

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/11-01/11
Date: 18 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

With CONFIDENTIAL Annex, *EX PARTE*, only available to the Prosecutor

Decision on the "Prosecution's request for an extension of time to apply for redactions pursuant to Regulation 35 and for redactions to two documents pursuant to 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**
 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 request for an extension of time to apply for redactions pursuant to Regulation 35 and for redactions to two documents pursuant to 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-02/11-01/11-565 with Annexes 1, 2 and 3, 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.

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 22 November 2013, the Prosecutor filed the Request.

5. On 16 December 2013, the Defence filed the “*Réponse de la Défense à la « Prosecution’s request for an extension of time to apply for redactions pursuant to Regulation 35 and for redactions to two documents pursuant to Rule 81(4)» (ICC-02/11-01/11-565)*” (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,
- b. grant, pursuant to Rule 81(4), the Prosecution’s requests for redactions to the documents in Annexes 1 and 2.⁸

7. The request concerns two documents (CIV-OTP-0052-0292 and CIV-OTP-0052-0386) which were received by the Prosecutor on 7 November 2013 from the Office of Public Counsel for victims (the “OPCV”).⁹ The Prosecutor states that the persons who provided the documents to the OPCV gave their consent to the documents being provided to the Prosecutor but requested that limited redactions be implemented if they were to be relied upon as evidence in the proceedings, and that the documents “were received from the OPCV on the condition that the Prosecution would only use the documents if redactions were granted.”¹⁰

⁶ *Ibid.*, p. 23.

⁷ ICC-02/11-01/11-574.

⁸ Request, para. 20.

⁹ *Ibid.*, paras 5-6.

¹⁰ *Ibid.*, para. 7.

8. The Prosecutor submits that the requirements of regulation 35(2) of the Regulations of the Court (the “Regulations”) are met as she was not in the possession of the documents until after 15 October 2013 and therefore was unable to file the application within the specified time limit.¹¹

9. The Prosecutor seeks to rely on the two documents for the purpose of confirmation of charges proceedings, submitting that they are relevant as they pertain to a question posed in the Adjournment Decision,¹² and further submits that the Defence will not suffer prejudice as the recent suspension of the procedural calendar had the effect of granting all parties additional time to prepare for the confirmation of charges hearing.¹³

10. The Prosecutor seeks, pursuant to rule 81(4) of the Rules of Procedure and Evidence (the “Rules”), authorisation to redact identifying information of third parties at risk on account of activities of the Court and identifying information of family members of victims.¹⁴ In particular, the Prosecutor seeks, with respect to document CIV-OTP-0052-0386, the redaction of the name and signature of the provider of the document, and, with respect to document CIV-OTP-0052-0292, the redaction of: (i) the names and other identifying information of the persons involved in compiling the information presented in the various parts of the document; (ii) the names and other identifying information of persons listed as “contacts” for the listed victims; (iii) personal information, such as phone numbers and e-mail addresses of these persons; and (iv) personal information, specifically telephone numbers, of victims and other persons mentioned in the document.¹⁵ The specific requests for

¹¹ *Ibid.*, para. 9.

¹² *Ibid.*, para. 8.

¹³ *Ibid.*, para. 10.

¹⁴ *Ibid.*, para. 11.

¹⁵ *Ibid.*, para. 13.

redactions are included in a confidential annex to the Request, *ex parte*, only available to the Prosecutor.¹⁶

11. The Prosecutor submits that the requests for redaction of the identity of the sources of the two documents are based on the fact that the persons who provided the documents to the OPCV also expressed concerns for their security in case their names or other identifying information would be revealed.¹⁷ The Prosecutor avers that the security concerns of the persons who provided the documents to the OPCV are directly related to the prospect of their names and the names of other innocent third parties being associated with the activities of the Court, and in particular being identified in her evidence.¹⁸ With respect to the proposed redaction of telephone numbers of victims, the Prosecutor submits that this is personal and private information, which can be redacted on the basis of article 68(1) of the Rome Statute (the "Statute").¹⁹

12. The Prosecutor submits that the requested redactions will 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.²⁰

B. The Defence

13. The Defence, in its Response, requests the Chamber to:

A titre principal,

- Ordonner au BCPV d'indiquer :

- Comment il se sera trouvé en possession des documents CIV-OTP-0052-0386 et CIV-OTP-0052-0292 ;

¹⁶ ICC-02/11-01/11-565-Conf-Exp-Anx3.

¹⁷ Request, paras 12, 14.

¹⁸ *Ibid.*, para. 16.

¹⁹ *Ibid.*, para. 17.

²⁰ *Ibid.*, para. 18.

- S'il a été en contact avec des « sources » relatives à ces documents ;
 - S'il a participé, d'une manière ou d'une autre, à la mise en forme/rédaction d'un quelconque ou de plusieurs des documents rassemblés sous la référence CIV-OTP-0052-0386 et CIV-OTP-0052-0292.
- **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.

A titre subsidiaire,

- **Ordonner** au Procureur d'inclure dans les *metadata* de ces documents toutes les informations concernant leurs sources originelles, les intermédiaires, etc.²¹

14. The Defence submissions are focused primarily on the role of the OPCV in the collection of the documents for which the Prosecutor seeks redactions in the Request. The Defence emphasises that under article 68(3) of the Statute, and the related jurisprudence of the Court, the participation of victims in the proceedings is limited and that victims cannot be equated with the parties.²² More specifically, the Defence submits that only the parties, *i.e.* the Prosecutor and the Defence, are authorised by the Statute to investigate, and that, conversely, victims participating in the proceedings are not authorised to do so.²³

15. The Defence states that it is in position of limited information about the two documents which are the object of the Request,²⁴ and submits that this raises two questions: (i) how the documents found themselves in the hands of the OPCV, in particular whether they were solicited by the OPCV; and (ii)

²¹ Response, pp. 18-19.

²² *Ibid.*, paras 3-14.

²³ *Ibid.*, paras. 15-19.

²⁴ *Ibid.*, para. 25.

what was the role of the OPCV in the drafting of the reports and in their compilation.²⁵

16. In this regard, the Defence argues that, were it to be confirmed that the OPCV had had an active role in the collection of the evidence, this would be incompatible with the role of the victims in the proceedings.²⁶ In particular, the Defence submits that the OPCV "*est devenu un Procureur bis à part entière, se substituant à lui quand il le juge opportun.*"²⁷ Furthermore, the Defence states:

L'intervention du BCPV dans les enquêtes, si elle était avérée, risquerait d'altérer la qualité de la preuve recueillie et partant, la solidité de la procédure, sans compter que cela créerait des incertitudes quant aux informations dont disposent les parties.²⁸

17. Further, the Defence submits that the Prosecutor must provide to it all information in his possession to ensure that it is in position to discuss the evidence and contest the charges, and adds that it appears, in the present instance, that the Prosecutor herself does not have full knowledge of how the evidence was obtained by the OPCV, and of any intermediaries which contributed to their collection.²⁹ The Defence notes that the Prosecutor seeks to redact information about the sources from the content of the document, but not from their metadata, and states that this leads to the conclusion that the true source of the documents is not found in the metadata.³⁰ However, the Defence argues that the E-court protocol requires the Prosecutor to indicate in the metadata all entities/persons who had the item, in chronological order.³¹

18. In conclusion of this line of argument, the Defence submits:

54. Conclusion : Compte tenu du flou entretenu par l'Accusation sur la façon dont elle a obtenu ces documents, du rôle possible que semble avoir tenu le

²⁵ *Ibid.*, paras 26-32.

²⁶ *Ibid.*, paras 33-36.

²⁷ *Ibid.*, para. 40.

²⁸ *Ibid.*, para. 42; see also paras 43-45.

²⁹ *Ibid.*, paras 46-47; see also paras 50-51.

³⁰ *Ibid.*, para. 48.

³¹ *Ibid.*, para. 49.

BCPV et des répercussions graves pour l'équité de la procédure qu'entraînerait l'intervention du BCPV, il convient que la Chambre interroge le BCPV afin de savoir comment :

- Il se sera trouvé en possession de ces éléments de preuve ;
- Si le BCPV a été en contact avec des « sources » relatives à ces documents ;
- Si le BCPV a participé, d'une manière ou d'une autre, à la mise en forme/compilation de ces éléments.

55. Si tel était le cas, et pour protéger l'intégrité de la procédure, il conviendrait d'écarter, en application de l'article 69 du Statut, ces éléments de preuve. Si néanmoins la Chambre n'estimait pas nécessaire d'écarter ces éléments de preuve, il conviendrait de demander au Procureur d'inclure dans les metadata de ces documents toutes les informations concernant leurs sources originelles, les intermédiaires, etc.³²

19. As concerns the Prosecutor's requests for redactions, the Defence argues that the Prosecutor has failed to provide precise reasons justifying each of the redactions requested.³³ The Defence submits that the Prosecutor has not shown how the security of each concerned person would be put at risk in case of disclosure of their identities.³⁴ Specifically, the Defence avers that the Prosecutor has failed to explain how disclosure to the Defence, which is bound to respect the confidentiality of evidence, would constitute a risk.³⁵ The Defence also submits that the information sought to be redacted, in particular information concerning the sources of the documents and the contact persons of the mentioned victims, are of great importance for the Defence as they allow for verification of the soundness of the reports.³⁶

20. The Defence is also critical of the fact that the Prosecutor submitted the documents for which redactions are requested together with the request for extension of time, stating that by doing so, the Prosecutor is attempting to disclose the evidence at the same time as submitting the Request and to force

³² *Ibid.*, paras 54-55.

³³ *Ibid.*, para. 60.

³⁴ *Ibid.*, paras 62-64.

³⁵ *Ibid.*, paras 65-67.

³⁶ *Ibid.*, paras 70-71.

the Chamber to pronounce itself on the redactions without even addressing the question of compliance with the time limit.³⁷

21. 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.³⁸ The Defence argues that all information of any significance to it must be disclosed in order to enable its preparation.³⁹ 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.⁴⁰ The Defence also states that it deplors the fact that the Prosecutor has not communicated to it the evidence in its redacted form, which would have allowed it to make submissions on the requested redactions.⁴¹

III. Analysis

22. The Single Judge notes articles 54(3)(f), 57(3)(c), 61, 64(9), 67 and 68(1) of the Statute, rules 63, 81 and 121 of the Rules, and regulation 35(2) of the Regulations.

A. *Request for extension of time*

23. The Single Judge notes that the Prosecutor obtained the evidence subject to the Request after expiration of the time limit set in the Adjournment Decision for the presentation of requests for redactions. In addition, she notes that the time limit for the submission of the amended document containing the charges and the amended list of evidence is presently set at 13 January

³⁷ *Ibid.*, paras 73-75.

³⁸ *Ibid.*, para. 76; see also paras 82-83

³⁹ *Ibid.*, paras 77-78.

⁴⁰ *Ibid.*, paras 79-81.

⁴¹ *Ibid.*, para. 85.

2013,⁴² and that it is therefore possible for the Chamber to adjudicate the requests for redactions, and for the Prosecutor to properly disclose the redacted evidence to the Defence in time to enable the latter's preparation.

24. The Defence does not raise any argument against allowing the Prosecutor's request for redactions after expiration of the time limit. However, it criticises the fact that the Prosecutor submitted such request at the same time that she asks for an extension of time.⁴³ Nevertheless, 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.

25. Accordingly, the Single Judge will proceed to the analysis of the requests for redactions.

B. Requests for redactions

26. 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,⁴⁴ and to the First Decision on Redactions, wherein the overall reasons for granting or rejecting redactions have been provided.⁴⁵ For the present decision, the Single Judge has adhered to the same approach.

27. At the outset, the Single Judge notes the argument of the Defence that it has not been properly informed of the Prosecutor's requests for redactions.⁴⁶ However, upon review of the Request, the Single Judge is of the view that provision of further details concerning the specific requests for redactions

⁴² Pre-Trial Chamber I, "Decision establishing a calendar for further proceedings", 17 December 2013, ICC-02/11-01/11-576, p. 6.

⁴³ Response, paras 73-75.

⁴⁴ Decision on Disclosure, paras 52-57

⁴⁵ First Decision on Redactions, paras 55-102.

⁴⁶ Response, para. 72.

which are currently *ex parte* would defeat the purpose of the requests and is therefore not appropriate. In this regard the Defence also submits that the Prosecutor should have provided to it the redacted evidence at the time of the filing of the Request.⁴⁷ While this has been done on some occasions, disclosure of the redacted evidence only after the decision on the request for redactions is in line with the system established by the Decision on Disclosure.

28. As stated above, the Prosecutor requests, pursuant to rule 81(4) of the Rules, with respect to document CIV-OTP-0052-0386, the redaction of the name and signature of the provider of the document, and, with respect to document CIV-OTP-0052-0292, the redaction of: (i) the names and other identifying information of the persons involved in compiling the information presented in the various parts of the document; (ii) the names and other identifying information of persons listed as “contacts” for the listed victims; (iii) personal information, such as phone numbers and e-mail addresses of these persons; and (iv) personal information, specifically telephone numbers, of victims and other persons mentioned in the document.

29. As concerns the identity of the name and signature of the provider of document CIV-OTP-0052-0386, the Single Judge is of the view, in particular in light of the content of the document in question, that disclosure to the Defence of the name and signature of the concerned individual would lead to an objectively identifiable risk for his security, and that redaction is therefore necessary. Considering that only the name and signature of the person are proposed for redaction, but not other information making it possible to understand and verify the nature and source of the document, the Single Judge is of the view, taking into account the present stage of the proceedings, that this redaction is not prejudicial to the rights of the Defence.

⁴⁷ *Ibid.*, para.85.

30. Similarly, the Single Judge is of the view, upon analysis of each requested redaction, that disclosure to the Defence of the names and other identifying information, personal information, such as phone numbers and e-mail addresses, of the persons involved in compiling the information presented in document CIV-OTP-0052-0292 would bring about an objectively identifiable risk for the security of the concerned persons. In the absence of less intrusive protective measures, redaction of this information is necessary. In addition, the Single Judge is of the view that the ability of the Defence to properly exercise its rights during the confirmation of charges proceedings will not be prejudiced by these limited redactions.

31. Finally, the Single Judge turns to the requests to redact the names and other identifying information of persons listed as contact persons for the listed victims, and to the requests to redact personal information, specifically telephone numbers, of such persons, as well as of certain victims. Upon review of each individual request,⁴⁸ the Single Judge considers that redaction of this information is necessary as their disclosure to the Defence would make possible improper interference with the victims and certain other persons to whom the proposed redactions relate. This would constitute, in the view of the Single Judge, an objectively identifiable risk for these persons in case of disclosure to the Defence. In this determination, the Single Judge is particularly attentive to the fact that the proposed redactions are limited, concerning only telephone numbers and names or other identifying information of persons who are not relevant to the substance of the document. The Defence ability to exercise its rights at this stage of the proceedings is therefore not affected.

⁴⁸ The Single Judge notes that in one instance, the Prosecutor requests redaction of the name of a third person who is not a contact person in the sense put forward by the Prosecutor. Nevertheless, all considerations of this paragraph apply equally to this proposed redaction.

32. In light of the above, the Single Judge grants the Prosecutor's requests for redactions in documents CIV-OTP-0052-0386 and CIV-OTP-0052-0292 as specified in the Annex to the present decision, which is classified as confidential, *ex parte*, only available to the Prosecutor.

C. Defence arguments in relation to the involvement of the OPCV in the collection of the concerned evidence

33. The Defence argues that the Chamber should compel the OPCV to provide information on how the documents in question came into its possession, and that if it transpires that the OPCV was in contact with the sources of these documents and/or that the OPCV participated in the compilation of the reports, the documents should be excluded from the evidence.⁴⁹

34. In light of the fact that the Defence has included in its Response comprehensive submissions for the argument that the victims participating in the proceedings under article 68(3) of the Statute are not authorised to investigate or to present evidence, the Single Judge considers it important to note that the present situation is not one concerning investigation and presentation of evidence by the victims. The two documents concerned were transmitted to the Prosecutor in the course of her investigation and it is the Prosecutor who seeks to rely on this evidence for the purposes of the confirmation of charges proceedings. The Single Judge is of the view that there is nothing in the applicable law preventing the Prosecutor from receiving evidence from victims. In this regard, the Single Judge is guided by the following Appeals Chamber's finding:

In the view of the Appeals Chamber, there is ample scope within the statutory scheme of the Statute for victims and anyone else with relevant information to pass it on to the Prosecutor without first being formally accorded a "general right to participate". [...] [The Prosecutor is] authorised under article 42(1) to

⁴⁹ Response, paras 54-55.

receive and consider “any substantiated information on crimes within the jurisdiction of the Court”.⁵⁰

35. For this reason, the Single Judge does not find of consequence the Defence submissions in relation to the role of the participating victims in the proceedings, also noting that the Defence does not argue that the documents in question should be excluded due to the mere fact that they were obtained by the Prosecutor from the OPCV. The Single Judge notes that the Prosecutor remains at liberty to use the evidence she receives, irrespective of the source of such evidence. Likewise, the Pre-Trial Chamber has the authority to assess freely all evidence submitted to it in the course of the confirmation of charges proceedings, in accordance with article 64(9) of the Statute and rule 63 of the Rules, irrespective of the source of such evidence.

36. Indeed, the Defence argument is not that the Prosecutor should not be allowed to use the documents in question, but rather that further information is necessary to evaluate the probative value of the evidence. In this respect, the Single Judge considers that the Defence argument that the possible involvement of the OPCV in the preparation of the evidence in question would affect its probative value is premature. Indeed, what is at issue at the moment is whether the Prosecutor should be allowed, after expiration of the relevant time limit, to disclose this evidence to the Defence and to present it in further confirmation of charges proceedings, and whether redactions can be authorised. After disclosure of the evidence the Defence will be in a position to analyse the evidence concerned, and take any action as appropriate under article 61(6) of the Statute, including challenging the probative value of the evidence, as part of further proceedings following the Adjournment Decision.

⁵⁰ Appeals Chamber, “Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007”, 19 December 2008, ICC-01/04-556, para. 53.

In this regard, the fact that the two documents were provided to the Prosecutor by the OPCV does not deprive in any way the Defence from his right to challenge them, as this right applies, in accordance with article 61(6)(b) to all evidence presented by the Prosecutor for the confirmation of the charges proceedings, irrespective of who gave such evidence to the Prosecutor or how such evidence came into her possession. For this reason, the Single Judge considers that the course of action proposed by the Defence in the Response is not appropriate.

37. By the same token, the Single Judge finds unwarranted the subsidiary request of the Defence, *i.e.* to order the Prosecutor to include in the metadata of the documents all information concerning "*leurs sources originelles, les intermédiaires, etc*",⁵¹ considering that the Prosecutor is already under obligation to disclose evidence in compliance with the E-court protocol, and considering that any further discussion of the provenance of the documents in question is not a matter of disclosure, but rather relates to the probative value of the evidence.

FOR THESE REASONS, THE SINGLE JUDGE

GRANTS the Prosecutor's requests for redactions as specified in the Annex to the present decision; 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.

⁵¹ Response, p. 19.

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



Judge Silvia Fernández de Gurmendi

Single Judge

Dated this Wednesday, 18 December 2013

At The Hague, The Netherlands