

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-02/11-01/11  
Date: 6 February 2013

**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 document**

***Decision on the "Demande d'autorisation d'interjeter appel de la « Decision on the Requête de la Défense aux fins de levée de certaines expurgations accordées par la Juge unique au Procureur dans sa Décision du 13 novembre 2012 (ICC-02/11-01/11-294) » (ICC-02/11-01/11-322)"***

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

**The Office of the Prosecutor**  
Fatou Bensouda

**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**  
Paolina Massidda

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

**States Representatives**

**Amicus Curiae**

## **REGISTRY**

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**Registrar & Deputy Registrar**  
Silvana Arbia  
Didier Preira

**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 (the "Chamber") of the International Criminal Court (the "Court"), 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 therefrom,<sup>1</sup> hereby issues the decision on the "*Demande d'autorisation d'interjeter appel de la « Decision on the Requête de la Défense aux fins de levée de certaines expurgations accordées par la Juge unique au Procureur dans sa Décision du 13 novembre 2012 (ICC-02/11-01/11-294) » (ICC-02/11-01/11-322)*" (the "Application").<sup>2</sup>

## **I. Procedural history**

1. 2. On 31 October 2012, the Prosecutor filed the "Prosecution's Request pursuant to Regulation 35 for variation of time limit to disclose incriminating evidence and modify the list of evidence for the confirmation hearing, and Request for redactions".<sup>3</sup>

2. On 13 November 2012, the Single Judge issued the "Decision on the 'Prosecution's Request pursuant to Regulation 35 for variation of time limit to disclose incriminating evidence and modify the list of evidence for the confirmation hearing, and Request for redactions'" (the "Decision of 13 November 2012").<sup>4</sup>

3. On 19 November 2012, the Prosecutor disclosed to the Defence the evidence to which redactions were authorized in the Decision of 13 November 2012.

4. On 7 December 2012, the Defence submitted the "*Requête de la défense aux fins de levée de certaines expurgations accordées par la Juge unique au Procureur*"

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<sup>1</sup> ICC-02/11-01/11-61.

<sup>2</sup> ICC-02/11-01/11-331-Conf.

<sup>3</sup> ICC-02/11-01/11-284-Conf-Exp.

<sup>4</sup> ICC-02/11-01/11-294 and annex.

*dans sa Décision du 13 novembre 2012 (ICC-02/11-01/11-294)*” (the “Request of 7 December 2012”)<sup>5</sup>, to which the Prosecutor responded on 11 December 2012.<sup>6</sup>

5. On 13 December 2012, the Single Judge issued the “Decision on the *Requête de la défense aux fins de levée de certaines expurgations accordées par la Juge unique au Procureur dans sa Décision du 13 novembre 2012 (ICC-02/11-01/11-294)*” (the “Decision of 13 December 2012”),<sup>7</sup> rejecting the Request of 7 December 2012.

6. On 19 December 2012, the Defence filed the Application.<sup>8</sup>

7. On 21 December 2012, the Prosecution filed the “Prosecution Response to Defence Application for Leave to Appeal the “Decision on the *Requête de la défense aux fins de levée de certaines expurgations accordées par la Juge unique au Procureur dans sa Décision du 13 novembre 2012 (ICC - 02/11 - 01/11 - 294)*” (the “Response”).<sup>9</sup>

## II. Background and submissions of the parties

### A. The Decision of 13 December 2012

8. In the Decision of 13 December 2012, the Single Judge held:

14. [I]n the Decision of 13 November 2012 the Single Judge was bound to examine and has indeed taken a position on the matters which the Defence raises in the Request, including the question whether requested redactions were prejudicial to the rights of Mr Gbagbo. To the extent that the Single Judge determined that the requested redactions were not inconsistent with the rights of Mr Gbagbo, and on the condition of other relevant criteria, the redactions were granted upon individual review as specified in the ex parte Annex to the Decision of 13 November 2012. For this reason, the Single Judge does not deem it necessary to entertain any further the arguments of the Defence as to the proper application of criteria for authorisation of redactions in the Decision of 13 November.

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<sup>5</sup> ICC-02/11-01/11-314-Conf.

<sup>6</sup> ICC-02/11-01/11-319-Conf.

<sup>7</sup> ICC-02/11-01/11-322.

<sup>8</sup> ICC-02/11-01/11-331-Conf.

<sup>9</sup> ICC-02/11-01/11-340-Conf.

15. The Single Judge notes, as recalled above, that authorisation of redactions may be withdrawn and full disclosure ordered in case of change of any relevant circumstances. However, none of the submissions of the Defence can be understood as alleging any such change of relevant circumstances. The Prosecutor, on the other hand, indicates that such change of circumstances is not present. Accordingly, variation of the previous authorisation of redactions is unwarranted and the Request must be rejected.<sup>10</sup>

## **B. The Application**

9. The Defence submits that the Single Judge erred in deciding that requests for the lifting of redactions must be treated as requests for reconsideration and articulates the issue proposed for appeal as follows:

La Chambre préliminaire peut-elle examiner une demande levée d'expurgation sans nécessairement considérer qu'il s'agit d'une demande en reconsidération d'une décision antérieure? Ici, la Chambre préliminaire a décidé que toute demande de levée d'expurgation devait être considérée comme une demande en reconsidération ce qui constitue aux yeux de la défense une erreur de droit. De plus, pour examiner le bien fondé des demandes de la défense, la Chambre préliminaire aurait du vérifier si le fait de refuser la levée de telle ou telle expurgation pourrait être préjudiciable à la défense.<sup>11</sup>

10. Similarly, the Defence identifies two legal errors allegedly committed by the Single Judge in the Decision of 13 December 2012:

- lorsqu'elle a considéré la requête comme une requête de reconsidération de la Décision du 13 novembre 2012 ; et
- lorsqu'elle a refusé d'examiner si les expurgations accordées constituent un obstacle aux enquêtes de la Défense.<sup>12</sup>

11. According to the Defence, these errors in the adjudication of its Request of 7 December 2012 impede the conduct of its investigations, create a situation of imbalance vis-à-vis the Prosecutor and result therefore in a violation of the principle of equality of arms. The Defence further argues that the issue proposed for appeal directly impacts its capacity to present arguments on the

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<sup>10</sup> The Decision of 13 December 2012, paras 14-15 (footnotes omitted).

<sup>11</sup> The Application, para.13.

<sup>12</sup> *Ibid*, para.18.

charges, and as such, has a direct impact on the expeditiousness and the outcome of the proceedings.<sup>13</sup>

12. Finally, the Defence submits that the issue, if not resolved, would prevent Mr Gbagbo from effectively conducting his defence during the confirmation hearing. Therefore, in the view of the Defence, an immediate resolution of the issue by the Appeals Chamber is necessary and may materially advance the proceedings.<sup>14</sup>

### C. *The Response*

13. The Prosecutor opposes the Application and submits that the issue proposed for appeal does not arise out of the Decision of 13 December 2012, as “the Single Judge did not examine the 7 December Request of the Defence as a motion for reconsideration”. Even if she had done so, the Prosecutor argues that the Application is premised on the faulty assumption that the Single Judge established a rule “as to how a request for lifting redactions must be examined,” when she simply “took a certain approach to the *specific* question before her”.<sup>15</sup>

14. The Prosecutor further submits that by way of its Application, “the Defence cannot obtain the relief that it is seeking, namely to lift the redactions that were put in place [by] a different decision of the Single Judge”. In the submission of the Prosecutor, that remedy is only available as a result of a successful challenge of the Decision of 13 November 2012. In addition, the Prosecutor submits that the Defence argument with respect to the impact of the proposed issue on the expeditiousness of the proceedings “is based on the assumption that through the lifting of redactions, the Defence will be in a position to further investigate and obtain information, as a result of which

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<sup>13</sup> *Ibid*, paras 21-32.

<sup>14</sup> The Application, paras. 33-36.

<sup>15</sup> The Response, paras. 12-13.

some of the charges will be dismissed at the confirmation hearing". In the view of the Prosecutor, this argument is hypothetical and speculative, and as such insufficient to meet the threshold of article 82(1)(d) of the Statute.<sup>16</sup>

### III. Analysis and conclusions of the Single Judge

15. The Single Judge notes article 82(1)(d) of the Rome Statute (the "Statute"), rule 155 of the Rules of Procedure and Evidence (the "Rules"), and regulation 65 of the Regulations of the Court (the "Regulations").

16. Article 82(1)(d) of the Statute sets out the following prerequisites to the granting of a request for leave to appeal:

- (a) the decision involves an issue that would significantly affect (i) the fair and expeditious conduct of the proceedings, or (ii) the outcome of the trial; and
- (b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

17. With respect to the particular question of the meaning of the term "issue" in the context of the first limb of the test under article 82(1)(d) of the Statute, the Appeals Chamber has stated:

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.<sup>17</sup>

18. The Single Judge observes that the Defence alleges that the Decision of 13 December 2012 erroneously treated the Request of 7 December 2012 as a request for reconsideration (*"demande en reconsidération"*), rather than a request for the lifting of redactions (*"requête aux fins de levée des expurgations"*).

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<sup>16</sup> *Ibid*, paras. 14-16.

<sup>17</sup> Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 9.

However, the Decision of 13 December 2012 does not make reference to any power of the Single Judge to reconsider her previous decisions and the Defence has not provided any arguments as to what distinguishes, in the specific circumstances, a decision on reconsideration from a decision on the lifting of redactions.

19. As concerns the second part of the Defence submissions as to the existence of an issue, namely the submission that the Single Judge erred by not assessing individually each redaction challenged by the Defence, the Single Judge notes that the Defence does not take issue with the position of the Single Judge, reiterated in the Decision of 13 December 2012, that authorisation of redactions may be withdrawn and full disclosure ordered in case of change of any relevant circumstances.<sup>18</sup> Neither does the Defence seek to challenge the finding that “none of the submissions of the Defence [in the Request of 7 December 2012] can be understood as alleging any such change of relevant circumstances”.<sup>19</sup> As a consequence, any individual assessment of the challenged redactions could thus not have led to any other result but the rejection of the Request of 7 December 2013.

20. In light of the above, the Single Judge is of the view that the Defence has failed to put forward in its Application an appealable issue by way of identifying “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”. Accordingly, the Application must be rejected.

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<sup>18</sup> Decision of 13 December 2012, paras 13 and 15.

<sup>19</sup> *Ibid.*, para. 15.



**FOR THESE REASONS, THE SINGLE JUDGE**

**REJECTS** the Application.

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



**Judge Silvia Fernández de Gurmendi**

**Single Judge**

Dated this 6 February 2013

At The Hague, The Netherlands