not unduly prejudice the Defence. Even so, the Prosecution undertakes not to call P-0606 in either its first 20 witnesses, or during the first half of 2016. In addition, the Prosecution hereby

¹ ICC-02/11-01/15-114-Conf-AnxA-Corr ("List of Witnesses").

² See ICC-02/11-01/15-114. See also the Trial Chamber's Order setting the commencement date for trial: ICC-02/11-01/15-58 ("7 May 2015 Order").

³ And a summary of his expected evidence was not submitted.

⁴ The enhanced video (CIV-OTP-0082-0357) and all other material relevant to the expertise of P-0606 were also disclosed on that same day: see ICC-02/11-01/15-86-Conf-AnxA.

⁵ See CIV-OTP-0082-0350 at ICC-02/11-01/15-114-Conf-AnxC ("List of Evidence"), p.262., P-0606's *curriculum vitae* (CIV-OTP-0082-0352) and the enhanced video (CIV-OTP-0082-0357) are also on the Prosecution's List of Evidence.

⁶ See ICC-02/11-01/15-148-Conf-Anx2-Corr, fns.1066 and 1067.

⁷ ICC-02/11-01/15-35-Red, para.13.

⁸ ICC-02/11-01/15-T-1-CONF-ENG ET, p. 10, lns.6ff.

submits, at Confidential Annex A, a summary of the main facts on which it is expected P-0606 will testify.

Confidentiality

4. Annex A is classified as “Confidential” pursuant to regulation 23*bis*(2) of the RoC as it contains the summary of the main facts on which it is expected P-0606 will testify. All summaries were submitted confidentially on 30 June 2015.⁹

Submissions

5. By its 7 May 2015 Order, the Trial Chamber directed the Prosecution to file its List of Witnesses by 30 June 2015.¹⁰
6. Under regulation 35(2) of the RoC, prior to the expiry of the time limit, a Chamber may extend a time limit “if good cause is shown”, and after the lapse of the time limit, “an extension may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control”.¹¹
7. Where the requirements of regulation 35(2) are met, the use of additional evidence is permitted “so long as such additions do not cause undue prejudice to the Defence”.¹²
8. This Trial Chamber has observed that regulation 35(2), last sentence, provides a strict standard affording only a few exceptions.¹³

⁹ ICC-02/11-01/15-114-Conf-AnxB-Corr.

¹⁰ 7 May 2015 Order, para.25.

¹¹ Regulation 35(2), last sentence.

¹² ICC-01/09-01/11-899-Red, paras.15-17; *see also* ICC-01/04-01/07-1590, para.12 (stating that where regulation 35(2) is satisfied, “the Chamber will in principle allow the late submission, unless this would cause undue prejudice to the Defence”).

¹³ ICC-02/11-01/15-183-Red, para.19.

9. Consistent with this Trial Chamber's jurisprudence,¹⁴ when the terms of the regulation are not met, the Chamber may nevertheless authorise the addition of evidence, if it can be permitted in line with the Chamber's obligation under article 64(2) of the Statute to ensure that "a trial is fair and expeditious and is conducted with full respect for the rights of the accused [...]". Such decisions require a case-by-case assessment which balances the justifications for adding new evidence against the potential prejudice which may be caused to the other party.¹⁵ In conducting this exercise, the Chamber shall be mindful of the right of the accused to have adequate time and facilities for the preparation of their defence. The Chamber may consider many factors, including (i) the length of time that has elapsed since the deadline; (ii) whether the new witness brings to light a previously unknown fact which has a significant bearing on the case; (iii) whether good cause exists for not seeking to add the witness at an earlier stage of the proceedings; (iv) whether the other party can be given adequate time to investigate the proposed new witness, bearing in mind the need to conduct the trial fairly and expeditiously; and (v) whether it would be in the interests of justice to grant the request.¹⁶

10. The Prosecution seeks here to add P-0606 to its List of Witnesses after expiry of the 30 June 2015 deadline for filing both the list, and summaries of the main facts upon which each witness will testify. The Prosecution does not advance an argument that the circumstances show reasons outside the Prosecution's control, within the meaning of the last sentence of regulation 35(2).¹⁷ Nevertheless, all of the circumstances - as elaborated below - justify addition of P-0606 to the Prosecution's list. P-0606's evidence is essential to the Prosecution's case, and

¹⁴ ICC-02/11-01/15-183-Red, para.20.

¹⁵ ICC-02/09-02/11-832, para.11.

¹⁶ ICC-02/09-02/11-832, para.11. *See also*, in the context of disclosure, in this case: ICC-02/11-01/15-183-Red, para.20; in the context of additions to the list of evidence, in the *Ntaganda* case: ICC-01/04-02/06-740-Red, para.13.

¹⁷ *See, for eg*, in the *Katanga* case: ICC-01/04-01/07-1515-Corr, paras.28, 33; in the *Ruto* case: ICC-01/09-02/11-832, paras.10, 12.

necessary for the determination of the truth. The Defence does not suffer undue prejudice as a result of the addition of P-0606 to the Prosecution's list, and can be given adequate time to investigate the proposed new witness.

The evidence of Witness P-0606 is essential to the Prosecution's case

11. The expertise of Witness P-0606 is essential to the Prosecution's case related to the charged incident of 3 March 2011, and necessary for the determination of the truth.
12. The expert testimony of P-0606, combined with the expected testimony of other Prosecution witnesses, will refute the different statements made soon after the 3 March 2011 incident by pro-Gbagbo government entities, the pro-Gbagbo media, and the Accused, Blé Goudé.
13. The Prosecution will prove at trial that, although the Gbagbo government had evidence implicating the FDS in the 3 March 2011 incident, first, the FDS denied responsibility, second, the pro-Gbagbo media denounced this incident as a set-up, and third, the Council of Ministers denied all responsibility, suggesting that the accusations levelled against the FDS were pure fabrication. On 23 March 2011 – as the Prosecution will show – the Accused Blé Goudé stated that the FDS could not be responsible for the women's death on 3 March 2011 because Abobo was in rebel hands at the time.¹⁸
14. The testimony and expert report of P-0606 is critical in that it will serve to prove beyond a reasonable doubt that the high definition video, filmed by Witness P-0114, of the 3 March 2011 incident is authentic, and that both the image and sound have not been manipulated or tampered with.

¹⁸ See Pre-Trial Brief, ICC-02/11-01/15-148-Conf-Anx2-Corr, para.349.

The Defence does not suffer undue prejudice

15. Witness P-0606's name was omitted from the Prosecution's List of Witnesses in error, despite the Prosecution's best efforts in providing the Chamber and the Defence with a complete List of Witnesses, and accompanying summaries.
16. In written submissions on 14 April 2015, and again in oral submissions during the Status Conference on 21 April,¹⁹ the Prosecution informed the Chamber and Parties that an expert report was being prepared and finalised by P-0606.²⁰ P-0606's three-page report was disclosed to the Defence on 8 June 2015.²¹ The report was thereafter included on the List of Evidence, filed on 30 June,²² and referenced in the Prosecution's Pre-Trial Brief, as filed on 16 July 2015.²³ As already advanced, the Prosecution erroneously omitted P-0606 from its List of Witnesses. The Prosecution only realised its oversight on 14 September 2015, immediately before filing this request.²⁴
17. Given that P-0606's report was disclosed as incriminating material over three months ago, P-0606's addition to the List of Witnesses will cause little, if any, prejudice to the Defence. The Defence has been on notice of the specific relevance of P-0606's report - which is only three pages long - and the Prosecution's intention to rely upon it, as a result both of its inclusion in the Prosecution's List of Evidence, and reference in the Pre-Trial Brief. It cannot come as a surprise to the Defence that the Prosecution, having disclosed and relied upon the expert report of P-0606 in its written brief, would seek to call this witness at trial to

¹⁹ ICC-02/11-01/15-T-1-CONF-ENG ET, p.10, lns.6ff.

²⁰ ICC-02/11-01/15-35-Red, para.13.

²¹ The enhanced video (CIV-OTP-0082- 0357) and all other material relevant to the expertise of P-0606 were also disclosed on the same day: see ICC-02/11-01/15-86-Conf-AnxA.

²² See CIV-OTP-0082-0350 at ICC-02/11-01/15-114-Conf-AnxC, p. 262. P-0606's *curriculum vitae* (CIV-OTP-0082-0352) and the enhanced video (CIV-OTP-0082-0357) are also on the Prosecution's List of Evidence.

²³ ICC-02/11-01/15-148-Conf-Anx2-Corr, fns. 1066 and 1067.

²⁴ The Prosecution realised its oversight upon reviewing its list of experts, in preparation for the upcoming status conference to be held on 25 September 2015: ICC-02/11-01/15-214.

introduce the report and speak to its content. Indeed, in the context of an expert witness such as P-0606, both expert report and testimony are, ordinarily, essential components of the expert's evidence, taken as a whole.

18. The presentation of the evidence is due to start in January 2016. In order to allow the Defence additional time to prepare, the Prosecution undertakes not to call P-0606 either as one of its first 20 witnesses, or in the first half of 2016. The Prosecution also submits by this filing, at Confidential Annex A, a summary of the main facts on which it is expected P-0606 will testify.

Conclusion

19. For the foregoing reasons, the Prosecution respectfully requests that the Trial Chamber grant the request and, in the interests of justice, permit the Prosecution to add Expert Witness P-0606 to its List of Witnesses.



Fatou Bensouda, Prosecutor

Dated this 15th day of September 2015
At The Hague, The Netherlands