

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/11
Date: 16 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 notification of its intention to rely on 18 documents previously disclosed pursuant to Rule 77 or Article 67(2) for the purposes of the confirmation of charges; and request for authorization to maintain redactions previously made; and additional request to disclose one document as incriminating evidence"

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
 Herman von Hebel

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 notification of its intention to rely on 18 documents previously disclosed pursuant to Rule 77 or Article 67(2) for the purposes of the confirmation of charges; and request for authorization to maintain redactions previously made; and additional request to disclose one document as incriminating evidence” (the “Submission”).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 In that

¹ ICC-02/11-01/11-61.

² ICC-02/11-01/11-562 with Annex 1 confidential, and Annex 2 confidential, *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.

decision, the Chamber also established a series of time limits for further disclosure of evidence and submissions of the parties and participants.⁶

4. On 8 November 2013, the Chamber issued the “Decision on the ‘Prosecution’s request pursuant to Regulation 35 for variation of time limit to file updated document containing the charges, list of evidence and consolidated elements-based chart’” (the “Decision of 8 November 2013”),⁷ suspending “the calendar established by the Adjournment Decision pending another calendar to be issued by the Chamber as soon as the date of the Appeals Chamber’s judgment on the Prosecutor’s appeal against the Adjournment Decision is known”.⁸

5. On 15 November 2013, the Prosecutor filed the Submission.

6. The Defence did not respond to the Request within the time limit prescribed by regulation 34(b) of the Regulations of the Court (“Regulations”).

II. Submissions of the Prosecutor

7. The Prosecutor requests the Chamber to:

- a. Grant, pursuant to Regulation 35, the extension of time for the Prosecution to maintain redactions already applied to the metadata of the documents previously disclosed pursuant to Rule 77;
- b. Authorize the maintenance of the redactions already applied to the metadata of the documents previously disclosed pursuant to Rule 77;
- c. Authorize the Prosecution to rely on the documents previously disclosed pursuant to Rule 77 and the one document previously disclosed pursuant to Article 67(2) for the purposes of the confirmation of charges;
- d. Authorize these documents to be reclassified as incriminating evidence as established by the “eCourt protocol”; and

⁶ *Ibid.*, pp. 22-24.

⁷ ICC-02/11-01/11-557.

⁸ *Ibid.*, p. 7.

- e. Authorize the Prosecution to rely on document CIV-OTP-0002-0725 for the purposes of the confirmation of charges; and to disclose it as incriminating evidence in eCourt compatible format.⁹

8. First, the Prosecutor seeks to rely on 17 documents previously disclosed pursuant to rule 77 of the Rules of Procedure and Evidence (the “Rules”).¹⁰ Of these documents, 16 have previously been disclosed with certain redactions to their metadata,¹¹ and the Prosecutor submits that the redactions previously applied to the metadata should be maintained with respect to 15,¹² while they can be lifted with respect to one document.¹³

9. The Prosecutor submits that seeking the Chamber’s approval to rely on evidence previously disclosed under rule 77 of the Rules and to maintain redactions previously applied is not a procedural step that was contemplated in the Decision on Disclosure or the Adjournment Decision, and that it is thus “arguable that the Prosecution has not exceeded any time limit imposed by the Chamber”.¹⁴ However, for the event that the Chamber determines that a time limit has been exceeded, the Prosecutor requests an extension of time pursuant to regulation 35(2) of the Regulations to include and rely on the said documents for the purposes of the confirmation of charges, on the basis that

⁹ Submission, para. 32.

¹⁰ *Ibid.*, para. 5. The documents are CIV-OTP-0002-0136, CIV-OTP-0018-0311, CIV-OTP-0018-0687, CIV-OTP-0018-0690, CIV-OTP-0018-0693, CIV-OTP-0018-0985, CIV-OTP-0018-1069, CIV-OTP-0025-0162, CIV-OTP-0025-0334, CIV-OTP-0027-0090, CIV-OTP-0027-0304, CIV-OTP-0048-0104, CIV-OTP-0048-0497, CIV-OTP-0048-0748, CIV-OTP-0048-1146, CIV-OTP-0047-0794, CIV-OTP-0047-0792.

¹¹ *Ibid.*, para. 6. The Single Judge notes that the Prosecutor refers to “15 documents” in this category, but in fact they appear to be 16: CIV-OTP-0018-0311, CIV-OTP-0018-0687, CIV-OTP-0018-0690, CIV-OTP-0018-0693, CIV-OTP-0018-0985, CIV-OTP-0018-1069, CIV-OTP-0025-0162, CIV-OTP-0025-0334, CIV-OTP-0027-0090, CIV-OTP-0027-0304, CIV-OTP-0048-0104, CIV-OTP-0048-0497, CIV-OTP-0048-0748, CIV-OTP-0048-1146, CIV-OTP-0047-0794, CIV-OTP-0047-0792.

¹² *Id.* The Single Judge notes that the Prosecutor refers to “14 documents” in this category, but in fact they appear to be 15: CIV-OTP-0018-0311, CIV-OTP-0018-0687, CIV-OTP-0018-0690, CIV-OTP-0018-0693, CIV-OTP-0018-0985, CIV-OTP-0018-1069, CIV-OTP-0025-0162, CIV-OTP-0025-0334, CIV-OTP-0027-0090, CIV-OTP-0048-0104, CIV-OTP-0048-0497, CIV-OTP-0048-0748, CIV-OTP-0048-1146, CIV-OTP-0047-0794, CIV-OTP-0047-0792.

¹³ *Ibid.*, para. 7. The document is CIV-OTP-0027-0304.

¹⁴ *Ibid.*, para. 12.

the documents were only recently identified as being material and relevant to aspects of the document containing the charges.¹⁵

10. The Prosecutor requests that these documents be reclassified as ‘incriminating’ in order to be accommodated within the established E-court protocol.¹⁶ The Prosecutor submits that the reclassification of these documents for the purposes of the confirmation of charges will not prejudice the Defence as the documents have been available to the Defence for a significant period of time and the Defence has sufficient time to re-analyse the documents.¹⁷

11. In relation to her request to maintain redactions under rule 81(2) of the Rules, the Prosecutor submits that revealing any of the previously redacted information to the Defence may unduly attract attention to the movement of Prosecutor’s staff and by extension to (potential) witnesses and therefore affect their security and the Prosecutor’s ability to conduct her ongoing investigations in Côte d’Ivoire.¹⁸ The Prosecutor adds that the redactions ensure that she can continue to use during her investigations the limited number of investigators that she currently has at her disposal and that absent some showing of a specific need or justification for disclosure she seeks in the present case and as a matter of practice, to maintain the redactions of investigators’ identities.¹⁹

12. The Prosecutor submits that the redactions sought do not affect the fairness of the proceedings as they do not relate to information that is relevant for the preparation of the Defence.²⁰ The Prosecutor states that the redactions

¹⁵ *Ibid.*, para. 13.

¹⁶ *Ibid.*, paras 9 and 14.

¹⁷ *Ibid.*, para. 15.

¹⁸ *Ibid.*, paras 26 and 28.

¹⁹ *Ibid.*, paras 26-27.

²⁰ *Ibid.*, para. 29.

sought are consistent with Chamber's prior decisions, and that she will periodically review the need to maintain them.²¹

13. Second, the Prosecutor seeks to rely for the purposes of the confirmation of charges on document CIV-OTP-0045-0973, which was disclosed without redactions pursuant to article 67(2) of the Rome Statute (the "Statute") on 15 October 2013, and also requests that the document be reclassified as 'incriminating'.²² The Prosecutor submits that the Defence will suffer no prejudice because the document has already been disclosed to the Defence without any redactions and no time limit for the disclosure of incriminating evidence has been exceeded.²³ In addition, the Prosecutor states that evidence with similar content has already been disclosed to the Defence.²⁴

14. Finally, the Prosecutor seeks to rely for the purposes of the confirmation of charges on document CIV-OTP-0002-0725,²⁵ submitting that it was collected in 2011 but was hitherto not disclosed as it was only when the Prosecutor reviewed the evidence for the amended document containing the charges following the Adjournment Decision that she identified it as relevant to the issue of the historical context.²⁶ The Prosecutor seeks to disclose the document as incriminating without redactions to the document or its metadata.²⁷ On the basis that the document was in the Prosecutor's possession prior to 3 June 2013 – and as such should have been disclosed, according to the Adjournment Decision, by 5 July 2013 – the Prosecutor requests an extension of time limit pursuant to regulation 35(2) of the Regulations and submits that as the document was only recently identified as relevant, it was

²¹ *Id.*

²² *Ibid.*, paras 8-9, 16 and 17.

²³ *Ibid.*, para. 18.

²⁴ *Id.*

²⁵ *Ibid.*, para. 19.

²⁶ *Ibid.*, paras 19 and 20.

²⁷ *Ibid.*, para. 21.

not possible to make this application prior to the expiration of the relevant time limit.²⁸ The Prosecutor submits that the late disclosure of this document will not prejudice the Defence.²⁹

III. Analysis

15. The Single Judge notes articles 54(3)(f), 57(3)(c), 61 and 67 of the Statute, and rules 77, 81 and 121 of the Rules.

A. Reliance of the Prosecutor on evidence previously disclosed under article 67(2) of the Statute or rule 77 of the Rules

16. The Single Judge notes that, despite the title of the Submission referring to a “notification” on the part of the Prosecutor, the latter’s position appears to be that authorisation of the Chamber is needed to rely for the purposes of the confirmation of charges hearing on evidence that was previously disclosed under article 67(2) of the Statute or rule 77 of the Rules.³⁰

17. The Single Judge recognises that the present procedural scenario is relatively unusual and was not envisaged in the Decision on Disclosure. It rather appears to be a particular consequence of the Adjournment Decision’s request to the Prosecutor to “consider providing further evidence or conducting further investigation with respect to all charges”.³¹ Nevertheless, the Single Judge considers that there is no obstacle in the applicable law preventing the Prosecutor from relying on evidence that was previously disclosed not as incriminating, but under a different legal provision.

18. Moreover, there is in the view of the Single Judge no legal basis to require the Prosecutor to obtain specific authorisation of the Chamber in such cases. Instead, what is important is that all disclosure obligations in relation to

²⁸ *Id.*

²⁹ *Ibid.*, para. 22.

³⁰ *Ibid.*, paras 3, 11, 32(c).

³¹ Adjournment Decision, p. 22.

incriminating evidence are properly discharged as envisaged in the Decision on Disclosure. In particular, this means that the Prosecutor must: (i) give notice to the Defence of her intention to use evidence previously disclosed under article 67(2) of the Statute or rule 77 of the Rules as soon as practicable and at the latest at the time of the filing of the list of evidence; and (ii) provide to the Defence a chart organising each item in light of the constituent elements of the relevant crimes as required with respect to incriminating evidence by the Decision on Disclosure.³²

19. As far as notice to the Defence is concerned, the Single Judge considers that it has been properly provided by way of notification to the Defence of the Submission. As for the obligation to provide an analysis chart, the Single Judge considers it appropriate to set a time limit for this purpose.

20. The Single Judge notes that the Prosecutor requests authorisation of the Chamber to “reclassify” the concerned evidence as incriminating in the E-court system.³³ However, as this is a technical aspect of disclosure, the Single Judge is of the view that no judicial order is necessary. Rather, the Prosecutor must make all necessary arrangements with the Registry.³⁴

B. Redactions previously applied to the evidence by the Prosecutor

21. The Single Judge notes that the Prosecutor has disclosed some of the evidence in question with redactions, and has done so without prior authorisation of the Chamber as agreed by the parties and as stated in the Decision on Disclosure.³⁵

22. For one item of evidence (CIV-OTP-0027-0304), the Prosecutor submits that redaction of certain information in the metadata is no longer needed.

³² Decision on Disclosure, p. 31 and para. 40.

³³ Submission, p. 12.

³⁴ Decision on Disclosure, p. 25.

³⁵ *Ibid.*, paras 48-51.

Accordingly, the Single Judge expects the Prosecutor to re-disclose said metadata immediately.

23. Presently, in light of the fact that she wishes to rely on this evidence for the purposes of the confirmation of charges proceedings, the Prosecutor submits these redactions to judicial review, in order to comply with the procedure established in the Decision on Disclosure for incriminating evidence.³⁶ The Single Judge agrees that this is the appropriate course of action in these circumstances, and will address the specific requests to maintain redactions previously applied.

24. The Single Judge makes reference to the First Decision on Redactions, wherein the overall reasons for granting or rejecting redactions have been provided.³⁷ For the present decision, the Single Judge has adhered to the same approach.

25. As stated above, the Prosecutor requests, under rule 81(2) of the Rules, the redaction of the identities of certain investigators and the name of the source in the metadata of 15 documents. The specific requests are provided to the Chamber *ex parte* in an annex to the Submission.³⁸

26. 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”.³⁹ In this regard, the Single Judge emphasises, as and as held in this case several times,⁴⁰ that

³⁶ *Ibid.*, pp. 29-30.

³⁷ First Decision on Redactions, paras 55-102.

³⁸ ICC-02/11-01/11-562-Conf-Exp-Anx2.

³⁹ Submission, para. 27.

⁴⁰ “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-

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.

27. Nevertheless, upon analysis of the individual requests for redactions, the Single Judge concludes that disclosure to the Defence of the identities of the 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 two investigators is adequate and necessary to reduce the prejudice, and is the least restrictive protective measure available.

28. 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.

29. Accordingly, the Single Judge grants authorisation to maintain redactions to the identities of certain investigators in the metadata of certain documents as requested.

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.

30. In relation to the proposed redaction of the identity of the person who provided to the Prosecutor certain documents, in the metadata of those documents, 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.

31. 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.

32. Accordingly, the Single Judge grants authorisation to maintain redactions to the identity of the source in the metadata of certain documents as requested.

C. Request to rely on document CIV-OTP-0002-0725

33. The Prosecutor submits that the document in question, despite being in the Prosecutor's possession since 2011, was "only recently identified as being material and relevant to aspects of the DCC that are being amended", and that this is the reason why it was not disclosed by the 5 July 2013 time limit.⁴¹

34. In these circumstances, the genuineness of which the Single Judge has no reason to doubt, the Single Judge is of the view that it is appropriate to allow the Prosecutor to rely for the purposes of the confirmation of charges proceedings on the document in question. Considering that the request relates to a single item of evidence and that the final time limit for the disclosure of

⁴¹ Submission, paras 19-21.

evidence by the Prosecutor remains open,⁴² no prejudice will arise to the Defence. The Prosecutor is therefore directed to proceed to immediate disclosure of the document in line with the E-court protocol.

FOR THESE REASONS, THE SINGLE JUDGE

GRANTS the Prosecutor's requests to maintain redactions;

AUTHORISES the Prosecutor to rely for the purposes of the confirmation of charges proceedings on document CIV-OTP-0002-0725; and

ORDERS the Prosecutor to complete outstanding disclosure obligations in relation to the evidence dealt with in the present decision by 20 December 2013.

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



Judge Silvia Fernández de Gurmendi

Single Judge

Dated this Monday, 16 December 2013

At The Hague, The Netherlands

⁴² Decision of 8 November 2013, p. 7.