

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 2 October 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

Decision on the "Prosecution's request pursuant to Regulation 35 for the extension of time for disclosure and for variation of time limit to submit a request for redactions"

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

The Office of the Prosecutor
 Fatou Bensouda, Prosecutor
 James Stewart, 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**
 Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
 Herman von Hebel, 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 (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 “Prosecution’s request pursuant to Regulation 35 for the extension of time for disclosure and for variation of time limit to submit a request for redactions” (the “Request”).²

I. Procedural history

1. On 24 January 2012, the Single Judge issued the “Decision establishing a disclosure system and a calendar for disclosure” (the “Decision on Disclosure”).³

2. On 27 March 2013, the Single Judge issued the “First decision on the Prosecutor’s requests for redactions and other protective measures” (the “First Decision on Redactions”).⁴

3. On 3 June 2013, the Chamber issued the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (the “Adjournment Decision”), in which it decided to adjourn the confirmation of charges hearing and requested the Prosecutor to consider providing further evidence or conducting further investigation.⁵ The Chamber, *inter alia*, ordered the Prosecutor to “disclose to the Defence by no later than Friday, 5 July 2013 all evidence in her possession for which she does not intend to present any requests for redactions” and to submit “as soon as practicable and no later than Friday, 5 July 2013 any requests for redactions

¹ ICC-02/11-01/11-61.

² ICC-02/11-01/11-494 and confidential annexes, *ex parte* only available to the Prosecutor.

³ ICC-02/11-01/11-30 and annexes.

⁴ ICC-02/11-01/11-74-Conf-Exp. A public redacted version has also been filed, see ICC-02/11-01/11-74-Red.

⁵ ICC-02/11-01/11-432, p. 22.

with regard to the evidence which is in her possession and on which she intends to rely for the purposes of the confirmation of charges”.⁶

4. On 11 September 2013, the Prosecutor filed the Request, requesting the Chamber to: (i) grant an extension of time for the disclosure of a piece of evidence; and (ii) grant the request for redactions to the metadata of the evidence in question.⁷

5. On 24 September 2013, the Defence filed its “*Réponse de la Défense à la « Prosecution’s request pursuant to Regulation 35 for disclosure and for variation of time limit to submit a request for redactions » (ICC-02/11-01/11-502)*” (the “Response”), urging the Chamber to reject the Request and to order the Prosecutor to immediately disclose the concerned information.⁸

II. Submissions of the parties

A. *The Prosecutor*

6. The Prosecutor requests an extension of time pursuant to regulation 35 of the Regulations of the Court (the “Regulations”) for the disclosure of a video that was registered in her evidence management database on 28 May 2013. According to the Prosecutor, this video was not part of the request for authorisation of redactions dated 5 July 2013 due to an oversight. She submits that she became aware of this oversight when reviewing for disclosure the transcript of the video, which was only received on 14 August 2013.⁹

7. The Prosecutor submits that the Defence will not suffer any prejudice as a result of the late disclosure. She underlines that the request concerns a single video file of one hour and three minutes. In addition, the Prosecutor

⁶ *Id.*, p.23.

⁷ Request, para. 2.

⁸ ICC-02/11-01/11-511.

⁹ Request, para.4.

states that some excerpts of the video were already disclosed to the Defence. Considering that the time limit for the submission of the amended list of evidence is 15 November 2013, the Prosecutor asserts that the Defence will have ample time to analyse the video.¹⁰

8. The Prosecutor further submits that the video is useful to understand some of the context and facts of the case and is relevant to the Chamber's assessment of the Prosecution's evidence. She submits, in particular, that "Serge Koffi's speech in relation to the population of Abobo shows the mindset of one of the leaders of the young patriots during the post-electoral violence in Côte d'Ivoire".¹¹

9. In the event that the extension of time for the disclosure of the video is granted, the Prosecutor requests redactions, pursuant to rule 81(2) of the Rules of Procedure and Evidence (the "Rules"), to the name of the investigator who obtained the video and the identity of the provider from its metadata.¹² She submits that the redactions sought are consistent with prior decisions of the Chamber.¹³

B. The Defence

10. The Defence submits that the Request is not justified and does not meet the requirements of the Regulations and of the jurisprudence of the Court. Therefore, it requests that it be rejected and the relevant evidence immediately disclosed to the Defence.¹⁴

11. Concerning the request for extension of time, the Defence submits that the Prosecutor has failed to satisfy the conditions of regulation 35(2) of the

¹⁰ *Ibid.*, para. 6.

¹¹ *Ibid.*, para. 7 (footnote omitted).

¹² *Ibid.*, para. 8.

¹³ *Ibid.*, para. 9.

¹⁴ Response, para. 15 and pp. 6-7.

Regulations. In particular, the Defence argues that an oversight or an omission, without further explanation, cannot constitute a reason outside of the control of the Prosecutor.¹⁵

12. With respect to the requests for redactions, the Defence submits that they are not properly justified. It emphasises that the Chamber should thoroughly determine whether the information concerned is useful to the Defence, in particular for the assessment of the credibility of witnesses and the contextual background. The Defence further submits that knowing the identity of the provider of evidence can be used to verify the authenticity and the reliability of the evidence concerned. Additionally, the Defence contends that the finding of the Adjournment Decision concerning the insufficiency of evidence presented by the Prosecutor makes the access to information by the Defence more crucial.¹⁶

III. Analysis

13. The Single Judge notes articles 54(3)(f), 57(3)(c), 61 and 67 of the Rome Statute, and rules 81 and 121 of the Rules.

14. The request concerns one item of evidence (video) which the Prosecutor wishes to rely on for the purposes of confirmation of charges against Mr Gbagbo, and which has been in the possession of the Prosecutor since 28 May 2013. Accordingly, under the terms of the Adjournment Decision, the Prosecutor should have disclosed this item of evidence, or applied for redactions, no later than 5 July 2013.¹⁷ The Single Judge emphasises the importance of compliance with the time limits set by the Chamber in the exercise of its duty to ensure proper disclosure, and regrets

¹⁵ *Ibid.*, paras 7-9.

¹⁶ *Ibid.*, paras 11-14.

¹⁷ Adjournment Decision, p. 22.

that that this has not been the case with respect to the item of evidence in question.

15. Nevertheless, the Single Judge recalls that she previously held that although the parties are under obligation to comply with time limits for the submission of redaction requests, such time limits do not have preclusive effect with respect to the parties' ability to seek protective measures or to rely on evidence at the confirmation of charges hearing, and that any consequences of non-compliance with time limits for disclosure are to be determined by the Chamber, within its powers and obligations in relation to the disclosure process, as provided for by article 61(3) of the Statute and rule 121(2) of the Rules.¹⁸

16. In the present circumstances, in light of the fact that the Request concerns only one video file of about one hour, the Single Judge is of the view that the Defence will still be able to analyse it and appropriately respond by 16 December 2013, which is the relevant time limit set by the Chamber in the Adjournment Decision.¹⁹ Furthermore, the Single Judge considers that no bad faith can be discerned on the part of the Prosecutor. Accordingly, the Single Judge is of the view that it would be disproportionate to preclude the Prosecutor from relying upon this evidence or from requesting redactions prior to its disclosure, and will address the Prosecutor's request for redactions to the evidence in question.

17. The Single Judge makes reference to the Decision on Disclosure, wherein the procedure related to requests for redactions to incriminating evidence under rule 81 of the Rules has been established,²⁰ and to the First Decision on Redactions, wherein the overall reasons for granting or rejecting

¹⁸ First Decision on Redactions, para. 28.

¹⁹ Adjournment Decision, p. 24.

²⁰ Decision on Disclosure, paras 52-57

redactions have been provided.²¹ For the present decision, the Single Judge has adhered to the same approach.

18. The Defence objects to the request for redactions arguing that it has not been properly informed of its underlying legal and factual basis.²² Indeed, the Single Judge observes that the information made available to the Defence as to the basis for the two requested redactions from the metadata of the evidence concerned is limited. Nevertheless, the Single Judge is of the view that the Request still complies with the regime as established in the Decision on Disclosure,²³ and that provision of additional information in respect of the two requests for redactions would defeat their purpose.

19. The Prosecutor requests redaction, in the metadata of the video, of the name of the investigator who obtained it, and of the identity of the provider.²⁴ In this respect, the Single Judge considers that it is reasonable to believe that the presence of the Prosecutor's investigators in Côte d'Ivoire could become easily traced if the name of the investigator in question were disclosed to the Defence. Equally, the Single Judge is of the view that disclosure of the identity of the source would make possible interference with the investigation. Thus, the Single Judge is of the view that disclosure of either the name of the investigator or the identity of the source would give rise to an objectively justifiable prejudice to the further or ongoing investigations of the Prosecutor.

20. The Single Judge is also of the view that redaction of the name of the investigator and the identity of the source of the video is adequate and necessary to address the prejudice to the further or ongoing investigations, and is the least restrictive protective measure available. Furthermore, the

²¹ First Decision on Redactions, paras 55-102.

²² Response, para. 11.

²³ Decision on Disclosure, paras 54-56; see also First Decision on Redactions, para. 54.

²⁴ Request, para. 8.

Single Judge is of the view that the non-disclosure of this information will not result in the confirmation of charges hearing, as a whole, being unfair to Mr Gbagbo, as the redactions only concern the metadata and Defence will still have access to the entirety of the video in question.

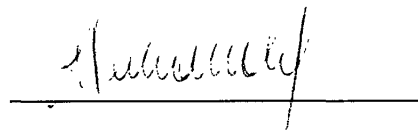
21. Accordingly, the Single Judge considers that both requests for redactions are justified, and must be granted.

FOR THESE REASONS, THE SINGLE JUDGE

GRANTS the Prosecutor's request to redact the name of the investigator and the identity of the source in the metadata of video CIV-OTP-0043-0269; and

RECALLS that the Prosecutor shall disclose to the Defence the evidence dealt with in the present decision as soon as practicable and no later than 5 days upon notification of the present decision.

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



Judge Silvia Fernández de Gurmendi

Single Judge

Dated this Wednesday, 2 October 2013

At The Hague, The Netherlands