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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 Public Annex A**

Public redacted version of Prosecution's Request for an extension of time to disclose and add to its list of evidence two expert reports and to disclose a related report under rule 77, 22 September 2015, ICC-02/11-01/15-234-Conf

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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”) applies, under regulations 35 and 44(5) of the Regulations of the Court (“Regulations”), articles 64(3)(c), 64(3)(f) and 69(3) of the Statute, and rules 76(2) and 84 of the Rules of Procedure and Evidence for an extension of time to disclose and add to its List of Evidence¹ two additional expert reports prepared by Prosecution expert Witness P-0601 (“additional reports”), and to disclose a related report, CIV-OTP-0081-0532, under rule 77.
2. The additional reports, dated 23 June 2015 (“23 June 2015 report”)² and 12 August 2015 (“12 August 2015 report”)³ were received by the Prosecution on 6 July 2015 and (in hard copy) on 16 September 2015 respectively. Both are drafted by P-0601 and both relate to the 3 March 2011 charged incident. P-0601 is a Prosecution expert witness⁴ on DNA analysis and interpretation who reports in his capacity as a [REDACTED] for the Netherlands Forensic Institute (“NFI”). He will provide expert evidence for the Prosecution on the issue of the identification of deceased victims of the 3 March 2011 charged incident.⁵ P-0601’s expert report (as amended), dated 13 May 2015 (“amended report”),⁶ was disclosed⁷ in advance of the Trial Chamber’s 30 June 2015 disclosure deadline⁸ and is included on the Prosecution’s List of Evidence.⁹ The proposed material in this request consists of supplements to this report.
3. CIV-OTP-0081-0532 is an autopsy report, dated 8 May 2015, prepared by Prosecution witnesses P-0564 and P-0585, relating to the body of an alleged victim of the 3 March 2011 charged incident. [REDACTED] samples taken from this body were analysed by P-0601 for purposes of his 12 August 2015 report. The

¹ See ICC-02/11-01/15-114-Conf-AnxC (“List of Evidence”).

² CIV-OTP-0083-1482, and the related cover letter at CIV-OTP-0083-1481.

³ CIV-OTP-0086-1261.

⁴ See Prosecution’s List of Witnesses, filed on 30 June 2015 and Corrigendum filed on 24 July 2015: ICC-02/11-01/15-114-Conf-AnxA-Corr.

⁵ See P-0601’s witness summary: ICC-02/11-01/15-114-Conf-AnxB-Corr, p.405.

⁶ CIV-OTP-0084-3930, as amended.

⁷ Disclosed in Pre-Trial INCRIM package 17, on 30 June 2015 ICC-02/11-01/15-116. The original report (CIV-OTP-0078-0532) was disclosed in Pre-Trial INCRIM package 9, on 11 May 2015, ICC-02/11-01/15-62.

⁸ See ICC-02/11-01/15-58 (“7 May 2015 Order”), para.22.

⁹ See ICC-02/11-01/15-114-Conf-AnxC.

Prosecution received this report on 10 May 2015, and now seeks to disclose it under rule 77. The report was not disclosed previously because the Prosecution could not evaluate its relevance before receipt of the 12 August 2015 report, as elaborated below.

4. The Prosecution seeks an extension of time, in relation to the additional reports, to comply with its obligation to disclose the reports of its expert witnesses,¹⁰ and permission to add the additional reports to its List of Evidence. The Prosecution also seeks an extension of time to disclose CIV-OTP-0081-0532 under rule 77. The additional reports, and CIV-OTP-0081-0532, are attached at Confidential Annex A.

Confidentiality

5. This motion is filed confidentially, because it refers to evidence presently treated as confidential in nature. Annex A is, similarly, filed confidentially.

Background

6. By its 7 May 2015 Order, the Trial Chamber directed the Prosecution to disclose the reports of its expert witnesses, as well as all article 67(2) and rule 77 material in its possession, by 30 June 2015.¹¹
7. P-0601's first report, dated 27 March 2015,¹² was replaced by an amended report, dated 13 May 2015¹³. Both reports were disclosed in advance of the 30 June 2015 disclosure deadline,¹⁴ and included on the Prosecution's List of Evidence.¹⁵
8. The additional reports answer specific requests made by the Prosecution, on the basis of the first (and amended) report(s):

¹⁰ See 7 May 2015 Order, para.22.

¹¹ 7 May 2015 Order, para.22.

¹² CIV-OTP-0078-0532, received by the Prosecution on 1 April 2015.

¹³ CIV-OTP-0084-3930, received by the Prosecution on 25 May 2015.

¹⁴ 7 May 2015 Order, para.22.

¹⁵ See ICC-02/11-01/15-114-Conf-AnxC.

- a. On 8 May 2015 (“8 May Request”), the Prosecution requested further DNA analysis in relation to one victim from the 3 March 2011 incident (request number 004). This request was answered by the 23 June 2015 report.¹⁶
 - b. On 12 May 2015 (“12 May Request”), the Prosecution requested, *inter alia*, further DNA analysis in respect of other alleged victims of the 3 March 2011 incident (request number 005).
 - c. Two reports received in response to the 12 May request (dated 3¹⁷ and 18¹⁸ August 2015) have been disclosed to the Defence under rule 77.¹⁹ The third - the 12 August 2015 report ²⁰ – forms part of this application.
9. CIV-OTP-0081-0532 is an autopsy report, dated 8 May 2015, prepared by Prosecution witnesses P-0564 and P-0585, relating to the body of an alleged victim of the 3 March 2011 charged incident (“alleged victim 13”). [REDACTED] samples retained during this autopsy were submitted for analysis by P-0601 as part of the 12 May request. The Prosecution received CIV-OTP-0081-0532 on 10 May 2015.
 10. The 12 August 2015 report analysed the [REDACTED] samples of alleged victim 13 (as well as [REDACTED] samples related to other alleged victims of the 3 March 2011 incident). None of the samples related to alleged victim 13 resulted in a DNA profile. DNA kinship analysis could not, therefore, be conducted in relation to this alleged victim.
 11. On 30 June 2015, the Prosecution filed a request pursuant to regulation 35 (“30 June 2015 Request”),²¹ indicating that it was expecting additional expert reports from the NFI arising out of its 12 May Request. The Prosecution’s 8 May Request (and consequent report) was not mentioned in the 30 June 2015 Request.
 12. In its 18 August 2015 Decision, the Trial Chamber rejected the Prosecution’s request for an extension of the disclosure deadline in respect of the “eventual

¹⁶ CIV-OTP-0083-1482, and the related cover letter at CIV-OTP-0083-1481. Received by the Prosecution on 6 July 2015.

¹⁷ CIV-OTP-0086-0568.

¹⁸ CIV-OTP-0086-0609.

¹⁹ Disclosed in Pre-Trial Rule 77 package 20, on 9 September 2015: ICC-02/11-01/15-210.

²⁰ CIV-OTP-0086-1261. Received in hard copy by the Prosecution on 16 September 2015.

²¹ ICC-02/11-01/15-115-Conf, para.24.

disclosure of two additional expert reports by NFI”,²² on grounds that the Prosecution request was “premature”, because it was submitted *in abstracto*.²³ The Trial Chamber found that it was “not in a position to determine the degree of prejudice, if any, that may result from late disclosure”.²⁴ The Trial Chamber also found that if, upon receipt of potential NFI expert reports, the Prosecution wished “to be authorised to rely on these expert reports at trial, it shall seise the Chamber anew providing the necessary justification”.²⁵

Submissions

13. This request is made after the expiry of the 30 June 2015 disclosure deadline, following receipt by the Prosecution of the last of four new reports received from the NFI, related to its 8 and 12 May Requests.²⁶
14. Under regulation 35(2) of the Regulations, 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”.²⁷
15. 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”.²⁸
16. This Trial Chamber has observed that regulation 35(2), last sentence, provides a strict standard affording only a few exceptions.²⁹

²² ICC-02/11-01/15-183-Red (“18 August 2015 Decision”), para.36.

²³ 18 August 2015 Decision, para.39.

²⁴ 18 August 2015 Decision, para.38.

²⁵ 18 August 2015 Decision, para.39.

²⁶ Including two reports now disclosed as rule 77: CIV-OTP-0086-0568 and CIV-OTP-0086-0609.

²⁷ Regulation 35(2), last sentence.

²⁸ 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”).

²⁹ ICC-02/11-01/15-183-Red, para.19.

17. Nevertheless, the Trial Chamber may authorise an extension of the relevant time limit for disclosure after expiry of the relevant deadline, having conducted a case-by-case assessment – one that balances the justifications for late disclosure with any potential prejudice to the receiving party – consistent with its obligations under article 64(2) of the Statute.³⁰ 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. Additional factors that may be considered include: (i) whether the new evidence brings to light a previously unknown fact that has a significant bearing on the case; (ii) whether the other party will have adequate time to investigate the new evidence, bearing in mind the need to conduct the trial fairly and expeditiously; and (iii) whether it would be in the interests of justice to grant the request.³¹
18. The Prosecution is under an ongoing obligation to disclose rule 77 material, as reiterated by the Trial Chamber in its 18 August 2015 Decision.³² Where the criteria under regulation 35(2) are not met, rule 77 material *must*, nevertheless, be disclosed.³³

The additional reports

Justification for late disclosure

19. This application is made following receipt of the last of the new reports generated by the Prosecution's 8 and 12 May Requests.³⁴ Further, the Prosecution reminds the Chamber that, in relation to the 12 August 2015 report at least, the Prosecution filed, on 30 June 2015, a prior request pursuant to regulation 35,³⁵ anticipating the need to disclose - and rely upon at trial - additional NFI expert reports related to

³⁰ ICC-02/11-01/15-183-Red, para.20. *See also*, in the context of additions to the list of evidence, in the *Ntaganda* case: ICC-01/04-02/06-740-Red, para. 13; and in the context of additions of witnesses to the list of witnesses, in the *Kenyatta* case: ICC-02/09-02/11-832, para. 11. Article 64(2) requires the Trial Chamber to ensure that the trial is "fair and expeditious and is conducted with full respect for the rights of the accused".

³¹ ICC-02/11-01/15-183-Red, para.20; ICC-01/04-02/06-740-Red, para.13.

³² ICC-02/11-01/15-183-Red, paras.34 and 39.

³³ *See e.g.* in the *Katanga* case: ICC-01/04-01/07-1590, para.12; ICC-01/04-01/07-1336, para.29 (in relation to potentially exculpatory material).

³⁴ Including two reports now disclosed as rule 77: CIV-OTP-0086-0568 and CIV-OTP-0086-0609.

³⁵ ICC-02/11-01/15-115-Conf, para.24.

the 3 March 2011 incident.³⁶ The additional reports to which this application relates are attached at Confidential Annex A.³⁷ The Trial Chamber is thus in a position to consider the application concretely, with all of the relevant information before it.

20. Upon receipt of P-0601's first report on 1 April 2015, the Prosecution exercised all due diligence in considering its content, and formulating specific requests related to it.
21. On 8 May 2015, the Prosecution submitted request number 004 for further DNA analysis. The additional report is dated 23 June 2015 - and received by the Prosecution on 6 July 2015 - because the NFI were at that time very much engaged with their scientific investigations into the downing of flight MH17 over Ukraine. On 12 May 2015, the Prosecution submitted request number 005. The additional report is dated 12 August 2015 - and received (in hard copy) by the Prosecution on 16 September 2015 - for the same reasons.³⁸
22. These circumstances constitute good cause and reasons outside the Prosecution's control within the meaning of regulation 35(2).³⁹

Disclosure is in the interests of justice and the Defence will suffer little, if any prejudice

23. All of the circumstances justify granting the Prosecution's application. Permission for the Prosecution to disclose and rely upon the additional reports is in the interests of justice and consistent with the Trial Chamber's obligations under article 64(2). The Defence will suffer little, if any, prejudice as a result of the late disclosure.

³⁶ See paras 8-9 above.

³⁷ Together with a cover letter related to the 23 June 2015 report (CIV-OTP-0083-1481).

³⁸ See also ICC-02/11-01/15-115-Conf, para.25.

³⁹ The Prosecution notes the following decisions in the *Katanga* case: ICC-01/04-01/07-1515-Corr, paras.28 and 33 (the practical impossibility of conducting a mission in time and the resulting uncertainty as to whether and when the resulting expert reports in that case would be finalised did not constitute justification under regulation 35(2), last sentence, for not making an application before the expiration of the relevant time limit); and ICC-01/04-01/07-1590, paras.14-15 (the fact that the UN took a long time to give consent for a witness to testify did not constitute an "exceptional circumstance" in the sense of regulation 35(2) last sentence. The Prosecution knew before the expiration of the time limit that the consent of the UN was a pre-requisite for obtaining the witness's testimony and *a fortiori* for disclosing her statement). See also, in the *Kenyatta* case: ICC-01/09-02/11-832, para.10.

24. Both reports are short (five and eight pages respectively – including the cover page, with the addition of a one-page cover letter for the 23 June 2015 report⁴⁰). Their respective findings are relevant and directly linked to the amended report about which P-0601 will testify at trial. Both documents report on further, positive DNA matches to relatives of one of the victims of the 3 March 2011 incident. As such, the additional reports corroborate an existing and wide-ranging body of evidence in this case, related to the 3 March 2011 incident.
25. It would be artificial and plainly counter to the Trial Chamber's truth-seeking function and the interests of justice were P-0601 to be required to testify on the issue of his DNA analysis related to the 3 March 2011 incident, without reference to two additional reports which further clarify this issue.

Disclosure under rule 77 of CIV-OTP-0081-0532

26. The Prosecution seeks to disclose CIV-OTP-0081-0532 under rule 77. As indicated above, CIV-OTP-0081-0532 is an autopsy report, dated 8 May 2015, prepared by Prosecution witnesses P-0564 and P-0585. The Prosecution does not intend to rely upon CIV-OTP-0081-0532 at trial, or seek to add it to its List of Evidence.
27. The Prosecution received this report on 10 May 2015, but did not disclose it because the Prosecution could not evaluate its relevance before receipt of the 12 August 2015 report. On the basis of the findings, described above, of the 12 August 2015 report in relation to the human remains retained during the autopsy to which CIV-OTP-0081-0532 relates, the Prosecution now seeks to disclose CIV-OTP-0081-0532 under rule 77.
28. CIV-OTP-0081-0532 must be disclosed as a result of the Prosecution's ongoing obligation under rule 77, and the Defence will suffer little, if any, prejudice as a result of the disclosure of this report now. The report is just over two pages long, and is also attached at Confidential Annex A.

⁴⁰ CIV-OTP-0083-1481.

Conclusion

29. For the reasons described above, the Prosecution seeks permission to disclose and add to its List of Evidence the additional expert reports of Witness P-0601 and to disclose CIV-OTP-0081-0532 under rule 77.



Fatou Bensouda, Prosecutor

Dated this 30th day of October 2015

At The Hague, The Netherlands