

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/11-01/11
Date: 27 September 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 redactions pursuant to Rule 81(2)
and Rule 81(4) and to the new disclosure calendar"**

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

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

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Didier Preira, Deputy Registrar

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 redactions pursuant to Rule 81(2) and Rule 81(4) and to the new disclosure calendar” (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-02/11-01/11-494 and confidential annexes, *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 30 August 2013, the Prosecutor filed the Request, seeking authorisation of redactions pursuant to rule 81(2) and (4) of the Rules of Procedure and Evidence (the “Rules”) to the content and metadata of nine witness statements, related annexes and investigator reports.⁷

5. On 18 September 2013, the Defence filed its “*Réponse de la Défense à la ‘Prosecution’s request for redactions pursuant to Rule 81(2) and Rule 81(4) and to the new disclosure calendar’ (ICC-02/11-01/11-494)*” (the “Response”), submitting that the requests for redactions should be rejected and the Prosecutor ordered to immediately disclose the concerned evidence.⁸

II. Submissions of the parties

A. The Prosecutor

6. The Request concerns nine witness statements, as well as related annexes and investigator reports. The Prosecutor seeks authorisation to redact, pursuant to rule 81(2) of the Rules: (a) the identity of all Prosecution staff members mentioned in the relevant documents; (b) the identity of translators and interpreters; (c) the day and month of interviews; (d) investigative leads. In this respect, the Prosecutor contends that revealing the identity of her staff could attract attention to their movements and by extension to witnesses, and therefore affect the security of both. She asserts that the redactions to the investigators’ identity aim at ensuring confidentiality to the investigations into the present as well as other cases, as the Prosecutor can assign her limited number of investigators to different cases at once. Otherwise, the Prosecutor

⁶ *Ibid.*, p.23.

⁷ Request, para. 2.

⁸ ICC-02/11-01/11-506.

submits, the need to replace her staff could have a negative impact on the expeditiousness and the costs of investigations. As concerns redactions of investigative leads, the Prosecutor contends that they aim at protecting the reliability of ongoing evidence collection and that they do not affect the reading and understanding of the statements. Lastly, the Prosecutor contends that the redactions sought do not affect the fairness of the proceedings and the rights of the Defence, as they do not relate to information that is relevant for the preparation of the Defence case. She asserts that she will periodically review the need to request the lifting of these redactions.⁹

7. The Prosecutor also seeks authorisation to redact, pursuant to rule 81(4) of the Rules: (a) identifying information of third parties at risk on account of the activities of the Court; and (b) identifying information of family members of any witnesses. The Prosecutor submits that the redactions sought do not cover information that is relevant for the preparation of the Defence. She adds that the number of proposed redactions and the information they cover are limited and do not alter the intelligibility of the statements. The Prosecutor further contends that it is in the interest of justice to ensure protection to witnesses' families, as witnesses' cooperation with the Prosecutor is often affected by their fear for the security of their family. The Prosecutor emphasises the limited number of redactions under this category. For four witnesses statements, the proposed redactions only apply to the names of the parents on the cover page of the statement. For one other witness statement, the proposed redactions additionally apply to the location of the residence of his family members, and for the four remaining statements, the proposed redactions apply to the names of the parents on the cover page, the location of

⁹ Request, paras 4-7.

residence and name or identifying information of the siblings or close family members of the witness.¹⁰

8. The Prosecutor further requests redactions to the metadata of the statements and annexes in relation to the identity of Prosecution staff members, day and month of interviews.¹¹

B. The Defence

9. The Defence submits that the requests for redactions sought by the Prosecutor pursuant to rules 81(2) and 81(4) of the Rules are general, systematic and not properly justified. It emphasises that redactions are exceptional measures, and that the Chamber should authorise them on a case by case basis and thoroughly assess if the redacted information could be of use to the Defence, in particular for the assessment of the credibility of witnesses and the reliability of evidence. The Defence recalls the criteria set by the jurisprudence of the Court and submits that they should be strictly applied, while emphasising that the Chamber should ensure that the rights of the suspect are protected. Additionally, the Defence contends that the finding of the Adjournment Decision concerning the insufficiency of evidence presented by the Prosecutor makes the access to information by the Defence more crucial.¹²

10. The Defence argues that the Chamber should reject the redactions sought pursuant to rule 81(2) of the Rules. As regards the request for redactions to the identity of investigators, the Defence submits that the Prosecutor's justification is unacceptable as it is based on logistical reasons. The Defence asserts that, when assessing the Prosecutor's argument, regard must be had to the disproportionality between the means of the Defence and

¹⁰ *Ibid.*, paras 8-9.

¹¹ *Ibid.*, para. 10.

¹² Response, paras 10-19, 34-42.

that of the Prosecutor. The Defence further argues that knowing the identity of the Prosecutor's investigators is essential in order to verify the chain of custody and metadata of the documents.¹³

11. In relation to redactions to the dates of interviews, the Defence submits that this information is essential for it to verify the situation of a witness at any given time, the possible evolution of his or her statements, and the time elapsed between the interview and the disclosure of the statements to the Defence.¹⁴

12. Concerning the redactions to investigative leads, the Defence submits that they inevitably affect the Defence ability to conduct investigations, and submits that following the Adjournment Decision, it is to be feared that the Prosecutor might try to conceal the paucity of her evidence by withholding certain information from the Defence.¹⁵

13. Further, the Defence requests the Chamber to reject the redactions sought pursuant to rule 81(4) of the Rules, submitting that information related to third parties and/or family members of witnesses can be of importance for the purpose of verifying the veracity of information and the credibility of witnesses.¹⁶

III. Analysis

14. The Single Judge notes articles 54(3)(f), 57(3)(c), 61, 67 and 68(1) of the Rome Statute, and rule 81 of the Rules.

15. The Single Judge makes reference to the Decision on Disclosure, wherein the procedure related to requests for redactions to incriminating

¹³ *Ibid.*, paras 24-25, 35.

¹⁴ *Ibid.*, paras 26-27.

¹⁵ *Ibid.*, para. 28.

¹⁶ *Ibid.*, paras 29-32.

evidence under rule 81 of the Rules has been established,¹⁷ and to the First Decision on Redactions, wherein the overall reasons for granting or rejecting redactions have been provided.¹⁸ For the present decision, the Single Judge has adhered to the same approach.

A. Defence arguments in relation to the procedure related to requests for redactions to incriminating evidence

16. The Defence emphasises in its Response that there is a need that the Chamber fully appreciate the competing interests of the Defence when adjudicating the proposals for redactions presented by the Prosecutor.¹⁹ The Single Judge shares the view that this is an important general principle, and notes that it has been recognised in the First Decision on Redactions:

The Single Judge will also determine whether the redactions are not prejudicial to or inconsistent with the rights of the suspect, including the right to a fair and impartial trial. In so doing, particular attention will be given to the relevance of the information sought to be redacted to the Defence as well as the stage of the proceedings, and will ensure at all times that the non-disclosure of such information “would not result in the confirmation of the charges, viewed as a whole, to be unfair to the suspect.”²⁰

17. It appears from the Response that the Defence considers that the Adjournment Decision has a bearing on the balance of the relevant interests and should inform the Single Judge’s adjudication of the Request.²¹ In this regard, the Single Judge emphasises that the need to limit exemptions from disclosure to what is strictly necessary, in order not to prejudice the rights of the Defence, is an overarching principle that has been taken into account throughout the proceedings in the present case, both before and after the Adjournment Decision.

¹⁷ Decision on Disclosure, paras 52-57

¹⁸ First Decision on Redactions, paras 55-102.

¹⁹ See Response, paras 12-19, 33-39.

²⁰ First Decision on Redactions, para. 58.

²¹ Response, paras 19, 35.

18. Similarly, the Single Judge shares the view put forward by the Defence that each requested redaction must be assessed individually, on a case by case basis.²² This has also been a guiding principle that has been applied throughout the proceedings in the case as announced in the First Decision on Redactions:

The Single Judge will set forth in the present decision the approach taken in the assessment of each requested redaction and will make it available to the Defence to the extent that they can be revealed to it without endangering the interests concerned and defeating the very purpose of redactions process. Accordingly, the overall reasons for granting or rejecting the requests for redactions within each category will be provided in the present decision. In the Annex, which is *ex parte* and only available to the Prosecutor and the VWU, the Single Judge, in compliance with the procedure prescribed by the Appeals Chamber, will specify to which of the five abovementioned categories each of the requested redactions belongs and whether the redaction is granted or rejected. Furthermore, when the specific nature of the requested redaction so requires, the Single Judge will further provide an additional explanation in the Annex of her decision.²³

19. The Single Judge notes the Defence objection that the requests for redactions by the Prosecutor are too general and insufficiently reasoned,²⁴ and its remark that redactions of a general and systematic nature have previously been authorised in the case.²⁵ However, as recognised by the Defence in its Response,²⁶ it necessarily follows from the redactions procedure that was adopted that the details of the Prosecutor's requests for redactions as well as the individual assessment by the Chamber of each requested redaction are not to be communicated to the Defence. In this regard, the Single Judge recalls that, in accordance with the Decision on Disclosure²⁷ and the First Decision on Redactions,²⁸ the Single Judge receives and reviews the individual requested redactions *ex parte* in order not to defeat the purpose of the requested

²² *Ibid.*, paras 15, 37.

²³ First Decision on Redactions, para. 61.

²⁴ Response, paras 10-11; see also paras 15, 42.

²⁵ *Ibid.*, para. 38.

²⁶ *Ibid.*, para. 37.

²⁷ Decision on Disclosure, paras 54-56.

²⁸ First Decision on Redactions, para. 61.

redactions.²⁹ Notwithstanding this limitation, the Single Judge is of the view that the information made available to the Defence in the Request and in the present decision is appropriate in light of the nature of the redactions requested. The Single Judge is of the view that the provision of additional information in respect of individual requests for redactions would defeat their purpose.

B. Redactions requested under rule 81(2) of the Rules

20. As noted above, the Prosecutor requests authorisation to redact the identity of members of her staff mentioned in the relevant documents, as well as of translators and interpreters.³⁰ In addition to other arguments, the Prosecutor indicates that “absent some showing of a specific need or justification for the disclosure of the identities of the investigators, [she] will seek as a matter of practice to maintain the confidentiality of investigator identities”.³¹ The Defence objects to this submission and underlines that redaction of the names of investigators must be authorised only exceptionally, in line with the general principles concerning redactions.³²

21. As indicated above, the Single Judge shares the view that redactions need to be assessed individually. Redactions are an exceptional remedy and cannot be authorised in a systematic manner “as a matter of practice” as suggested by the Prosecutor. Rather, redaction can be authorised only when

²⁹ See also Appeals Chamber, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’”, 13 October 2006, ICC-01/04-01/06-568, para. 66; Appeals Chamber, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, 13 May 2008, ICC-01/04-01/07-475, para. 52.

³⁰ See above paras 6, 8.

³¹ Request, para. 5.

³² Response, paras 20-21.

in the specific circumstances, objectively justifiable prejudice to the further or ongoing investigations of the Prosecutor would arise from the disclosure.

22. Nevertheless, the Single Judge observes that, notwithstanding her submission, the Prosecutor requests the redaction of identities of individual members of her staff and one interpreter and that, consistent with the approach of the First Decision on Redactions,³³ she does not request the redaction of the name of a member of her staff who has previously attended public hearings in the case.³⁴

23. Upon analysis of the individual requests for redactions, the Single Judge concludes that disclosure to the Defence of the identities of certain members of the Prosecutor's staff currently working in the field, and of an interpreter, 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 concerned members of the Prosecutor's staff and the interpreter is adequate and necessary to reduce the prejudice, and is the least restrictive protective measure available.

24. In addition, the Single Judge is of the view that redaction of the identities of these persons is not incompatible with Mr Gbagbo's fair trial rights, also taking into account the present stage of the proceedings in the case, as the Defence will still be in position to identify possible faults in the evidence itself and bring them to the attention of the Chamber. The Single Judge notes that redactions are to be authorised only to the names and

³³ First Decision on Redactions, para. 86.

³⁴ See ICC-02/11-01/11-494-Conf-Exp-Anx3, ICC-02/11-01/11-494-Conf-Exp-Anx4; ICC-02/11-01/11-494-Conf-Exp-Anx4; ICC-02/11-01/11-494-Conf-Exp-Anx5;

identifying information, and not to the specific professions of the persons concerned.³⁵ Furthermore, the Single Judge notes that in the First Decision on Redactions, the Prosecutor was ordered, in order to enable the Defence to identify more efficiently possible faults, to provide to 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 of another member of the Prosecutor's staff,³⁶ and considers that it is appropriate to require the Prosecutor to update this information when disclosing the evidence subject to the present Decision.

25. Accordingly, the Single Judge grants authorisation to redact the identities of certain members of the Prosecutor's staff, and of an interpreter, in the evidence to be disclosed, and in the accompanying metadata, as specified in the Annex to the present decision, confidential *ex parte*, only available to the Prosecutor.

26. The Single Judge notes that the Prosecutor also requests, under rule 81(2) of the Rules, the redaction of the dates, *i.e.* the day and month, of witness interviews.³⁷ These redactions are objected to by the Defence, which argues instead that such information is essential for its preparation, and that its disclosure would not be prejudicial to the further or ongoing investigations of the Prosecutor.³⁸

27. The Single Judge considers that disclosing to the Defence the specific dates, *i.e.* the day and month, of witness interviews that were conducted in Côte d'Ivoire may attract attention to the movement of the Prosecutor's staff as well as the witnesses interviewed, thus making possible interference with

³⁵ First Decision on Redactions, para. 89.

³⁶ *Ibid.*, para. 89 and p. 37.

³⁷ See above para. 6.

³⁸ Response, paras 26-27.

the investigation. In the assessment of the Single Judge, disclosure of the specific dates of witness interviews in these circumstances, and at this stage in the proceedings, would give rise to an objectively identifiable prejudice to the further or ongoing investigations. The Single Judge is also of the view that redaction of this information is adequate and necessary to address the prejudice to the further or ongoing investigations, and is the least restrictive protective measure available. Finally in this regard, the Single Judge is of the view that the non-disclosure of the specific dates when the concerned witnesses were interviewed will not result in the confirmation of charges hearing, as a whole, being unfair to Mr Gbagbo, as the Defence will still have access to the substance of the witness statements concerned.

28. Thus, the Single Judge grants authorisation to redact the specific dates of the interviews, *i.e.* the day and month, in the evidence to be disclosed, and in the accompanying metadata, as specified in the Annex to the present decision, confidential *ex parte*, only available to the Prosecutor.

29. Also under rule 81(2) of the Rules, the Prosecutor requests authorisation to redact certain “investigative leads”.³⁹

30. The Single Judge has assessed individually, on a case by case basis, the requests for redactions of investigative leads, and considers that disclosure to the Defence of this information may interfere with ongoing evidence collection 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 investigative leads is appropriate to address this risk, and does not consider that a less restrictive measure can be envisaged.

³⁹ See above, para. 6.

31. The Single Judge notes the argument of the Defence that redaction of investigative leads has an impact on its ability to investigate.⁴⁰ Indeed, it must be acknowledged that, in principle, such information may be relevant to the Defence preparation. However, the Single Judge is of the view that in the present circumstances the redaction of the investigative leads proposed in the Request will not result in the confirmation of charges hearing, as a whole, being unfair to Mr Gbagbo. The Single Judge notes in particular that the requested redactions are very limited and do not prejudice the Defence ability to understand the substance of the evidence disclosed. In these circumstances, the concern of the Defence that the Prosecutor might try to conceal the paucity of her evidence by withholding certain information from the Defence is,⁴¹ in the view of the Single Judge, unfounded.

32. Accordingly, the Single Judge grants authorisation to redact investigative leads, as specified in the Annex to the present decision, confidential *ex parte*, only available to the Prosecutor.

C. Redactions requested under rule 81(4) of the Rules

33. Under rule 81(4) of the Rules, the Prosecutor requests, first, the redaction of identifying information of third parties at risk on account of the activities of the Court.⁴²

34. The Single Judge recalls that rule 81(4) of the Rules has been interpreted by the Appeals Chamber as including the possibility to authorise redactions for the protection of “persons at risk on account of the activities of the Court”, who are not witnesses, victims or members of their families.⁴³

⁴⁰ Response, para. 28.

⁴¹ *Ibid.*, para. 28.

⁴² See above, para. 7.

⁴³ Appeals Chamber, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to

35. The Single Judge notes that requests for redactions of this category are very limited, and put forward only in relation to two witness statements.⁴⁴ Upon individual review of the requests, the Single Judge considers that the third persons concerned are mentioned in witness statements in contexts that may make them appear as collaborating with the Court, which could in case of disclosure of their identities to the Defence, lead to an objectively identifiable risk to their safety. While noting the arguments to the Defence,⁴⁵ the Single Judge is of the view that the limited redactions of identifying information of third persons will not unduly impact on the ability of the Defence to respond to the evidence, and considers that redaction of this information represents an adequate, proportionate and necessary protective measure, considering that no less restrictive measure is available.

36. On the basis of the above, the Single Judge grants authorisation to redact the names of third parties at risk on account of the activities of the Court, as specified in the Annex to the present decision, confidential *ex parte*, only available to the Prosecutor.

37. Second, the Prosecutor requests under rule 81(4) of the Rules the redaction of the names of family members of witnesses.⁴⁶

38. As specified in the Annex to the present decision, confidential *ex parte*, only available to the Prosecutor, the redactions of this category relate to the references to the witness' parents on the first page of each witness statement, and, in five witness statements, also to other references to the witness' family members' names or other identifying information, including places of residence.

Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, para. 52; see also First Decision on Redactions, para. 78.

⁴⁴ ICC-02/11-01/11-494-Conf-Exp-Anx3; ICC-02/11-01/11-494-Conf-Exp-Anx6.

⁴⁵ Response, para. 32.

⁴⁶ See above, para. 7.

39. The Single Judge, upon review of each requested redaction, considers that if the names or identifying information, including places of residence, of family members of witnesses were disclosed to the Defence, this could have an impact on their safety, in particular as a consequence of the witnesses' 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.

40. The Single Judge notes the argument of the Defence that information concerning family members may be of importance to the Defence to verify the truthfulness of the evidence and the credibility of witnesses.⁴⁷ Insofar as the references to witnesses' parents on the initial pages of the witness statements are concerned, the Single Judge is of the view that this information is of no significance for the preparation of the Defence. Furthermore, even with respect to redactions of references to names or identifying information of witnesses' family members, in particular in the body of the four witness statements, the Single Judge is of the view that these limited redactions, which do not affect the substance of the statements, will equally not result in undue prejudice to the Defence.

41. Accordingly, the Single Judge grants authorisation to redact the names and identifying information of family members of witnesses, as specified in the Annex to the present decision, confidential *ex parte*, only available to the Prosecutor.

⁴⁷ Response, para. 32.

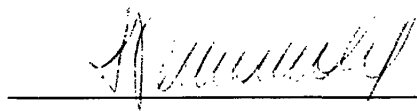
FOR THESE REASONS, THE SINGLE JUDGE

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

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; and

ORDERS the Prosecutor to provide the Defence, at the time of disclosure of the witness statements dealt with in the present decision, with updated information as to which statements have been taken by the same investigator or in the presence of the same interpreter, translator or other OTP staff member.

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



Judge Silvia Fernández de Gurmendi

Single Judge

Dated this Friday, 27 September 2013

At The Hague, The Netherlands