

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 12 December 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 to apply for redactions and request redactions pursuant to Rule 81(2) and Rule 81(4)"

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**

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Defence**

States Representatives

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REGISTRY

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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 to apply for redactions and request for redactions pursuant to Rule 81(2) and Rule 81(4)” (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 2012, 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 ordered the Prosecutor to submit “as soon as practicable and no later than Tuesday, 15 October 2013 any requests for redactions with regard to the

¹ ICC-02/11-01/11-61.

² ICC-02/11-01/11-559 with confidential Annexes 1, 2 and 6, *ex parte*, only available to the Prosecutor and confidential Annexes 3, 4, and 5.

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.

evidence she has collected in the course of her further investigation and on which she intends to rely for the purposes of the confirmation of charges”.⁶

4. On 12 November 2013, the Prosecutor filed the Request.

5. On 4 December 2013, the Defence filed the “*Réponse de la Défense à la « Prosecution’s request pursuant to Regulation 35 for the extension of time to apply for redactions and request for redactions pursuant to Rule 81(2) and Rule 81(4) » (ICC-02/11-01/11-559)*” (the “Response”).⁷

II. Submissions of the parties

A. The Prosecutor

6. The Prosecutor requests the Chamber to:

- a. grant, pursuant to Regulation 35, the extension of time for the Prosecution to request redactions to the subject documents and their metadata; and,
- b. grant, pursuant to Rule 81(2) and Rule 81(4), the Prosecution’s requests for redactions to the metadata of Annex 3 and to the documents in Annexes 1 and 2 and their metadata.⁸

7. The Request concerns: (i) two *procès-verbaux d’audition* of Witness P-330 (CIV-OTP-0046-0153 and CIV-OTP-0046-0156), collected on 8 July 2013, which were reviewed by the Prosecutor and considered to be incriminating and requiring redactions, but were, due to oversight, not included in the Prosecutor’s request for redactions on 15 October 2013;⁹ and (ii) one document (CIV-OTP-0043-0206), collected on 25 May 2013, which was shown to Witness P-10 during his recent interview, but was, due to oversight, also not included in the 15 October 2013 request for redactions.¹⁰

⁶ *Ibid.*, p. 23.

⁷ ICC-02/11-01/11-567.

⁸ Request, para. 26.

⁹ *Ibid.*, paras 4-5.

¹⁰ *Ibid.*, paras 7-8.

8. The Prosecutor submits that the request meets the requirements of regulation 35(2) of the Regulations of the Court (the “Regulations”) “since an oversight is by definition an unexplained and uncontrolled error”.¹¹ The Prosecutor further states that she takes her disclosure obligations seriously and makes every effort to strictly comply with the limits set by the Chamber, but that despite her best efforts inadvertent errors occasionally occur.¹²

9. The Prosecutor submits that the Defence will not suffer any prejudice if the Chamber grants the requested extension of time and the requested redactions.¹³ She states in particular that the Defence will have sufficient time to analyse the documents and respond to them in the context of the confirmation of charges, the calendar having been recently suspended by the Chamber.¹⁴

10. Simultaneously, but “without presuming the Chamber’s decision on the Regulation 35 request”,¹⁵ the Prosecutor also provides arguments in support of her requests for redactions to the three documents subject to the Request. The specific requests for redactions are included in a confidential annex to the Request, *ex parte*, only available to the Prosecutor.¹⁶

11. Under rule 81(2) of the Rules of Procedure and Evidence (the “Rules”), the Prosecutor seeks: (i) with respect to documents CIV-OTP-0046-0153 and CIV-OTP-0046-0156, the redaction in the metadata of the name of the investigator who obtained the documents and of the name of the source; and

¹¹ *Ibid.*, para. 10.

¹² *Id.*

¹³ *Ibid.*, para. 11.

¹⁴ *Ibid.*, para. 14.

¹⁵ *Ibid.*, para. 15.

¹⁶ ICC-02/11-01/11-559-Conf-Exp-Anx6.

(ii) with respect to document CIV-OTP-0043-0206, the redaction in the metadata of the name of the investigator who collected the document.¹⁷

12. The Prosecutor submits that disclosure of any of this information to the Defence could impact on the Prosecutor's ability to conduct investigations as it may unduly attract attention to the movement of her staff and by extension to (potential) witnesses, which would also impact on their security.¹⁸ The Prosecutor adds that the redactions would further ensure that she can continue to conduct her investigations using the limited number of staff.¹⁹

13. The Prosecutor recalls that her investigators can work on several investigations at once and that when one investigation is concluded, they are assigned to another, constantly facing potential security issues which require their identities to be kept confidential.²⁰ The Prosecutor thus submits that "absent some showing of a specific need or justification for the disclosure of the identities of the investigators, the Prosecution will seek as a matter of practice to maintain the confidentiality of investigator identities".²¹

14. Furthermore, the Prosecutor states that her investigations are conducted confidentially and that in order to maintain the confidentiality of its ongoing investigation in Côte d'Ivoire and to "protect the reliability of its ongoing evidence collection, the Prosecution seeks to redact investigative leads, including the names of sources".²²

15. Finally, the Prosecutor submits that the redactions sought pursuant to rule 81(2) of the Rules do not affect the ability to understand the annexed documents and would not result in unfairness to Mr Gbagbo at the

¹⁷ Request, para. 16.

¹⁸ *Ibid.*, para. 17.

¹⁹ *Id.*

²⁰ *Ibid.*, para. 18.

²¹ *Id.*

²² *Ibid.*, para. 19.

confirmation of charges since the redactions do not relate to information that is relevant to the preparation of the Defence case.²³ The Prosecutor adds that the redactions sought are consistent with the Chamber's prior decisions authorising redactions in this matter, and that the need to request their lifting will be periodically reviewed.²⁴

16. Further, the Prosecutor requests, under rule 81(4) of the Rules, authorisation to redact, in documents CIV-OTP-0046-0153 and CIV-OTP-0046-0156, the name of the witness's father and the witness's phone number.²⁵

17. The Prosecutor submits that these redactions "do not have any impact on the fairness of the proceedings and the rights of the Defence, as they do not cover any information that is relevant for the preparation of the case of the Defence" and that the redactions are "very limited and in no way affect the content and substantive information presented in the documents".²⁶

18. Finally, the Prosecutor emphasises that for the purposes of investigations it is essential for the Prosecutor to be able to seek protection for "identifying information of family members of any witnesses" as "witnesses often fear for the security of their family and in many cases, their cooperation with the prosecution depends on it" and it is therefore in the interest of justice to protect family members of witnesses.²⁷

B. The Defence

19. The Defence opposes the Requests, and instead requests the following:

A titre principal,

- Rejeter la demande de prorogation de délai présentée par le Procureur ;

²³ *Ibid.*, paras 19-20.

²⁴ *Ibid.*, para. 20.

²⁵ *Ibid.*, para. 22.

²⁶ *Ibid.*, para. 23.

²⁷ *Ibid.*, para. 24.

A titre subsidiaire,

- **Rejeter** la demande d'expurgations présentée par le Procureur comme insuffisamment motivée et préjudiciable à la Défense ;
- **Ordonner** au Procureur de communiquer immédiatement à la Défense les éléments d'informations manquants.²⁸

20. In relation to the Prosecutor's request for extension of time, the Defence submits, including by reference to previous jurisprudence of the Court, that an oversight cannot provide valid grounds within the meaning of regulation 35(2) of the Regulations, emphasising that an oversight cannot constitute a reason outside of the control of the Prosecutor.²⁹ The Defence adds that this is the sixth time that the Prosecutor has invoked oversight to obtain an extension of time,³⁰ and draws attention to the fact that it has itself previously requested, unsuccessfully, extension of time only once for technical reasons, and has never requested extension of time as a result of human error.³¹

21. The Defence also makes submissions on the merits of the Prosecutor's requests for redactions. At the outset, the Defence argues that the Prosecutor has failed to properly inform it of the legal and factual basis of the requests for redactions.³²

22. Further, the Defence argues that the conditions for authorisation of redactions as established by the Appeals Chamber have not been met with respect to any requested redaction.³³

23. Specifically in relation to the requested redaction of the identities of the investigators of the Prosecutor who have collected the documents subject to the Request, the Defence argues that the Prosecutor has failed to provide specific reasons for each requested redaction as required by the

²⁸ Response, p. 18.

²⁹ *Ibid.*, paras 9-12, 17.

³⁰ *Ibid.*, para. 18.

³¹ *Ibid.*, para. 23.

³² *Ibid.*, para. 27.

³³ *Ibid.*, para. 29.

jurisprudence.³⁴ The Defence also submits that the Prosecutor improperly relies on logistical reasons in support of requests for redactions, and adds that this argument is hardly logical in light of the comparatively larger resources of the Prosecutor in comparison with those of the Defence and in light of the fact that the Prosecutor benefits from the cooperation of the new Ivorian authorities, which is not the case for the Defence.³⁵ Further, the Defence contests the Prosecutor's submission that redaction of identities of investigators is sought as a matter of practice and states that the Prosecutor appears to be taking for granted that requests for redactions will be granted regardless of the reasons advanced, including when they go against the jurisprudence.³⁶ Finally in this regard, the Defence emphasises that knowing the identities of the Prosecutor's staff that obtained documents or interviewed witnesses is indispensable for its ability to verify the chain of custody and the metadata, and states that this is particularly the case in the present instance.³⁷

24. Similarly, with respect to the proposed redaction of the source of two documents, the Defence submits that the Prosecutor has failed to satisfy the criteria established in the jurisprudence for the authorisation of such redactions.³⁸ The Defence states that in the absence of information on the source, it will not be in position to verify the authenticity and reliability of the documents in question.³⁹

25. As concerns the requests for redactions under rule 81(4) of the Rules, the Defence submits that the Prosecutor has likewise failed to satisfy the requirements in the jurisprudence.⁴⁰ In particular, the Defence submits that

³⁴ *Ibid.*, paras 31-37, 40.

³⁵ *Ibid.*, paras 38-39.

³⁶ *Ibid.*, paras 41-44.

³⁷ *Ibid.*, paras 45-46.

³⁸ *Ibid.*, paras 48-50.

³⁹ *Ibid.*, para. 51.

⁴⁰ *Ibid.*, paras 54-56, 61-62.

the Prosecutor has not established the existence of an objectively identifiable risk for the person in question, instead relying on general submissions, and has not demonstrated the necessity of non-disclosure by showing that the Defence was susceptible to communicating the information in question to third persons or to bring the slightest risk to the concerned persons.⁴¹

26. The Defence also submits, in relation to the requirement that any redactions are compatible with the rights of the Defence, that the information proposed by the Prosecutor for redaction may be important for the verification of the credibility of the evidence.⁴²

27. The Defence is also critical of the fact that the Prosecutor submitted the requests for redactions together with the request for extension of time, stating that by doing so, the Prosecutor is attempting to force the Chamber to pronounce itself on the redactions without even addressing the question of compliance with the time limit.

28. Finally, the Defence makes submissions on the prejudice that would arise to it from granting the Request. The Defence states that in such case, it would no longer be able to analyse the evidence of the Prosecutor, verify it, contest it, or lead its own investigations.⁴³ The Defence argues that all information of any significance to it must be disclosed in order to enable its preparation.⁴⁴ Further, the Defence submits that the Prosecutor must be required to present the evidence as completely as possible, in order to make possible proper adversary debate, in particular following the Adjournment Decision.⁴⁵

⁴¹ *Ibid.*, paras 57-60.

⁴² *Ibid.*, para. 30 (p. 15).

⁴³ *Ibid.*, para. 69, 78.

⁴⁴ *Ibid.*, paras 70-71.

⁴⁵ *Ibid.*, paras 72-75.

III. Analysis

29. The Single Judge notes articles 54(3)(f), 57(3)(c), 61, 67 and 68(1) of the Rome Statute, rules 81 and 121 of the Rules, and regulation 35(2) of the Regulations.

30. The request concerns three documents on which the Prosecutor wishes to rely for the purposes of the confirmation of charges proceedings. Two of these documents (CIV-OTP-0046-0153 and CIV-OTP-0046-0156) have been in the possession of the Prosecutor since 8 July 2013. The third document (CIV-OTP-0043-0206) has been in the possession of the Prosecutor since 25 May 2013, but the Prosecutor has only made the decision to rely on this document for the purposes of confirmation of charges following a recent interview of Witness P-10. Accordingly, under the terms of the Adjournment Decision, the Prosecutor should have submitted requests for redactions to the three documents no later than 15 October 2013.⁴⁶

31. The Single Judge is of the view that, as submitted by the Defence,⁴⁷ oversight attributable to the Prosecutor does not allow for a finding that the Prosecutor was unable to present her request for redactions within the applicable time limit. Accordingly, a retroactive extension of time limit cannot be granted under the terms of regulation 35(2) of the Regulations.

32. 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, which are established pursuant to rule 121(2) of the Rules in order to ensure that disclosure takes place under satisfactory conditions, do not have preclusive effect with respect to the parties' ability to seek protective measures or to rely on evidence at the

⁴⁶ Adjournment Decision, p. 23.

⁴⁷ Response, paras 7-12.

confirmation of charges hearing,⁴⁸ as opposed to the preclusive final time limits for disclosure of evidence by the parties under rule 121(3) to (6) of the Rules. For this reason, the Single Judge does not find pertinent the Defence argument that the Request should not be granted because previously a Defence request for extension of the time limit for disclosure of evidence established by rule 121(6) of the Rules was rejected even though the Defence did not invoke oversight but technical difficulties.⁴⁹

33. Instead, as also previously held, the Single Judge must determine, in the exercise of the powers and obligations of the Chamber in relation to the disclosure process, as provided for by article 61(3) of the Statute and rule 121(2) of the Rules, any consequences that shall attach to the non-compliance of the Prosecutor with the time limit for the submission of redaction requests.⁵⁰

34. The Single Judge notes that the Request concerns only three items of evidence, amounting to seven pages of text, which are closely related to other evidence already disclosed to the Defence. Therefore, also taking into account the fact that the time limits for further proceedings in relation to the confirmation of charges are presently suspended pending resolution of the Prosecutor's appeal against the Adjournment Decision, the Single Judge is of the view that the Defence will be able to analyse and appropriately respond to the evidence in question. Accordingly, the Single Judge considers that it would be disproportionate to preclude the Prosecutor from relying upon this

⁴⁸ First Decision on Redactions, para. 28; see also "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", 2 October 2013, ICC-02/11-01/11-520, para. 15.

⁴⁹ Response, paras 23-24.

⁵⁰ First Decision on Redactions, para. 28; see also "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", 2 October 2013, ICC-02/11-01/11-520, para. 15.

evidence or from requesting redactions prior to its disclosure, and will address the Prosecutor's request for redactions to the evidence in question.

35. At this juncture, the Single Judge notes that the Defence expresses criticism of the fact that the Prosecutor submitted the requests for redactions at the same time as the request to be allowed to make such requests.⁵¹ However, the Defence does not explain what should be the consequences of this fact, and on what legal basis. In any case, the Single Judge considers that no procedural impropriety can be discerned.

36. 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,⁵² and to the First Decision on Redactions, wherein the overall reasons for granting or rejecting redactions have been provided.⁵³ For the present decision, the Single Judge has adhered to the same approach.

37. The Single Judge notes the argument of the Defence that the Prosecutor has failed to sufficiently inform it of her *ex parte* requests for redactions.⁵⁴ However, upon review of the Request, the Single Judge is of the view that provision of further details concerning the specific requests for redactions which are currently *ex parte* would defeat the purpose of the requests and is therefore not appropriate.

38. As stated above, the Prosecutor requests, under rule 81(2) of the Rules: (i) the redaction of the name of the investigator who obtained documents CIV-OTP-0046-0153 and CIV-OTP-0046-0156 and of the name of the source in the metadata of said documents; and (ii) the redaction of the name of the

⁵¹ Response, paras 64-68.

⁵² Decision on Disclosure, paras 52-57

⁵³ First Decision on Redactions, paras 55-102.

⁵⁴ Response, para. 27.

investigator who collected document CIV-OTP-0043-0206 in the metadata of the document.⁵⁵

39. The Single Judge notes the argument of the Prosecutor that “absent some showing of a specific need or justification for the disclosure of the identities of the investigators, the Prosecution will seek as a matter of practice to maintain the confidentiality of investigator identities”.⁵⁶ In this regard, the Single Judge emphasises, as also submitted by the Defence⁵⁷ and as held in this case several times,⁵⁸ that redactions are an exceptional remedy and cannot be authorised in a systematic manner, or “as a matter of practice”. Rather, redactions need to be assessed individually and can be authorised only in specific circumstances when disclosure to the Defence would give rise to an objectively justifiable prejudice to the further or ongoing investigations of the Prosecutor.

40. Nevertheless, upon analysis of the individual requests for redactions, the Single Judge concludes that disclosure to the Defence of the identities of the two investigators would give rise to an objectively justifiable prejudice to the Prosecutor’s investigations still ongoing in Côte d’Ivoire, as it is reasonable to believe that their presence, if their identities were to be disclosed, could become easily traced, and, as a consequence, the investigation could be interfered with. The Single Judge is also of the view that, at this stage of the proceedings, the non-disclosure of the identities of the

⁵⁵ Request, para. 16.

⁵⁶ *Ibid.*, para. 18.

⁵⁷ Response, para. 41.

⁵⁸ “Decision on the ‘Prosecution’s request for redactions pursuant to Rule 81(2) and Rule 81(4) and to the new disclosure calendar’”, 27 September 2013, ICC-02/11-01/11-514, para. 21; “Decision on the ‘Prosecution’s request for redactions to the statement of witness CIV-OTP-P-0369 pursuant to Rule 81(2)’”, 30 October 2013, ICC-02/11-01/11-549, para. 13; “Decision on the ‘Prosecution’s request for redactions pursuant to Rule 81(2) and Rule 81(4)’”, 7 November 2013, ICC-02/11-01/11-556, para. 33.

two investigators is adequate and necessary to reduce the prejudice, and is the least restrictive protective measure available.

41. In addition, the Single Judge is of the view that such redactions are not incompatible with Mr Gbagbo's fair trial rights, also taking into account the present stage of the proceedings in the case. Also considering that the redactions only relate to the metadata of the documents, the Single Judge is confident that the Defence will still be in position to identify possible faults in the evidence and bring them to the attention of the Chamber.

42. Accordingly, the Single Judge grants authorisation to redact the identities of two investigators in the metadata of the three documents.

43. In relation to the proposed redaction of the identity of the source of documents CIV-OTP-0046-0153 and CIV-OTP-0046-0156 in their metadata, the Single Judge considers that disclosure to the Defence of this information may interfere with the ongoing collection of evidence and thereby give rise to an objectively identifiable prejudice to the ongoing or further investigations of the Prosecutor. The Single Judge is of the view that redaction of the identity of the source is appropriate to address this risk, and does not consider that a less restrictive measure can be envisaged.

44. Furthermore, the Single Judge is of the view that the said redaction will not result in the confirmation of charges hearing, as a whole, being unfair to Mr Gbagbo, as it only relates to metadata and does not prejudice the Defence ability to understand the substance of the evidence disclosed.

45. Accordingly, the Single Judge grants authorisation to redact the identity of the source of documents CIV-OTP-0046-0153 and CIV-OTP-0046-0156 in their metadata.

46. Under rule 81(4) of the Rules, the Prosecutor requests authorisation to redact, in documents CIV-OTP-0046-0153 and CIV-OTP-0046-0156, the name of a witness's father and a witness's phone number.⁵⁹

47. The Single Judge is of the view that disclosure of the identity of the witness's father to the Defence could have a negative impact on his safety, in particular as a consequence of the witness's cooperation with the Court. The Single Judge is additionally of the view that redaction of this information is an adequate measure to reduce this risk, and that no less restrictive protective measure is available.

48. The Defence argues that the Prosecutor has failed to demonstrate that the Defence was susceptible to communicating the information in question to third persons or to bring the slightest risk to the concerned persons.⁶⁰ The Single Judge recognises that the risk to the witness's father is not imminent, but harm to his safety by way of his identity being revealed to third persons or otherwise, in case of disclosure of his identity to the Defence, remains a possible occurrence, and the risk is objectively identifiable. The Single Judge makes the present findings also in the conviction that the information concerned is of no significance for the preparation of the Defence, which knows the identity of the witness and may thus undertake steps to verify the witness's evidence. Thus, the Single Judge is of the view that the redaction as proposed will not result in undue prejudice to the Defence.

49. Accordingly, the Single Judge grants authorisation to redact the name of the witness's father in documents CIV-OTP-0046-0153 and CIV-OTP-0046-0156.

⁵⁹ Request, para. 22.

⁶⁰ Response, para. 60.

50. Finally, the Single Judge is of the view that disclosure of the witness' phone number to the Defence could have a negative impact on his safety. In the view of the Single Judge, redaction of the phone number is adequate and necessary to address this risk. The Single Judge is further of the view that this proposed redaction will not result in any prejudice to the Defence, which will be able to make full use of the item of evidence concerned.

51. Accordingly, the Single Judge grants authorisation to redact the phone number of the witness in documents CIV-OTP-0046-0153 and CIV-OTP-0046-0156.

FOR THESE REASONS, THE SINGLE JUDGE

GRANTS the Prosecutor's requests for redactions;

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 Thursday, 12 December 2013

At The Hague, The Netherlands