

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/11

Date: 1 June 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Single Judge

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR V. LAURENT GBAGBO***

**Public
URGENT**

**Decision on the "Requête de la Défense aux fins de prorogation du délai
d'expurgation, aux fins d'expurgation et aux fins d'attribution de
pseudonymes aux témoins"**

Decision to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor
Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence
Emmanuel Altit
Agathe Bahi Baroan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Judge Silvia Fernández de Gurmendi, Single Judge for Pre-Trial Chamber I of the International Criminal Court (“Chamber”), responsible for carrying out the functions of the Chamber in relation to the situation in the Republic of Côte d’Ivoire and the cases emanating therefrom¹ hereby issues the decision on the “*Requête de la Défense aux fins de prorogation du délai d’expurgation, aux fins d’expurgation et aux fins d’attribution de pseudonymes aux témoins.*”²

I. Procedural history and submissions of the Defence

1. On 23 November 2011, Pre-Trial Chamber III issued an arrest warrant for Laurent Gbagbo (“Mr Gbagbo”),³ who was transferred to the Court on 30 November 2011. On 5 December 2011, the first appearance of Mr Gbagbo was held before the Court. During the hearing, Pre-Trial Chamber III scheduled the commencement of the confirmation of charges hearing for 18 June 2012.⁴

2. On 24 January 2012, the Single Judge issued the “Decision establishing a disclosure system and a calendar for disclosure” (“Decision on Disclosure”) in order to ensure, in compliance with Rule 121(2)(b) of the Rules of Procedure and Evidence (“Rules”), that disclosure takes place under satisfactory conditions while safeguarding the interests at stake.⁵ To that end, the Decision on Disclosure, *inter alia*, ordered the Defence:

- (i) to submit no later than 10 May 2012 any request under Rule 81 of the Rules for redactions to evidence collected by the Defence;

¹ ICC-02/11-01/11-61.

² ICC-02/11-01/11-134-Conf-Exp.

³ Warrant Of Arrest For Laurent Gbagbo, 23 November 2011, ICC-02/11-01/11-1.

⁴ ICC-02/11-01/11-T-1-ENG, p. 8.

⁵ ICC-02/11-01/11-30 and Annex.

- (ii) to make *ex parte* applications for protective measures other than redactions as expeditiously as possible but no later than 5 March 2012; and
- (iii) to file in the record of the Case no later than 1 June 2012 the Defence List of Evidence, if any, to be presented at the confirmation hearing.

3. On 6 March 2012, the Single Judge issued the “Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations” (“Decision on the Protocols”).⁶

4. On 16 May 2012, the Prosecutor submitted, pursuant to Rule 121(3) of the Rule of Procedure and Evidence (“Rules”), his detailed description of the charges brought against Mr Gbagbo (“Document containing the Charges” or “DCC”).⁷

5. On 1 June 2012, the Defence submitted the “*Requête de la Défense aux fins de prorogation du délai d’expurgation, aux fins d’expurgation et aux fins d’attribution de pseudonymes aux témoins*” (“Request”).⁸ The Defence thereby submits (i) a request for extension of time limit to submit its requests for redactions to the declarations of seven persons and (ii) the actual requests for redactions.

6. The Defence recalls in particular that the DCC was submitted on 16 May 2012. It submits in this respect that it is therefore difficult within this time frame to identify and collect the statements of the relevant witnesses in

⁶ ICC-02/11-01/11-49 and its annex.

⁷ ICC-02/11-01/11-124-Anx1-Red.

⁸ ICC-02/11-01/11-134-Conf-Exp and its annexes.

light of the content of the DCC but also to reinsure them that their identity will not be disclosed.

7. The Defence further submits as annexes the declarations for which he is seeking anonymity of their authors and redactions to any information contained therein which could lead to their identification. He further underlines that the redacted versions of these declarations can also be made public.⁹

II. Applicable law

8. The Single Judge notes Articles 54, 57(3), 61, 67 and 68 of the Rome Statute and Rules 15, 78, 81 and 121 of the Rules and Regulation 35 of the Regulations of the Court.

III. Analysis and conclusions of the Single Judge

9. At the outset, the Single Judge recalls that the Defence should have informed the Prosecutor of the existence of his requests and of the underlying legal and factual basis of his requests for redactions to the largest extent possible. Accordingly, the Defence is directed to submit confidential or public redacted versions thereof.

A. Request for variation of time limit

10. In light of the fact that the Defence is due to submit its list of evidence today, 1 June 2012, the Single Judge is of the view that it is not possible to give the Prosecutor an opportunity to be heard on this matter.

11. The Single Judge notes the arguments brought forward by the Defence in support of its Request. The Single Judge further considers relevant that documents for which redactions are sought are not lengthy and that the

⁹ ICC-02/11-01/11-134-Conf-Exp, para.20.

Single Judge will be able to assess the legal and factual merits of the requests. Accordingly, the Single Judge considers it appropriate to address the Requests for redactions to the items of evidence in question.

B. *Requests for redactions*

12. The Single Judge recalls that to grant requests for redactions pursuant to rule 81(4) of the Rules, she must first and foremost, reach the conclusion that the disclosure to the Prosecutor of the identities of these persons, at this stage of the proceedings, could, as submitted by the Defence, pose a danger to their safety.¹⁰ It is recalled that, the risk alleged by the Defence “must involve an objectively justifiable risk” to their safety.¹¹ After having ascertained the existence of such risk, the Single Judge will notably assess whether the requested redactions are necessary, namely that the redactions sought could overcome or reduce such risk and that at this stage there are no less intrusive alternative protective measures available.

13. The Single Judge notes that the Defence has identified the existence of an objectively justifiable risk to the persons who submitted the declarations should their identity be disclosed. Indeed, having reviewed the declarations annexed by the Defence, the Single Judge is of the view that if they were to be disclosed to the public in an unredacted format, there would be an objectively justified security risk to their safety.

14. However, it is recalled that the Defence is seeking the anonymity of the authors of the declarations also vis-à-vis the Prosecutor. In this respect, the Single Judge draws the Defence’s attention to the fact that the risk alleged shall therefore arise out of the disclosure to the Prosecutor. In light of the information provided by the Defence, the Single Judge remarks that the risk

¹⁰ ICC-02/11-01/11-74-Red, paras 55-66, 82-102.

¹¹ Judgment of 13 May 2008, ICC-01/04-01/07-475, para.71.

alleged is created by persons or entities other than the Office of the Prosecutor. At no point in its request the Defence explain why the disclosure of their identities to the Prosecutor – as distinct from the above referred persons or entities – would endanger their safety. The alleged fear of disclosure to the Prosecutor cannot simply be completely hypothetical or denuded of factual basis. The Single Judge is accordingly of the view that the Defence has not provided sufficient information to demonstrate the existence of an objectively justifiable risk in disclosing the identities of the authors of the declarations to the Prosecutor.

15. In any event, the Single Judge wishes to recall at this juncture that Article 54(1)(b) of the Statute indeed sets an obligation for the Prosecutor to “respect the interests and personal circumstances of victims and witnesses” during his investigations. Moreover, article 68(1) of the Statute puts an obligation on the Court to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses” and expressly states that the “Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes.”

16. It is further recalled that, following consultations with the parties, the Single Judge issued the Decision on the Protocols. This decision aims at safeguarding, to the greatest degree possible, the security of witnesses during the investigations, whilst taking into account the rights and the obligations of the parties.

17. The Single Judge therefore considers that so long as (i) the identities of the authors of the declarations remain confidential and are therefore not disclosed to the public and (ii) the parties comply with the abovementioned Protocols, the safety of these persons would be safeguarded to the greatest degree possible.

18. The Single Judge is further of the view that the anonymity of their authors *vis-à-vis* the public would be better safeguarded if these declarations were not being filed publicly, even in a redacted form. Should reference to these declarations be made in public sessions of the confirmation of charges hearing or in public written submissions, the parties are directed to refer to the authors' pseudonym, which are to be conferred to them by the Defence in compliance with the e-court protocol.

FOR THESE REASONS,

GRANTS the Defence request for an extension of time limit to submit requests for redactions;

REJECTS the request for redaction as to the identity and identifying information of the authors of declarations;

ORDERS the parties to only refer to the authors' pseudonym, which are to be conferred to them by the Defence in compliance with the e-court protocol;

ORDERS the Defence to file a confidential or a public redacted version of his Request by Monday 4 June 2012.

Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi

Single Judge

Dated this Friday, 1 June 2012

At The Hague, The Netherlands