



Original: English

No.: ICC-02/11-01/15
Date: 2 December 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 Annexes A and B

Public redacted version of "Prosecution's Request for an extension of time to disclose Witness P-0114's second statement and Witness P-0360's second statement and annexes", 23 October 2015, ICC-02/11-01/15-312-Conf

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

Ms Fatou Bensouda

Mr James Stewart

Mr Eric Macdonald

Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit

Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops

Mr Claver N'dry

Legal Representatives of the Victims

Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution applies, under regulation 35 of the Regulations of the Court (“Regulations”), articles 64(3)(c), 64(6)(f) and 69(3) of the Rome Statute (“Statute”), and rules 76(2) and 84 of the Rules of Procedure and Evidence, for an extension of time to disclose additional statements of Witnesses P-0114¹ and P-0360,² as well as 18 photographs,³ as incriminatory material, and to add them to its List of Evidence which was filed on 30 June 2015.⁴ The proposed material is attached hereto as Confidential Annex A and Confidential Annex B.
2. For reasons outside its control, the Prosecution was unable to obtain this material before the 30 June 2015 deadline for disclosure set by the Trial Chamber.⁵ The new statements do not add substantive information and mainly address matters relating to chain of custody.
3. For reasons elaborated below, the Prosecution submits that granting this Request is in the interests of justice, and will not cause the Defence any undue prejudice.

Confidentiality

4. This motion and its accompanying Annexes A and B are classified as confidential because both refer to evidence presently treated as confidential in nature.

Submissions

5. The Prosecution’s current application is brought under regulation 35(2) of the Regulations, given that it seeks permission to disclose material after the expiry of

¹ CIV-OTP-0089-0655 (“P-0114’s Second Statement”).

² CIV-OTP-0089-0557 (“P-0360’s Second Statement”).

³ CIV-OTP-0089-0568, CIV-OTP-0089-0569, CIV-OTP-0089-0570, CIV-OTP-0089-0571, CIV-OTP-0089-0572, CIV-OTP-0089-0573, CIV-OTP-0089-0574, CIV-OTP-0089-0575, CIV-OTP-0089-0576, CIV-OTP-0089-0577, CIV-OTP-0089-0578, CIV-OTP-0089-0579, CIV-OTP-0089-0580, CIV-OTP-0089-0581, CIV-OTP-0089-0582, CIV-OTP-0089-0583, CIV-OTP-0089-0584, CIV-OTP-0089-0585

⁴ ICC-02/11-01/15-114-Conf-AnxC (“List of Evidence”).

⁵ ICC-02/11-01/15-58, para. 22.

the 30 June 2015 disclosure deadline.⁶ Under this regulation, prior to the expiry of a time limit, a Chamber may extend a time limit “if good cause is shown”, and after the expiry of a 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”. If 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”.⁷ This Trial Chamber has observed that regulation 35(2) provides a strict standard affording only a few exceptions.⁸

6. Nevertheless, the Trial Chamber may authorise an extension of the time limit for disclosure after the expiry of the deadline having conducted a case-by-case assessment taking into consideration the justifications for late disclosure and the potential impact it may have upon the receiving party – consistent with its obligations under article 64(2) of the Statute⁹. Additional factors may be considered, such as: (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; and (iii) whether it would be in the interests of justice to grant the request.¹⁰ Furthermore, regulation 35 does “not exist for its own sake”¹¹ and should be read in accordance with regulation 1 and article 64 of the Statute.

⁶ ICC-02/11-01/15-58, para. 22.

⁷ 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”).

⁸ 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”).

⁹ 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”.

¹⁰ ICC-02/11-01/15-183-Red, para. 20; ICC-01/04-02/06-740-Red, para. 13.

¹¹ ICC-02/11-01/15-228, para. 29.

Witness P-0360: Good cause and reasons outside the Prosecution's control

7. In September 2015, the Prosecution obtained 18 photographs which it could not have retrieved from Witness P-0360 earlier. It secured this additional material as soon as it became available. Moreover, as detailed below, this material was already brought to the Defence's attention in Witness P-0360's prior statement provided on 15-16 July 2013 ("Witness P-0360's First Statement"). Witness P-0360's First Statement and accompanying annexes¹² were disclosed to the Gbagbo and Blé Goudé Defence teams by 9 May 2014¹³ and appear on the Prosecution's List of Evidence.
8. In his First Statement, Witness P-0360 [REDACTED]. [REDACTED].¹⁴ [REDACTED].¹⁵ Three annexes were attached to the First Statement: [REDACTED].¹⁶
9. Days after the incident, Witness P-0360 [REDACTED].¹⁷ After giving his First Statement, Witness P-0360 [REDACTED]. Witness P-0360 informed the Prosecution of this retrieval at the beginning of September 2015, and the Prosecution took immediate steps to obtain the photographs and to take a further statement from the witness in relation to the collection of the material.
10. Witness P-0360's photographs were handed over to the Prosecution during the first half of September 2015 and Witness P-0360's Second Statement was taken, dealing strictly with the issue of their chain of custody.
11. Witness P-0360's Second Statement, which the Prosecution now seeks to disclose and add to its List of Evidence, does not add any substance to Witness P-0360's

¹² CIV-OTP-0046-1203 and annexes: CIV-OTP-0046-1213, CIV-OTP-0046-1214 and CIV-OTP-0046-1215.

¹³ See Pre-confirmation INCRIM package 18 of 3 October 2013 (*Gbagbo* case); Pre-confirmation INCRIM package 2 of 9 May 2014 (*Blé Goudé* case).

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

First Statement, save to deal with the chain of custody of the 18 photographs which the Prosecution also seeks to disclose and rely on at trial.

12. The 18 photographs annexed to Witness P-0360's Second Statement were taken by him during the post-electoral crisis. They are of significant probative value, [REDACTED]. They will provide a better understanding of what the witness saw and the overall situation in [REDACTED]. The 18 photographs corroborate Witness P-0360's evidence, in particular, [REDACTED]. Six of the photographs were taken [REDACTED]. The remaining twelve photographs relate to [REDACTED]. Among the 18 photographs, one [REDACTED] is a duplicate and has already been disclosed as an annex to Witness P-0360's First Statement.¹⁸
13. Of the photographs Witness P-0360 took, [REDACTED].¹⁹ In his First Statement, Witness P-0360 also confirmed [REDACTED]²⁰ [REDACTED].
14. The circumstances in which Witness P-0360 retrieved his photographs and provided them to the Prosecution constitute good cause and reasons outside the Prosecution's control within the meaning of regulation 35(2).

Witness P-0114: Good cause and reasons outside the Prosecution's control

15. In October 2015, the Prosecution was able to meet with Witness P-0114 for the sole purpose of [REDACTED]. Witness P-0114 gave his Second Statement [REDACTED].²¹
16. Witness P-0114 [REDACTED]. [REDACTED] originally obtained by the Prosecution as open source material, was disclosed to the Gbagbo Defence team and the Blé Goudé Defence team on 3 February 2012 and 25 April 2014 respectively.²²

¹⁸ CIV-OTP-0046-1213, already on the List of Evidence.

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² CIV-OTP-0003-0716, disclosed in Pre-confirmation INCRIM package 1 (joint case).

17. In February 2015, investigators obtained a statement from Witness P-0114 [REDACTED].²³ This First Statement was disclosed to both Defence teams by 30 June 2015²⁴ and appears on the Prosecution's List of Evidence.

18. In March 2015, the Prosecution obtained the [REDACTED] of Witness P-0114's [REDACTED], and disclosed it to both Defence teams.²⁵ [REDACTED]. In following up the request in May, the Prosecution informed [REDACTED] to allow for timely disclosure. Despite further follow-ups by the Prosecution in June, July, August and September, [REDACTED].

19. On 15 October 2015, the Prosecution met with Witness P-0114 for the follow-up interview. [REDACTED]²⁶ [REDACTED].

20. The circumstances surrounding Witness P-0114's [REDACTED] constitute good cause and reasons outside the Prosecution's control within the meaning of regulation 35(2).

The requested permission to disclose is in the interests of justice and the Defence will suffer little, if any, prejudice.

21. All of the circumstances justify granting the Prosecution's request. Permission for the Prosecution to disclose the new material, and rely on it at trial, is in the interests of justice and consistent with the Trial Chamber's obligations under article 64(2) of the Statute.

22. It is submitted that the Defence will suffer little, if any, prejudice as a result of the late disclosure.

²³ [REDACTED].

²⁴ Pre-Trial INCRIM package 15. Before the joinder of the cases, P-0114's First statement has been disclosed on 27 February 2015 (Pre-Trial INCRIM Package 39) to the Gbagbo Defence and on 2 March 2015 (Pre-Trial INCRIM package 12 to the Blé Goudé Defence.

²⁵ CIV-OTP-0077-0411, disclosed in Pre-Trial INCRIM package 1 of 23 March 2015. [REDACTED].

²⁶ [REDACTED].

23. Witness P-0360's First Statement, in which he indicated that he would seek to retrieve the remaining photographs, was disclosed to the Defence teams by 18 June 2015, and the First Statement and accompanying photographs appear on the Prosecution's List of Evidence. The Second Statement only addresses the issue of chain of custody of the 18 newly obtained photographs.
24. Regarding Witness P-0114's Second Statement, the Defence will suffer no prejudice since Witness P-0114's First Statement [REDACTED], were all disclosed by the 30 June 2015 deadline. Witness P-0114's Second Statement [REDACTED]. The Prosecution submits that [REDACTED] is the best evidence, both in terms of chain of custody as well as [REDACTED].
25. Finally, neither Witness P-0360 nor Witness P-0114 will be called among the Prosecution's first 20 witnesses.²⁷
26. It would be artificial and counter to the Trial Chamber's truth-seeking function and the interests of justice if the new material was not before the Chamber, given that both witnesses will be speaking to the content of their first statements. These additions can only assist the Chamber in evaluating the evidence of both witnesses.

²⁷ See ICC-02/11-01/15-294-Conf-AnxA.

Conclusion

27. For the reasons outlined above, the Prosecution seeks permission to disclose Witness P-0360's Second Statement and the 18 accompanying photographs, as well as Witness P-0114's Second Statement as incriminatory material, and permission to add them to its List of Evidence.

A handwritten signature in blue ink, appearing to read 'Fatou Bensouda', is written over a horizontal line. The signature is stylized with a large initial 'F' and a long, sweeping underline.

Fatou Bensouda, Prosecutor

Dated this 2nd day of December 2015

At The Hague, The Netherlands