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

Date: 11 July 2014

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 “*Demande d’autorisation d’interjeter appel de la décision de la Juge unique du 19 juin 2014 sur la « Prosecution’s request to disclose material in a related proceeding pursuant to Regulation 42(2) » (ICC-02/11-01/11-659)*”

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 “*Demande d’autorisation d’interjeter appel de la décision de la Juge unique du 19 juin 2014 sur la « Prosecution’s request to disclose material in a related proceeding pursuant to Regulation 42(2) » (ICC-02/11-01/11-659)*” (the “Request”), filed on 26 June 2014.²

1. On 30 May 2014, the Prosecutor filed the “Prosecution’s request to disclose material in a related proceeding pursuant to Regulation 42(2)”,³ submitting that the evidence obtained from the Defence in the present case had to be disclosed to the Defence in the case against Charles Blé Goudé, and requesting authorisation to disclose to the Defence of Mr Blé Goudé the evidence which was disclosed by the Defence confidentially.⁴

2. On 11 June 2014, the Defence filed the “*Réponse à la « Prosecution’s request to disclose material in a related proceeding pursuant to Regulation 42(2) » déposée le 30 mai 2014 (ICC-02/11-01/11-652)*”, opposing the Prosecutor’s request.⁵

3. On 19 June 2014, the Single Judge issued the “Decision on the ‘Prosecution’s request to disclose material in a related proceeding pursuant to Regulation 42(2)’” (the “Decision”),⁶ authorising the Prosecutor to disclose to the Defence in the case against Mr Blé Goudé all material disclosed by the

¹ “*Décision portant désignation d’un juge unique*”, 16 March 2012, ICC-02/11-01/11-61.

² ICC-02/11-01/11-660-Conf. A corrigendum was filed on 30 June 2014, see ICC-02/11-01/11-660-Conf-Corr. A public redacted version of the corrigendum is also available, see ICC-02/11-01/11-660-Corr-Red.

³ ICC-02/11-01/11-652.

⁴ *Id.*, paras 3, 6.

⁵ ICC-02/11-01/11-655.

⁶ ICC-02/11-01/11-659.

Defence in the present case with the same confidentiality level and protective measures, with the exception of certain documents which contain information of a sensitive and personal nature, without prejudice to the Prosecutor reassessing the need for their disclosure and providing reasons for which disclosure is deemed necessary.⁷

4. On 25 June 2014, the Prosecutor disclosed to the Defence of Blé Goudé the evidence concerned as authorised by the Decision.⁸ [the “First Issue”]

5. On 25 June 2014, the Defence filed the Request, seeking leave to appeal the Decision with respect to the following issues:

- (i) Première question : La Juge unique pouvait elle rendre une décision sans se prononcer sur la question essentielle de la base légale déterminée par le demandeur ? [the “First Issue”]⁹
- (ii) Deuxième question : la Juge unique, lorsqu’elle prend une décision, peut-elle écarter les éléments de réflexion et l’argumentation présentés par la défense sans même les avoir discutés ? [the “Second Issue”]¹⁰
- (iii) Troisième question : la Juge unique peut-elle rendre une décision non motivée en droit ? [the “Third Issue”]¹¹
- (iv) Quatrième question: la Juge unique n’a-t-elle pas commis une erreur de droit en considérant que les pièces résultant d’enquêtes menées par la défense et divulguées par une équipe de défense au Procureur et à la Chambre seraient « en la possession ou sous le contrôle du Procureur » ? [the “Fourth Issue”]¹²
- (v) Cinquième question : Peut-elle laisser le Procureur décider de divulguer à des tiers dans une autre affaire des pièces couvertes par secret médical ou couvertes par le sceau de la confidentialité sans qu’il ait à se justifier ? [the “Fifth Issue”]¹³
- (vi) Sixième question : La Juge unique pouvait-elle s’appuyer sur une formulation sans signification juridique pour permettre la transmission à des

⁷ *Ibid.*, p. 7.

⁸ ICC-02/11-02/11-91 and confidential annex.

⁹ Request, p. 7.

¹⁰ *Ibid.*, p. 8.

¹¹ *Ibid.*, p. 9.

¹² *Id.*

¹³ *Ibid.*, p. 11.

tiers de documents divulgués par une équipe de défense ? [the “Sixth Issue”]¹⁴

- (vii) Septième question : La Juge unique n’a-t-elle pas commis une erreur de droit en attachant à des affaires « closely related » les conséquences pratiques attachées à une jonction d’affaire ? Plus précisément, la Juge unique n’a-t-elle pas erré en ordonnant la transmission de pièces émanant d’une équipe de défense dans une affaire à une autre équipe de défense dans une autre affaire alors même qu’il s’agit de deux affaires distinctes et que la question de la jonction des affaires n’a jamais été discutée ? [the “Seventh Issue”]¹⁵
- (viii) Huitième question : Le destinataire d’un document médical, qui ne lui a été transmis par l’intéressé que dans un but précis, dans des circonstances particulières, et dans des conditions de confidentialité telles qu’il était inconcevable que le destinataire puisse transmettre ce document à un tiers, peut-il, de sa propre autorité, le transmettre à un tiers sans accord de l’intéressé ? Question corollaire : Le Juge peut-il l’autoriser à transmettre un tel document sans accord de l’intéressé ? [the “Eighth Issue”]¹⁶
- (ix) Neuvième question : Le Procureur peut-il transmettre à un tiers avec l’accord du Juge des éléments confidentiels qui n’avaient été transmis qu’à lui ? En ce qui concerne les documents non couverts par le secret médical, la question est de savoir qui est le maître de la confidentialité. [the “Ninth Issue”]¹⁷
- (x) Dixième question : La Juge unique n’a-t-elle pas violé les articles 57(3)(c) et 68(1) du Statut en décidant de divulguer à un tiers des déclarations de témoins sans d’abord rechercher le consentement de ces témoins et sans auparavant s’assurer que la sécurité desdits témoins serait effectivement garantie en cas de divulgation à un tiers ? [the “Tenth Issue”]¹⁸

6. On 30 June 2014, the Prosecutor responded to the Request,¹⁹ arguing that it was filed out of time,²⁰ and, in any case, that it is either moot or does not satisfy the criteria for granting leave to appeal.²¹

7. On 2 July 2014, the Defence filed the “*Demande d’autorisation de répliquer à la « Prosecution’s Response to Defence Application for Leave to Appeal the Single*

¹⁴ *Ibid.*, p. 12.

¹⁵ *Id.*

¹⁶ *Ibid.*, p. 13.

¹⁷ *Ibid.*, p. 15.

¹⁸ *Ibid.*, p. 16.

¹⁹ ICC-02/11-01/11-664.

²⁰ *Ibid.*, paras 2-3.

²¹ *Ibid.*, paras 4-9.

Judge's Decision of 19 June 2014 on disclosure in a related proceeding » (ICC-02/11-01/11-664) déposée le 30 juin 2014” (the “Request for Leave to Reply”), in relation to alleged technical problems encountered at the time of the filing of the Request.²²

8. The Single Judge notes articles 57(2) and 82(1)(d) of the Rome Statute (the “Statute”), rules 7 and 155 of the Rules of Procedure and Evidence (the “Rules”), and regulations 33 and 65 of the Regulations of the Court (the “Regulations”).

9. The Single Judge notes first the Defence submission that the Request should be adjudicated by the full Chamber.²³ In the present case, following a decision to this effect by the Chamber,²⁴ the functions of the Chamber are exercised by the Single Judge, with the exception of those decisions listed in article 57(2)(a) of the Statute and in the Rules and unless the full Chamber decides otherwise in accordance with rule 7(3) of the Rules. As the present decision is not of a type which under article 57(2)(a) of the Statute or under the Rules must be issued by the full Chamber and given that the full Chamber, after consultation, has decided not to make use of its prerogative under rule 7(3) of the Rules to decide on this Request, the Single Judge remains competent to exercise the functions of the Chamber in relation to this Request.

10. The Prosecutor argues that the Request was filed out of time and should be dismissed.²⁵ The Decision was notified to the Defence on 19 June 2014 and, thus, under rule 155(1) of the Rules and regulation 33(1) of the Regulations, any application for leave to appeal the Decision had to be filed, at the latest, on 25 June 2014. According to the information provided by the Registry, the

²² ICC-02/11-01/11-665-Conf and annexes.

²³ Request, paras 5-8.

²⁴ ICC-02/11-01/11-61.

²⁵ Response, paras 2-3

Request was indeed filed on 25 June 2014. For this reason, the Single Judge considers the Request to have been filed within the applicable time limit. In the view of the Single Judge, the fact that the Request was not filed before 16.00 hours, as prescribed by regulation 33(2) of the Regulations, but only at 17.08 hours, has no bearing on the question whether it was filed within the applicable time limit, as regulation 33(2) of the Regulations pertains to the procedure for notification of documents by the Registry, and not to their admissibility. Indeed, regulation 33(3) of the Regulation does not make documents filed after 16.00 hours inadmissible, but merely states that they “shall be notified on the next working day of the Court”. In light of these considerations, the proposed reply of the Defence is not necessary and the Request for Leave to Reply must be rejected.

11. Having disposed of these preliminary matters, the Single Judge now turns to the merits of the request.

12. Article 82(1)(d) of the Statute provides that either party may appeal:

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

13. According to established jurisprudence, an “issue” is an identifiable subject or topic requiring a decision for its resolution, as opposed to a hypothetical concern or an abstract legal question or a question over which there is a mere disagreement or conflicting opinion. An “issue” is constituted by a subject the resolution of which is “essential for the determination of matters arising in the judicial cause under examination”.²⁶

²⁶ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 9.

14. Furthermore, for leave to appeal to be granted, article 82(1)(d) of the Statute requires that the “issue” identified by the party would significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the trial. In order to assess whether the issue would indeed significantly affect one of the “elements of justice” mentioned in article 82(1)(d) of the Statute, the Chamber “must ponder the implications of a given issue being wrongly decided” on the fairness and expeditiousness of the proceedings or the outcome of the trial, performing an “exercise [that] involves a forecast of the consequences of such an occurrence”.²⁷

15. Finally, it is necessary that, in the opinion of the Single Judge, an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings. As held by the Appeals Chamber, “the issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”.²⁸ In this regard, “advancing the proceedings” has been identified by the Appeals Chamber as “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines” and the term “immediate” has been defined as “underlin[ing] the importance of avoiding errors through the mechanism provided by subparagraph (d) by the prompt reference of the issue to the court of appeal”.²⁹

²⁷ *Ibid.*, paras 10 and 13.

²⁸ *Ibid.*, para. 14.

²⁹ *Ibid.*, para. 18.

16. Accordingly, “[p]ut in a nutshell, the object of paragraph (d) of article 82 (1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.³⁰

17. The Defence raises ten issues for appeal against the Decision, alleging various errors. As also pointed out by the Prosecutor,³¹ some of the issues put forward by the Defence relate to disclosure of medical documents. This is entirely the case for the Fifth,³² Eighth,³³ and Ninth Issue,³⁴ and, as it appears from the Request, partly also for the First³⁵ and Third Issue.³⁶

18. The Single Judge notes that the Decision did not authorise the Prosecutor to disclose to the Defence of Mr Blé Goudé documents which contain information of a sensitive and personal nature, including in particular medical documents, but reserved this decision for a later stage, should the Prosecutor, upon reassessment, provide reasons for which disclosure is deemed necessary despite the nature of the information contained in this documentation.³⁷ The documents concerned have thus not been disclosed to the Defence of Mr Blé Goudé, and the Prosecutor is not authorised to disclose them without further intervention by the Chamber. In these circumstances, any issue pertaining to the propriety of the disclosure of medical documents which were confidentially disclosed to the Prosecutor by the Defence in the present case to the Defence of Mr Blé Goudé does not arise from the Decision.

19. As concerns other evidence (First to Fourth, Sixth, Seventh and Tenth Issue), the Single Judge considers that the Defence has not demonstrated that

³⁰ *Ibid.*, para. 19.

³¹ Response, para. 7.

³² Request, paras 50-53.

³³ *Ibid.*, paras 60-72.

³⁴ *Ibid.*, paras 73-78.

³⁵ See *ibid.*, para. 32.

³⁶ See *ibid.*, para. 39.

³⁷ Decision, para. 7 and p. 7.

these are issues that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Defence provides brief and superficial submissions on this point, and does not explain how the specific issues identified fulfil the abovementioned criterion.³⁸ Indeed, the Single Judge cannot discern how the disclosure of the Defence evidence to the Defence of Mr Blé Goudé as authorised by the Decision would in any way, let alone “significantly” as required by article 82(1)(d) of the Statute, affect the ability of the Defence to exercise its rights in the present case, or the outcome thereof.

20. In any case, considering that the Prosecutor has already proceeded to disclosure as authorised by the Decision, prior to being notified of the Request, no decision by the Appeals Chamber could provide to the Defence the remedy that it seeks, namely prevention of the disclosure to Mr Blé Goudé.³⁹ Consequently, the Single Judge takes the view that appellate intervention at this stage would not materially advance the proceedings.

FOR THESE REASONS, THE SINGLE JUDGE

REJECTS the Request; and

REJECTS the Request for Leave to Reply.

³⁸ Request, paras 84-87.

³⁹ See *ibid.*, para. 90.

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



Judge Silvia Fernández de Gurmendi
Single Judge

Dated this Friday, 11 July 2014

At The Hague, The Netherlands