

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/11-01/11
Date: 13 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 OPCV's "Requests to receive information and access documents for the effective participation of victims at the confirmation of charges hearing"

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

Sarah Pellet

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

States Representatives

Amicus Curiae

REGISTRY

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,¹ hereby issues the decision on the “Requests to receive information and access documents for the effective participation of victims at the confirmation of charges hearing” (the “Request”).²

I. Procedural History

1. On 4 June 2012, the Single Judge issued the “Decision on victims’ participation at the confirmation of charges hearing and in the related proceedings”, in which she admitted 139 applicants as victims participating at the confirmation of charges hearing and in the related proceedings.³ In addition, the Single Judge decided to appoint a counsel from the Office of Public counsel for Victims (“OPCV”) as the Common Legal Representative of all the victims admitted to participate by that decision.⁴

2. On 14 December 2012, the Single Judge issued the “Decision on the date of the confirmation of charges hearing and proceedings leading thereto”, in which she decided that the hearing on the confirmation of charges shall commence on 19 February 2013.⁵

3. On 1 February 2013, the Defence filed its list of evidence for the purposes of the confirmation of charges hearing, in accordance with rule 121(6) of the Rules of Procedure and Evidence (the “Rules”).

4. On 6 February 2013, the Single Judge issued the “Second decision on victims’ participation at the confirmation of charges hearing and in the related

¹ ICC-02/11-01/11-61.

² ICC-02/11-01/11-388.

³ ICC-02/11-01/11-138, pp. 25-26.

⁴ ICC-02/11-01/11-138, p. 26.

⁵ ICC-02/11-01/11-325, p. 14.

proceedings”, in which she admitted 60 applicants as victims participating at the confirmation hearing and in the related proceedings and confirmed the appointment of a counsel from the OPCV as the Common Legal Representative of the victims admitted by that decision.⁶

5. On 7 February 2013, the OPCV filed its Request, in which it requests the Single Judge:

- to order the Defence to inform the Common Legal Representative about the existence of an alibi or grounds for excluding criminal responsibility;
- to order the notification to the OCPV of the Prosecution and Defence Observations filed in accordance with Rule 89 of the Rules of Procedure and Evidence and related to her clients;
- to order the notification to the OPCV of the Defence list of evidence or, in the alternative, the notification of the redacted list of evidence;
- to order the Defence to communicate to the Common Legal Representative its intention to call *viva voce* witnesses and, in the affirmative, to inform her of the areas to be covered by their respective testimonies.⁷

6. On 12 February 2013, the Prosecutor⁸ and the Defence⁹ filed their respective observations on the Request. While the Prosecutor does not object any of the requests made by the OPCV,¹⁰ the Defence requests the Single Judge to deny to the Common Legal Representative access to the observations filed by the Defence under rule 89 of the Rules as well as the list of evidence submitted in accordance with rule 121(6) of the Rules.¹¹ The Defence also requests the Single Judge authorisation to communicate to the Common Legal Representative a redacted version of its list of evidence, mentioning exclusively the public pieces of evidence listed therein.¹²

⁶ ICC-02/11-01/11-384, pp. 22-23.

⁷ ICC-02/11-01/11-388, p. 14.

⁸ ICC-02/11-01/11-394.

⁹ ICC-02/11-01/11-395.

¹⁰ ICC-02/11-01/11-394, para. 2.

¹¹ ICC-02/11-01/11-395, p. 13.

¹² *Id.*

II. The requests by the Common Legal Representative

7. With regard to the request concerning the existence of an alibi or a grounds excluding criminal responsibility, the Common Legal Representative submits that, should the Defence have raised any of them, this may result in the Chamber's decision not to confirm the charges against the suspect, "thereby jeopardizing the holding of a trial and therefore affecting any entitlements to reparations, the personal interests of victims are engaged by these defences".¹³ Accordingly, in order for the victims to be able to participate meaningfully at the confirmation of charges hearing through the Common Legal Representative, the latter should be notified of the Defence intention, if any, to raise an alibi or a ground excluding criminal responsibility pursuant to rule 79 of the Rules.

8. The Common Legal Representative also submits that, consistent with the practice of the Court, the OPCV should be granted access to the observations on the applications for victims' participation in the present case that the parties filed pursuant to rule 89 of the Rules.¹⁴

9. Moreover, the Common Legal Representative requests that the OPCV be granted access to the list of evidence, or a redacted version thereof, filed by the Defence in accordance with rule 121(6) of the Rules. In this respect, the Common Legal Representative contends that absent notification of the Defence list of evidence, she is not in a position "to identify specific issues arising out of the confirmation of charges hearing which may affect the personal interests of the victims" so as to warrant a request to access certain documents.¹⁵ In addition, the Common Legal Representative underlines that not all documents listed in the Defence list of evidence are confidential, as she

¹³ ICC-02/11-01/11-388, para. 17.

¹⁴ *Ibid.*, para. 26.

¹⁵ *Ibid.*, para. 28.

had access to several public documents in the course of pre-trial proceedings.¹⁶ Accordingly, it is alleged that the classification of the whole list of evidence as “confidential” is not justified.¹⁷

10. Lastly, the Common Legal Representative alleges that she should be informed of the intention of the Defence to call *viva voce* witnesses, if any, and where applicable of the topics to be addressed by these witnesses. Absent such information, the Common Legal Representative is unable to submit, on a case by case basis, specific and motivated requests to question any witnesses.¹⁸

III. The Defence observations

11. The Defence informs the Common Legal Representative that it does not intend to raise an alibi or a ground for excluding criminal responsibility and that it will not call *viva voce* witnesses at the confirmation of charges hearing.¹⁹

12. Regarding the list of evidence, the Defence contends that rule 121(6) of the Rules provides that the list of evidence by the Defence must be communicated to the Prosecutor only. In the view of the Defence, the Common Legal Representative is not entitled to have access to said list given the intrinsically distinct role played by the participating victims in comparison with the Prosecutor.²⁰ As for the observations under rule 89 of the Rules, the Defence submits that the confidential annexes attached to the main observations, the latter being filed as “public”, do not add any information that is not already reflected in the public observations.²¹ Thus, the Defence contends that the annexes to the observations filed under rule 89 of the Rules

¹⁶ *Ibid.*, para. 29.

¹⁷ *Id.*

¹⁸ *Ibid.*, para. 30.

¹⁹ ICC-02/11-01/11-395, paras 15, 52.

²⁰ *Id.*, paras 29-30, 33.

²¹ *Ibid.*, para. 35.

should remain confidential, as they reflect the work methodology of the Defence team.²²

13. The Defence further submits that that the Common Legal Representative has not proved that the personal interests of the victims are affected by any issues at stake as to justify access to the requested confidential documents.²³ In the view of the Defence, granting access to said documents would go beyond the rights afforded to the participating victims by the Rome Statute (the “Statute”) and the Rules and would render the Common Legal Representative a second prosecutor.²⁴

IV. Applicable law and Single Judge’s determination

14. The Single Judge notes article 68(3) of the Statute, rules 121(6) and (10) of the Rules and regulation 23 *bis* of the Regulations of the Court.

15. The Single Judge notes that the Request relates to access to material and information that is classified as “confidential” and was not notified to the Common Legal Representative. In this regard, the Single Judge recalls that according to Rule 121(10) of the Rules, the Registry shall create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber and “victims or their legal representatives may, subject to any restrictions concerning confidentiality and the protection of national security information, consult such record”. However, the Single Judge held that “in relation to those filings that are marked confidential and are not notified to the victims’ Common Legal Representative [...] the Chamber retains the option to decide on a case-by-case basis, either *proprio motu* or upon receipt of a specific and

²² *Ibid.*, para. 35.

²³ *Ibid.*, para. 43.

²⁴ *Ibid.*, para. 47.

motivated request, whether to grant the Common Legal Representative of victims access thereto”.²⁵

16. The Single Judge observes that since the Defence addresses the issues of alibi, grounds for excluding criminal responsibility and *viva voce* witnesses in its observations, it is unnecessary to rule on this part of the Request.

17. With regard to the request to access the observations submitted by the parties pursuant to rule 89 of the Rules, the Single Judge points out that each of these observations consist of a main document, filed as “public” and containing the actual observations on the applications for victim participation and a confidential annex setting out these observations in a different layout, with a view to assisting the Single Judge in the assessment of each application for participation. The Single Judge therefore considers that the confidential annexes referred to by the Common Legal Representative contain information that is already reflected in the actual observations filed by the parties, which are accessible to the Common Legal Representative.

18. In light of the above, the Single Judge considers that the requested documents are of no relevance to the Common Legal Representative for the preparation of the confirmation of charges hearing. However, the Single Judge considers that the annexes to the Prosecutor’s observations under rule 89 of the Rules may be notified to the Common Legal Representative, since the Prosecutor does not object to that.

19. As for the request to access the list of evidence filed by the Defence pursuant to rule 121(6) of the Rules, the Single Judge underlines that, contrary to the arguments of the Defence, granting access to the Defence list of evidence does not amount to providing the Common Legal Representative with automatic access to all confidential material listed therein. Should the

²⁵ ICC-02/11-01/11-384-Corr, para. 56.

Common Legal Representative wish to access confidential documents in the Defence list of evidence, she will have to submit a specific and motivated request to this effect. By the same token, the Single Judge recalls that the Common Legal Representative needs the leave of the Chamber to make any oral submission during the confirmation of charges hearing, subject to the requirements of article 68(3) of the Statute. However, in light of the concerns expressed by the Defence with regard to the confidential information mentioned in the list of evidence, which are at the basis of the chosen level of classification,²⁶ the Single Judge considers it is appropriate to allow the provision of the list with redaction, as proposed by both the Defence and the Common Legal Representative.

20. The Single Judge notes that a list of the public items contained in the Defence list of evidence has already been provided to the Common Legal Representative on 4 February 2013.²⁷ However, the Single Judge considers that access to the list itself, even if in redacted form, may be of assistance to the Common Legal Representative in following the discussion on the evidence at the hearing, which may include confidential evidence. Therefore, the Single Judge considers it appropriate that the list of evidence filed by the Defence in the record of the case be communicated to the Common Legal Representative, containing such redactions to the titles of confidential items of evidence that are necessary to preserve the confidentiality of these documents.

²⁶ ICC-02/11-01/11-381, para. 11.

²⁷ ICC-02/11-01/11-395, para. 34.

FOR THESE REASONS, THE SINGLE JUDGE

ORDERS the Defence to file in the record of the case, by Thursday 14 February 2013, a confidential redacted version of document ICC-02/11-01/11-381-Conf-Anx, to be notified to the OPCV;

ORDERS the Registry to provide the OPCV with access to documents ICC-02/11-01/11-131-Conf-Exp-AnxA-Corr, ICC-02/11-01/11-131-Conf-Exp-AnxB-Corr, ICC-02/11-01/11-131-Conf-AnxC; ICC-02/11-01/11-131-Conf-Exp-AnxD-Corr; ICC-02/11-01/11-131-Conf-Exp-AnxE-Corr; ICC-02/11-01/11-358-Conf-Exp-AnxA and ICC-02/11-01/11-377-Conf-AnxA.

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



Judge Silvia Fernández de Gurmendi

Single Judge

Dated this 13 February 2013

At The Hague, The Netherlands