

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/11-01/11
Date: 11 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 Defence request for leave to appeal three decisions authorising
exemptions from disclosure**

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 « Decision on the “Prosecution’s request for protective measures, including redactions to the statement of witness CIV-OTP-P-0238” » (ICC-02/11-01/11-554) du 7 novembre 2013 ; de la « Decision on the “Prosecution’s request to be authorized to rely on the anonymous statement of witness CIV-OTP-P-0316” » (ICC-02/11-01/11-555) du 7 novembre 2013 ; et de la « Decision on the “Prosecution’s request for redactions pursuant to Rule 81(2) and Rule 81(4)” » (ICC-02/11-01/11-556) du 7 novembre 2013.*” (the “Application”), submitted by the Defence on 13 November 2013.²

I. Procedural history

1. On 14 October 2013, the Prosecutor filed the “Prosecution’s request for protective measures, including redactions to the statement of witness CIV-OTP-P-0238”.³ The Defence responded on 25 October 2013.⁴ On 7 November 2013, the Single Judge issued the “Decision on the ‘Prosecution’s request for protective measures, including redactions to the statement of witness CIV-OTP-P-0238’” (the “First Decision”).⁵

¹ ICC-02/11-01/11-61.

² ICC-02/11-01/11-560-Conf.

³ ICC-02/11-01/11-535-Conf-Exp, only available to the Prosecutor and the VWU, and annexes, confidential, *ex parte*, only available to the Prosecutor and the VWU. A confidential redacted version was filed on 15 October 2013 (see ICC-02/11-01/11-535-Conf-Red).

⁴ ICC-02/11-01/11-545-Conf.

⁵ ICC-02/11-01/11-554-Conf-Exp and annex, confidential, *ex parte*, only available to the Prosecutor and the VWU. A confidential redacted version has also been filed (ICC-02/11-01/11-554-Conf-Red).

2. On 15 October, the Prosecutor filed the “Prosecution’s Request to be authorised to rely on the anonymous statement of witness CIV-OTP-P-0316 for the purposes of the confirmation of the charges”.⁶ The Defence responded on 25 October 2013.⁷ On 7 November 2013, the Single Judge issued the “Decision on the ‘Prosecution’s Request to be authorised to rely on the anonymous statement of witness CIV-OTP-P-0316 for the purposes of the confirmation of the charges’” (the “Second Decision”).⁸

3. Also on 15 October 2013, the Prosecutor filed the “Prosecution’s request for redactions pursuant to Rule 81(2) and Rule 81(4)”.⁹ The Defence responded on 25 October 2013.¹⁰ On 7 November 2013, the Single Judge issued the “Decision on the ‘Prosecution’s request for redactions pursuant to Rule 81(2) and Rule 81(4)’” (the “Third Decision”).¹¹

4. On 13 November 2013, the Defence filed the Application.

5. On 18 November 2013, the Prosecutor filed the “Prosecution’s Response to the Defence Request for Leave to Appeal Decisions ICC-02/11-01/11-554-Conf-Red, ICC-02/11-01/11-555-Conf-Red and ICC-02/11-01/11-556” (the “Response”),¹² opposing the Application.¹³

⁶ ICC-02/11-01/11-536-Conf-Exp, only available to the Prosecutor and the VWU. A confidential redacted version was filed on 16 October 2013 (ICC-02/11-01/11-536-Conf-Red).

⁷ ICC-02/11-01/11-545-Conf, p. 9.

⁸ ICC-02/11-01/11-555-Conf-Exp. A confidential redacted version has also been filed (ICC-02/11-01/11-555-Conf-Red).

⁹ ICC-02/11-01/11-537-Conf and annexes, confidential, *ex parte*, only available to the Prosecutor.

¹⁰ ICC-02/11-01/11-544-Conf.

¹¹ ICC-02/11-01/11-556 and annex, confidential, *ex parte*, only available to the Prosecutor.

¹² ICC-02/11-01/11-564-Conf.

¹³ *Ibid.*, p. 15.

II. Submissions of the parties

A. *The Defence*

6. The Defence requests leave to appeal the First, Second and Third Decision in respect of the following issues:

- a. La Juge unique a-t-elle erré en droit en ne se référant pas aux conditions posées par la jurisprudence à propos de l'expurgation des informations relatives au témoin P-238 ? [the "First Issue"]
- b. La Juge unique a-t-elle erré en droit en ne motivant pas sa décision d'autoriser le Procureur à utiliser le témoignage anonyme du témoin P-316 lors de l'audience de confirmation des charges ? [the "Second Issue"]
- c. La Juge unique a-t-elle erré en droit en autorisant, sans motivation, le Procureur à expurger le nom de certains membres de son bureau, la date et le lieu des entretiens tenus avec les témoins et le nom de certains « investigative leads » ? [the "Third Issue"]
- d. La Juge unique aurait dû démontrer que la divulgation à la défense des informations dont le Procureur souhaitait l'expurgation pouvait entraîner de façon concrète un risque pour les témoins du Procureur. La Juge unique dans les trois décisions du 7 novembre 2013 a considéré que la divulgation de ces éléments d'information à la défense constituerait un risque sans jamais expliquer sa position, ce qui constitue une erreur de droit. N'appartenait-il pas à la Juge unique de démontrer l'existence de risques pour les témoins du fait de la transmission de certaines informations à la défense ? [the "Fourth Issue"]
- e. La Juge unique aurait dû démontrer que la divulgation à la défense des informations dont le Procureur souhaitait l'expurgation pouvait entraîner de façon concrète un risque pour les « enquêtes en cours et à venir » au sens de la Règle 81 (2). La Juge unique a-t-elle erré en droit en n'expliquant pas en quoi la divulgation d'informations particulière à la défense pourrait conduire à un risque pour l'enquête ? [the "Fifth Issue"]
- f. La Juge unique a-t-elle erré en droit en ne prenant pas suffisamment en compte l'atteinte aux droits de la défense qu'entraînent les décisions permettant au Procureur d'expurger le nom des témoins, toute information relative à ces témoins, le lieu et la date des entretiens réalisés, le nom des « investigative leads », tous éléments qui, lorsqu'ils s'ajoutent les uns aux autres, conduisent la défense à ne disposer que de documents incompréhensibles, illisibles et inutiles ? [the "Sixth Issue"]¹⁴

¹⁴ Application, pp. 13-14.

7. The Defence submits that these issues arise from the impugned decisions.¹⁵

8. The Defence also contends that the Single Judge has not drawn any distinction between disclosure to the public and confidential disclosure to the Defence, and that the decisions rest on a presumption of distrust towards the Defence.¹⁶ In the submission of the Defence, *“la Juge Unique ne démontre jamais l’existence d’un « objectivement identifiable prejudice », se contenant de mentionner un préjudice hypothétique et abstrait, ce risque tenant d’après-elle à toute communication à la défense.”*¹⁷

9. The Defence also argues:

Non seulement la Juge unique a-t-elle suivi le Procureur sans appliquer les critères de la Chambre d’Appel et sans analyser les demandes du Procureur in concreto mais encore n’at-elle pas pris en compte les conséquences qu’entraîne pour la défense le fait d’accorder au Procureur toutes ses demandes. La défense avait pourtant démontré qu’elle se trouverait dans l’impossibilité d’enquêter et de répondre aux affirmations contenues dans les témoignages expurgés et anonymes si ces témoignages lui étaient présentés sous une forme inutilisable. La Juge unique n’a jamais pris la peine d’examiner les conséquences spécifiques que telle ou telle expurgation pouvait entraîner quant à la capacité de la défense de vérifier la véracité ou la crédibilité des éléments contenus dans les témoignages.¹⁸

10. The Defence submits that the issues proposed for appeal affect the fairness of the proceedings, in particular the ability of the Defence to contest the evidence presented by the Prosecutor during the confirmation of charges hearing.¹⁹

11. Finally, the Defence submits that immediate resolution of the identified issues by the Appeals Chamber would benefit the proceedings, as it would

¹⁵ *Ibid.*, para. 26.

¹⁶ *Ibid.*, para. 27; see also para. 33.

¹⁷ *Ibid.*, para. 29; see also para. 31.

¹⁸ *Ibid.*, para. 32.

¹⁹ *Ibid.*, paras 34-36.

place the Defence in possession of information indispensable to allow it to discuss the content of the witness statements relied upon by the Prosecutor.²⁰ Conversely, the Defence suggests that unnecessary delays could occur if the Prosecutor were allowed to rely, for the purpose of confirmation of charges, on evidence that would turn out to be doubtful later in the proceedings.²¹

B. The Prosecutor

12. The Prosecutor submits at the outset that “to the extent that the procedure related to requests for redactions to incriminating evidence under Rule 81 and/or the overall reasons for granting or rejecting redactions are challenged via the Application – those Issues do not arise from the Impugned Decisions” but rather from previous decisions in the case.²² Similarly, the Prosecutor contends that the factual findings regarding the objectively justifiable risk to the safety of Witness P-316 and the necessity of anonymity arise from a previous decision, and not from the Second Decision.²³

13. Further, the Prosecutor argues that the six issues identified by the Defence for appeal do not arise from the Decision, submitting that they are predicated on a mischaracterisation of the impugned decisions.²⁴

14. In addition, the Prosecutor submits that the Defence does not explain sufficiently how the issues proposed for appeal affect the fair conduct of the proceedings.²⁵ In any case, the Prosecutor argues that the limited nature of the redactions and the safeguards put in place by the Single Judge ensure that the fair and expeditious conduct of the proceedings is not affected.²⁶ Similarly, the

²⁰ *Ibid.*, para. 38.

²¹ *Id.*

²² Response, para. 9.

²³ *Id.*

²⁴ *Ibid.*, paras 11, 13, 15, 18, 21, 23.

²⁵ *Ibid.*, para. 24.

²⁶ *Ibid.*, paras 25, 27.

Prosecutor argues that “the limited number of documents affected by the impugned decisions and the limited, mostly temporary nature of the redactions make it extremely unlikely that the six Issues will have an impact on the outcome of any eventual trial”.²⁷ On the same basis, the Prosecutor submits that “it is also extremely unlikely that an immediate resolution of the Issues will materially advance the proceedings”, and adds that the Defence can seek leave to appeal the confirmation decision if it is of the view that the redactions granted have unduly influenced the Chamber’s decision under article 61(7) of the Rome Statute (the “Statute”).²⁸

III. Applicable law

15. The Single Judge notes article 82(1)(d) of the Statute, rule 155 of the Rules of Procedure and Evidence and regulation 65 of the Regulations of the Court. 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.

16. 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”.²⁹

²⁷ *Ibid.*, para. 28.

²⁸ *Ibid.*, para. 29.

²⁹ 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.

17. 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.³⁰

18. Finally, it is necessary that, in the opinion of the Chamber, 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”.³¹

19. 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”.³²

IV. Analysis

A. First Issue

20. As stated above, the First Issue is whether the Single Judge erred in law by not referring to the conditions established in the jurisprudence with respect to the redaction of information concerning Witness P-238.³³ Although

³⁰ *Ibid.*, paras 10 and 13.

³¹ *Ibid.*, para. 14.

³² *Ibid.*, para. 19.

³³ Application, p. 13.

this is not explicitly stated by the Defence, the First Issue can only be discussed with respect to the First Decision.

21. The Single Judge considers, as also suggested by the Prosecutor,³⁴ that the Defence submissions in respect of the First Issue are insufficiently clear. In particular, the Defence does not explain which conditions established in the jurisprudence it alleges to have been improperly ignored and how the conclusions of the First Decision would be materially affected if that relevant jurisprudence had instead been considered.

22. For this reason, the Single Judge is of the view that the Application does not allow for an issue within the meaning of article 82(1)(d) of the Statute to be discerned in respect of the First Issue. Leave to appeal is therefore rejected.

B. Second Issue

23. The Second Issue raised by the Defence in the Application is whether the Single Judge erred in law by not reasoning the decision to authorise the Prosecutor to rely on the anonymous statement of Witness P-316 for the purposes of the confirmation of charges hearing.³⁵ Although the Defence does not state this explicitly, the Single Judge understands that the Second Issue is raised with respect to the Second Decision.

24. The Single Judge notes that the Second Decision, on its face, provides reasons with respect to the necessity of the continued non-disclosure of the identity of Witness P-316 to the Defence,³⁶ as well as with respect to the question whether allowing the Prosecutor to rely on the anonymous

³⁴ Response, para. 11.

³⁵ Application, p. 13.

³⁶ Second Decision, paras 25-26.

statement of Witness P-316 would be prejudicial to or inconsistent with the rights of the Defence.³⁷

25. In these circumstances, the Single Judge is unable to accept the allegation of the Defence, made without any explanation, that the authorisation to the Prosecutor to rely on the anonymous statement of Witness P-316 was not reasoned. Consequently, any issue of whether absence of reasoning constitutes an error of law cannot be said to arise out of the Second Decision. Leave to appeal in this respect cannot be granted.

C. *Third Issue*

26. The Third Issue proposed by the Defence is whether the Single Judge erred in law by authorising, without providing reasons, redactions to the names of certain members of the Prosecutor's staff, the date and place of interviews of witnesses and the names of certain investigative leads.³⁸ Considering the matter raised by the Defence, this issue can be examined with respect to the First and Third Decision.

27. The Single Judge observes that, as above, any question of whether the absence of reasoning amounted to an error of law is hypothetical and cannot be said to constitute an issue arising from the impugned decisions, for the reason that the decisions plainly do contain reasons.³⁹

28. Nevertheless, the Single Judge is of the view that this conclusion should not have, in the particular circumstances, the automatic consequence of rejection of the Application as concerns the Third Issue. Indeed, upon review of other submissions in the Application which are substantially related to the subject-matter, the Single Judge considers that it is possible to discern

³⁷ *Ibid.*, paras 27-32.

³⁸ Application, p. 13.

³⁹ See First Decision, paras 43-54; Third Decision, paras 31-42.

another, slightly different line of argument. Namely, it is apparent that the Defence contests not only the alleged lack of reasoning with respect to certain redactions authorised, but also, or in particular, the content of that reasoning.

29. Specifically, the Defence alleges that the impugned decisions are premised on an erroneous assessment of the prejudice that would arise for the investigation of the Prosecutor if names of certain members of the Prosecutor's staff, the date and place of interviews of witnesses or the names of certain investigative leads were disclosed to the Defence.⁴⁰ In these circumstances, with a view to fully exhausting the substance of the argument contained in the Application, the Single Judge considers it appropriate to proceed to further analysis of such issue under article 82(1)(d) of the Statute.

30. As concerns the requirement that the issue significantly affect the fair and expeditious conduct of the proceedings or the outcome of any potential trial, the Single Judge is of the view that in the present case, such impact is negligible, and not significant as required by the Statute. Indeed, the Single Judge notes that the redactions to the names of certain members of the Prosecutor's staff, the date and place of interviews of witnesses and the names of certain investigative leads are limited in scope and do not at all affect the Defence ability to understand the substance of the evidence concerned. In addition, the Single Judge notes that certain measures have been taken to preserve the Defence ability to adequately respond to the redacted evidence that the Prosecutor intends to rely upon, in particular the obligation that the Prosecutor provide the Defence with information as to which statements have been taken by the same investigator or in the presence of the same interpreter, translator or another member of the Prosecutor's staff.⁴¹

⁴⁰ Application, paras 26-31.

⁴¹ First Decision, para. 47; Third Decision, para. 36.

31. Accordingly, the Single Judge concludes that leave to appeal in respect of the Third Issue cannot be granted.

D. Fourth Issue

32. The Forth Issue concerns the question whether the Single Judge erred in law by not providing reasons for the conclusion that witnesses would be put at risk if certain information was disclosed to the Defence.⁴²

33. The Single Judge notes that redactions were authorised following a finding that disclosure of certain information would bring about an objectively identifiable risk to the safety of witnesses in the First Decision, extending to all identifying information of Witness P-238,⁴³ and in the Third Decision to one reference to a telephone number of a witness of the Prosecutor.⁴⁴ Similarly, the Second Decision, based on an assessment of the risk to Witness P-316 that would arise from full disclosure, stated that anonymity of the witness continued to be necessary.⁴⁵ All the impugned decisions provide reasons with respect to the risk for witnesses that would arise from disclosure.

34. Therefore, as above, the Single Judge takes the view that any issue of whether the absence of reasoning constitutes an error of law does not arise out of the impugned decisions. For this reason, leave to appeal in respect of the Fourth Issue must be rejected.

⁴² Application, p. 14.

⁴³ First Decision, para. 33.

⁴⁴ Third Decision, para. 53.

⁴⁵ Second Decision, para. 26.

E. Fifth Issue

35. The Fifth Issue is whether the Single Judge erred in law by not explaining how disclosure of information to the Defence would give rise to a prejudice to the Prosecutor's current or ongoing investigations.⁴⁶

36. The Defence argues that the Single Judge has made her determination in a general and abstract manner without providing specific reasons as to why risks would arise from disclosure to the defence, as opposed to the general public.⁴⁷ The Defence thus concludes that the assessment of the Single Judge is based on a presumption of distrust of the Defence.⁴⁸ The Single Judge notes that specific reasons were provided in the impugned decisions for each redaction that was authorised. As may be discerned from the impugned decisions, each authorisation of redactions was indeed not based on distrust towards the members of the Defence but merely on an objective assessment of potential risks in light of the nature and circumstances of the information proposed for redaction.⁴⁹ Whether the Single Judge should have embarked in addition on a subjective assessment of the potential behaviour of the Defence is a question that could be characterised as an "issue" within the meaning of article 82(1)(d) of the Statute. In any event, similar to what is stated above,⁵⁰ such an issue, if there is one, is not one significantly affecting the fair and expeditious conduct of the proceedings or the outcome of the trial, because of the limited scope of the redactions in question. Any such issue can thus not be certified for appeal.

⁴⁶ Application, p. 14.

⁴⁷ *Ibid.*, para. 27.

⁴⁸ *Id.*

⁴⁹ First Decision, paras 46, 49, 53; Third Decision, paras 35, 38, 40.

⁵⁰ See above para. 30.

F. Sixth Issue

37. The Sixth Issue concerns the question whether the Single Judge erred in law by not sufficiently taking into account the prejudice to the rights of the Defence arising from the authorisation to the Prosecutor to redact names of witnesses, all information related to these witnesses, the time and place of meetings and the names of investigative leads, resulting, in combination, in disclosure to the Defence of incomprehensible, illegible and useless documents.⁵¹

38. In the view of the Single Judge, the Sixth Issue is a generic expression of disagreement by the Defence with the impugned decisions, which does not withstand scrutiny under article 82(1)(d) of the Statute.

39. The Defence wishes to argue before the Appeals Chamber it has suffered prejudice from disclosure of documents rendered incomprehensible, illegible and useless through a combination of redactions of names of witnesses, all information related to these witnesses, the time and place of meetings and the names of investigative leads. Yet, the Single Judge observes that no item of evidence has been disclosed following any of the impugned decisions which would contain all the categories of redactions listed by the Defence.

40. In any case, the Single Judge notes that the Defence claims that “[l]a Juge unique n’a jamais pris la peine d’examiner les conséquences spécifiques que telle ou telle expurgation pouvait entraîner quant à la capacité de la défense de vérifier la véracité ou la crédibilité des éléments contenus dans les témoignages”, without acknowledging the fact that, as stated clearly in the impugned decision, the proposed redactions were assessed individually, on a case by case basis, and

⁵¹ Application, para. 14.

that the individual assessment of each redaction is not communicated to the Defence, but is provided to the Prosecutor only by way of an *ex parte* annex to the decision.

41. In addition, considering that the impugned decisions rest, *inter alia*, on an assessment of the possible impact of the non-disclosure of certain information on the Defence ability to properly exercise its rights during the confirmation of charges proceedings,⁵² the Defence does not explain what, in its view, would constitute “sufficient” consideration of the rights of the Defence. Leave to appeal with respect to the Sixth Issue is therefore rejected.

FOR THESE REASONS, THE SINGLE JUDGE

REJECTS the Application.

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



Judge Silvia Fernández de Gurmendi

Single Judge

Dated this Wednesday, 11 December 2013

At The Hague, The Netherlands

⁵² First Decision, paras 34-36, 47, 50, 53, 57; Second Decision, paras 27-31; Third Decision, paras 36, 38, 41, 45, 50, 53.