

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 « Decision on the Prosecutor's request for redactions pursuant to Rule 81 (2) and Rule 81 (4) pursuant to the new disclosure calendar and the Prosecution's request for redactions to the transcribed statements of witnesses CIV-OTP-P-0321 and CIV-OTP-P-0324 » du 2 août 2013 (ICC-02/11-01/11-465)"

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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REGISTRY

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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 Prosecutor’s request for redactions pursuant to Rule 81 (2) and Rule 81 (4) pursuant to the new disclosure calendar and the Prosecution’s request for redactions to the transcribed statements of witnesses CIV-OTP-P-0321 and CIV-OTP-P-0324 » du 2 août 2013 (ICC-02/11-01/11-465)*” (the “Application”), submitted by the Defence on 12 August 2013.²

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 2013, 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”, 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 Friday, 5 July 2013 any

¹ ICC-02/11-01/11-61.

² ICC-02/11-01/11-473-Conf, reclassified as “public” on 16 August 2013.

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.

requests for redactions with regards to the evidence which is in her possession and on which she intends to rely for the purposes of the confirmation of charges”.⁶

4. On 5 July 2013, the Prosecutor filed the “Prosecutor’s request for redactions pursuant to Rule 81(2) and Rule 81(4) pursuant to the new disclosure calendar” (the “First Request”),⁷ seeking authorisation of redactions pursuant to rule 81(2) and rule 81(4) of the Rules of Procedure and Evidence (the “Rules”) to the content and metadata of evidence she wishes to rely on for the purposes of the confirmation of charges.⁸

5. On 24 July 2013, the Defence filed the “*Réponse de la Défense à la « Prosecution’s request for redactions pursuant to Rule 81(2) and Rule 81(4) pursuant to the new disclosure calendar » (ICC-02/11-01/11-450) et à la « EXPURGÉ » (ICC-02/11-01/11-447-Conf-Red)*” (the “Response to the First Request”).⁹

6. On 29 July 2013, the Prosecutor, having obtained an extension of time limit for this purpose,¹⁰ filed the “Prosecution’s request for redactions to the transcribed statements of witnesses CIV-OTP-P-0321 and CIV-OTP-P-0324 pursuant to Rule 81(2)” (the “Second Request”),¹¹ seeking authorisation of redactions pursuant to rule 81(2) of the Rules to the content and metadata of the transcripts of interviews of two further witnesses.¹²

7. On 2 August 2013, the Single Judge issued the “Decision on the ‘Prosecutor’s request for redactions pursuant to Rule 81(2) and Rule 81(4) pursuant to the new disclosure calendar’ and the ‘Prosecution’s request for

⁶ *Id.*

⁷ ICC-02/11-01/11-450 and confidential annexes, *ex parte*, only available to the Prosecutor.

⁸ First Request, para. 2.

⁹ ICC-02/11-01/11-461-Conf. A public redacted version has also been filed, see ICC-02/11-01/11-461-Red.

¹⁰ ICC-02/11-01/11-455.

¹¹ ICC-02/11-01/11-463 and confidential annexes, *ex parte*, only available to the Prosecutor.

¹² Second Request, para. 2.

redactions to the transcribed statements of witnesses CIV-OTP-P-0321 and CIV-OTP-P-0324 pursuant to Rule 81(2)’” (the “Decision”).¹³

8. On 12 August 2013, the Defence filed the Application, requesting leave to appeal the Decision in relation to the following issues:

(i) Concernant la seconde requête du Procureur (ICC-02/11-01/11-463) : une décision de la Juge unique rendue sans débat contradictoire, sur la base des seuls éléments présentés par le Procureur, constitue-t-elle une violation de l’article 67 (1) du Statut et de la Norme 24 du Règlement de la Cour ? (the “First Issue”)¹⁴

(ii) Concernant la première requête du Procureur (ICC-02/11-01/11-450), la question est la suivante : la Juge unique a-t-elle outrepassé son pouvoir discrétionnaire en accordant les expurgations demandées par le Procureur sans examiner l’argumentation de la défense? (the “Second Issue”)¹⁵

(iii) Les troisième et quatrième questions : elles concernent la non-communication de la motivation d’une décision à l’une des parties et la question du degré d’information dont doit disposer une partie pour être à même de faire valoir des arguments et bénéficier de la notion de débat contradictoire, composante essentielle du procès équitable (the “Third and Fourth Issue”).¹⁶

9. On 16 August 2013, the Prosecutor filed the “Prosecution Response to the Defence ‘Demande d’autorisation d’interjeter appel de la Decision on the Prosecutor’s request for redactions pursuant to Rule 81(2) and Rule 81(4) pursuant to the new disclosure calendar and the Prosecution’s request for redactions to the transcribed statements of witnesses CIV-OTP-0321 and CIV-OTP-P-0324’” (the “Response”), opposing the Application.¹⁷

¹³ ICC-02/11-01/11-465, with confidential annex, *ex parte*, only available to the Prosecutor.

¹⁴ Application, p. 8.

¹⁵ *Ibid.*, p. 9.

¹⁶ *Ibid.*, p. 11.

¹⁷ ICC-02/11-01/11-483.

II. Applicable law

10. The Single Judge notes article 82(1)(d) of the Rome Statute (the “Statute”), rule 155 of the Rules and regulation 65 of the Regulations of the Court. Article 82(1)(d) of the Statute provides that any 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.

11. 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”.¹⁸

12. 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. 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”.¹⁹ Accordingly, “[p]ut in a nutshell, the object of paragraph (d) of article 82 (1) of the Statute is

¹⁸ 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.

¹⁹ *Ibid.*, para. 14.

to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.²⁰

III. Analysis

A. *The First Issue*

13. The First Issue proposed for appeal by the Defence reads as follows:

Concernant la seconde requête du Procureur (ICC-02/11-01/11-463) : une décision de la Juge unique rendue sans débat contradictoire, sur la base des seuls éléments présentés par le Procureur, constitue-t-elle une violation de l'article 67 (1) du Statut et de la Norme 24 du Règlement de la Cour ?²¹

(i) The Defence Application

14. The First Issue concerns the issuance of the Decision, in the submission of the Defence, without hearing the Defence (“*sans débat contradictoire*”).²² More specifically, the Defence submits that it was not accorded time to exercise its right to respond to the Second Request, pursuant to regulation 24 of the Regulations of the Court.²³

15. The Defence argues that this issue affects the fairness of the proceedings:

[E]n ne permettant pas à la défense de répondre à une requête du Procureur portant sur une question aussi fondamentale que l’expurgation d’informations qui pourraient s’avérer cruciales pour la défense en lui permettant d’examiner ou de comprendre le sens d’une pièce et plus généralement, en lui permettant d’appréhender de manière globale le dossier à charge du Procureur, la Juge unique a, du point de vue de la défense, violé les principes de l’égalité des armes et du contradictoire, affectant ainsi le caractère équitable de la procédure.²⁴

16. Furthermore, the Defence argues that the issue affects the expeditiousness of the proceedings. In particular, the Defence, states:

²⁰ *Ibid.*, para. 19.

²¹ Application, p. 8.

²² *Ibid.*, p. 8 (heading 1.1).

²³ *Ibid.*, para. 28.

²⁴ *Ibid.*, para. 52.

La capacité de la défense à mener des enquêtes, à vérifier la crédibilité des témoins, à récolter des éléments à décharge a un impact immédiat sur la façon dont elle pourra argumenter lors de l'audience de confirmation des charges et par conséquent sur le choix que fera la Chambre de retenir telle ou telle charge. Le fait qu'une bonne défense, c'est-à-dire une défense capable de disposer d'informations permettant de discuter les éléments de preuve présentés par le Procureur, conduise à l'abandon de certaines charges aura un impact évident sur la rapidité de la procédure. La Défense rappelle que dans l'affaire Katanga, la Cour a jugé que la non-divulgence de certaines informations pouvait affecter de manière appréciable le déroulement rapide de la procédure dans la mesure où elle pourrait retarder certaines mesures d'enquête de la Défense.²⁵

17. Finally, the Defence argues that immediate resolution of the issue by the Appeals Chamber is necessary, as, in the absence of immediate appellate intervention, the Defence will be deprived of its right to respond to the Prosecutor, it will not be able to contest redactions, and will not be able to present its case at the confirmation of charges hearing. In addition, the Defence states that, if not resolved immediately, the issue will reappear in the future, and that, therefore, its immediate resolution by the Appeals Chamber will contribute to the proper conduct of the proceedings, as well as to their efficiency.²⁶

(ii) The Prosecutor's Response

18. The Prosecutor submits that the First Issue does not arise out of the Decision, arguing that even if the Defence did not file a response to the Second Request, the substance of the Decision on the Second Request, as well as the process adopted by the Single Judge were subject to an adversarial process.²⁷

19. In particular, the Prosecutor notes that the Decision refers to the Decision on Disclosure and to the First Decision on Redactions, both of which were issued after the Defence had filed its submissions, and that the Single

²⁵ *Ibid.*, para. 69.

²⁶ *Ibid.*, paras 75 and 78.

²⁷ Response, para. 9.

Judge took into consideration the recent Defence response to the First Request. The Prosecutor emphasises that the First Request included, *inter alia*, the same types of redactions as sought in the Second Request, and that “[t]herefore, by responding to the First Prosecution Request, the Defence has had an opportunity to make submissions in relation to every type of redaction sought in the Second Prosecution Request and it could do so in the context of the same type of documents”.²⁸

20. The Prosecutor also invokes a previous decision of Pre-Trial Chamber I, which rejected an application for leave to appeal in a case where “the Defence merely claims that the Decision was issued without hearing the Defence, while making no analysis of the governing regime for *ex parte* motions in proceedings before the Pre-Trial Chamber”.²⁹

21. The Prosecutor submits that, even if the First Issue arose from the Decision, its impact on the fairness of the proceedings is negligible, as the Defence had filed the Response to the First Request regarding the same types of redactions imposed on the same types of documents at approximately the same time as the Second Request and as the Single Judge expressly took into consideration the protection of the interests of the Defence.³⁰

22. As concerns the impact of the First Issue on the expeditiousness of the proceedings, the Prosecutor submits that the Defence arguments are either unrelated to the matter, or speculative in nature. Similarly, the Prosecutor opposes as speculative the Defence argument that immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings.³¹

²⁸ *Ibid.*, paras 10-12.

²⁹ *Ibid.*, para. 14.

³⁰ *Ibid.*, paras 15-16.

³¹ *Ibid.*, paras 17-18.

(iii) Conclusions of the Single Judge

23. The First Issue proposed for appeal by the Defence is built on the fact that the Decision, as can be seen from the above rehearsal of the relevant procedural history, was issued without awaiting the response of the Defence to the Second Request.

24. However, the submission of the Defence regarding the contours of the First Issue is broader, namely whether the issuance of the Decision “*sans débat contradictoire*” in respect of the Second Request gave rise to a violation of the rights of the Defence.³² Whether this issue arises out of the Decision must be determined taking into account all the relevant circumstances of the Decision.

25. In this respect, the Single Judge notes that the Decision is one in a series of decisions dealing with the subject matter of redactions to evidence disclosed by the Prosecutor, and forms part of a process initiated with the Decision on Disclosure and the First Decision on Redactions. The Single Judge notes in particular that the Defence made submissions for the purpose of those decisions,³³ and also made submissions on redactions subsequently requested by the Prosecutor.³⁴ Most recently, the Defence submitted the Response to the First Request on 24 July 2013, which was taken into consideration for the purposes of the Decision.³⁵

26. In the present circumstances, it is crucial to note that all of the types of redactions requested by the Prosecutor in the Second Request – the identities of investigators mentioned in the relevant documents and the day, month and location of interviews³⁶ – also formed part of the First Request.³⁷ The Defence

³² Application, p. 8, heading 1.1; see also para. 31.

³³ See ICC-02/11-01/11-T-3-ENG; ICC-02/11-01/11-27; ICC-02/11-01/11-44; ICC-02/11-01/11-58.

³⁴ ICC-02/11-01/11-346-Conf.

³⁵ Decision, para. 14.

³⁶ Second Request, para. 4.

³⁷ First Request, para. 4.

put forward submissions on these types of redactions in its Response to the First Request.³⁸ The Single Judge also notes the proximity in time of the First Request, the Defence response and the Second Request.

27. Therefore, the Single Judge cannot accept the submission of the Defence that the issue of whether adversarial process was at all adhered to is an issue that arises out of the Decision.

28. Nevertheless, the Single Judge, considering it necessary not only to address the First Issue as formally proposed but to fully address the substance of the argument contained in the Application, proceeds to examine whether leave to appeal can be granted in respect of a narrower issue than that formally proposed by the Defence, namely whether the issuance of the Decision without awaiting the response of the Defence to the Second Request gave rise to a violation of the Defence rights under article 67(1) of the Statute and regulation 24 of the Regulations of the Court.

29. The Single Judge must therefore determine whether, in a procedural situation as described above, obtaining the Defence response to the Second Request was essential for the decision on the redactions proposed in the Second Request. In other words, it needs to be assessed whether, in circumstances where the authorisation of redactions was taking place pursuant to procedures previously established in the case with participation of the Defence, and where the Defence presented submissions on the same type of redactions at approximately the same time, the Decision could be different if a response by the Defence to the Second Request was obtained.

30. The Single Judge notes that the Defence makes no submissions on this question. In any case, the Single Judge considers that this potential narrower

³⁸ Response to the First Request, paras 25-31.

issue was of no significance as there is no indication that the Defence would have brought to the attention of the Single Judge information that could affect the Decision. Consequently, the First Issue does not represent a subject the resolution of which is essential for the determination of the matter at stake.

31. On the basis of the above, the Single Judge concludes that the First Issue does not arise out of the Decision and that leave to appeal in its respect cannot be granted.

B. The Second Issue

32. As recalled above, the Second Issue is:

Concernant la première requête du Procureur (ICC-02/11-01/11-450), la question est la suivante : la Juge unique a-t-elle outrepassé son pouvoir discrétionnaire en accordant les expurgations demandées par le Procureur sans examiner l'argumentation de la défense?³⁹

(i) The Defence Application

33. The Defence takes issue with the finding of the Decision that, as summarised by the Defence, it was not necessary to examine the arguments of the Defence, and with the reference to the First Decision on Redactions issued on 27 March 2012.⁴⁰

34. The Defence argues that the Decision should have addressed the Prosecutor's requests for redactions in the context of the changed circumstances following the hearing on the confirmation of charges, which laid bare the insufficiency of the Prosecutor's evidence.⁴¹

35. In addition, the Defence refers to the jurisprudence of the Appeals Chamber in relation to the criteria for authorisation of redactions, and states

³⁹ Application, p. 9.

⁴⁰ *Ibid.*, para. 32.

⁴¹ *Ibid.*, paras 33-34.

that these criteria must be examined in the present context and not on outdated considerations.⁴²

36. The Defence thus concludes as follows:

Se fonder sur des arguments formulés un an et demi auparavant en réponse à des demandes anciennes présentées par le Procureur (demandes par définition différentes des demandes que le Procureur présente aujourd'hui) et formulés dans un contexte différent revient pour le Juge à refuser par principe d'examiner les arguments actuels de la défense, à refuser de prendre en compte le contexte nouveau et par conséquent, la conduit à accorder automatiquement, sans débat contradictoire, toutes les expurgations que peut ou pourra demander à l'avenir le Procureur. C'est la négation même de la notion de débat contradictoire.⁴³

37. In relation to the other requirements of article 82(1)(d) of the Statute, the Defence submits that the Second Issue affects the fairness of the proceedings, as the refusal of the Single Judge to examine the arguments of the Defence puts it in an unfavourable position vis-à-vis the Prosecutor and prevents it from conducting its investigations.⁴⁴

38. The submissions of the Defence in relation to the impact of the issue on the expeditiousness of the proceedings, as well as in relation to the question of whether immediate resolution of the issue may materially advance the proceedings, are the same as referred to above.⁴⁵

(ii) The Prosecutor's Response

39. The Prosecutor submits that the Second Issue is predicated on the incorrect assumption that the Decision did not take into consideration the arguments of the Defence. Conversely, the Prosecutor avers that the text of

⁴² *Ibid.*, paras 35-36.

⁴³ *Ibid.*, para. 42.

⁴⁴ *Ibid.*, para. 60.

⁴⁵ See above paras 16-17.

the Decision makes clear that the Single Judge did in fact consider the arguments of the Defence, and merely avoided repetitive analysis.⁴⁶

40. The Prosecutor also submits that the Defence has not specified its submission that the arguments that it advanced in response to the First Request are different from those rehearsed previously in the context of the First Decision on Redactions. In relation to the Defence reference to the Adjournment Decision as one new circumstance, the Prosecutor responds that it does not amount to a change of circumstances relevant to the context of redactions.⁴⁷

41. Further, the Prosecutor opposes the submission of the Defence that the Second Issue affects the fairness of the proceedings, arguing that the Defence has failed to show any impact in concrete terms. In particular, the Prosecutor alleges that no impact on the fairness of the proceedings arises since the Single Judge determined in the Decision that the arguments advanced by the Defence were the same as those previously advanced for the purposes of the First Decision on Redactions, and as the Defence has not specified any concrete change of circumstance. Finally, the Prosecutor objects as speculative the Defence argument that the Decision prevents it from conducting its investigations.⁴⁸

(iii) Conclusions of the Single Judge

42. The Second Issue proposed for appeal by the Defence concerns paragraph 14 of the Decision, which reads:

The Single Judge notes that the First Decisions on Redactions has addressed the protection of the interests of the Defence in the process of adjudicating redaction requests emanating from the Prosecutor, including the substance of the arguments advanced by the Defence presently in its response. For this

⁴⁶ Response, para. 19.

⁴⁷ *Ibid.*, para. 21.

⁴⁸ *Ibid.*, paras 23-26.

reason, while noting the submissions of the Defence, the Single Judge will not analyse them again.⁴⁹

43. The Decision makes specific reference to paragraphs 54 to 59 of the First Decision on Redactions. The Single Judge noted the submissions made by the Defence in its Response to the First Request, held that they concerned matters previously addressed in the First Decision on Redactions, recalled the relevant passages of that decision, and refrained from further repetitive analysis. In essence, the Defence appears to challenge the finding that the substance of the arguments advanced in the Defence response to the First Request was already adequately addressed in the First Decision on Redactions.

44. For this purpose, the Defence argues in the Application that the circumstances have changed since the issuance of the First Decision on Redactions, and that the Decision has failed to address these changed circumstances.⁵⁰ It is apparent from the Application that the only alleged change of circumstances is constituted by the Adjournment Decision.⁵¹

45. However, the Single Judge observes that the argument of changed circumstances is introduced by the Defence only in the Application, and was not developed previously in the Response to the First Request. In its Application, the Defence does not refer to the response to show that the argument of changed circumstances was ignored by the Single Judge. Indeed, the Single Judge observes that the Response to the First Request dealt primarily with questions of principles applicable to the authorisation of redactions to evidence, and referred to the Adjournment Decision only twice

⁴⁹ Footnote omitted.

⁵⁰ Application, para. 33-34.

⁵¹ *Ibid.*, para. 33.

in passing,⁵² without properly explaining how it constitutes a changed circumstance with impact on the assessment of requests for redactions.

46. In light of the above, it must be concluded that no issue concerning a purported failure to examine the Defence arguments arises out of the Decision. Accordingly, leave to appeal the Decision in respect of the Second Issue must be rejected.

C. The Third and Fourth Issue

47. The Third and Fourth Issue, jointly proposed and argued by the Defence, read as follows:

Les troisième et quatrième questions : elles concernent la non-communication de la motivation d'une décision à l'une des parties et la question du degré d'information dont doit disposer une partie pour être à même de faire valoir des arguments et bénéficier de la notion de débat contradictoire, composante essentielle du procès équitable (the "Third and Fourth Issue").⁵³

(i) The Defence Application

48. The Defence states that the reasons for the redactions that were granted by the Single Judge are unknown to it, and that, consequently, it is not in a position to examine and discuss those reasons, including before the Appeals Chamber.⁵⁴

49. Elsewhere in the Application, the Defence states:

La Juge unique s'est contentée d'affirmer dans la décision du 2 août 2013 qu'elle a examiné les propositions d'expurgation du Procureur « individually, on a case by case basis », sans donner aucune explication supplémentaire.⁵⁵

50. Referring to the jurisprudence of the Appeals Chamber in relation to proper reasoning of decisions authorising exemptions from disclosure, the

⁵² Response, paras 24 and 35.

⁵³ Application, p. 11.

⁵⁴ *Ibid.*, para. 45.

⁵⁵ *Ibid.*, para. 63.

Defence identifies two “*erreurs de droit*”, for which it alleges there is a need for determination by the Appeals Chamber:

1. La quantité et le niveau d’information que la défense doit être à même de recevoir pour pouvoir examiner utilement et discuter toute décision ;
2. le pouvoir dont disposerait le Juge unique de ne pas transmettre à la défense la partie de la décision comprenant la motivation.⁵⁶

51. The Defence argues that the Third and Fourth Issues affect the fairness of the proceedings, as the right to fair trial includes a requirement that reasons are provided for judicial decisions.⁵⁷

52. The submissions of the Defence in relation to the impact of the issue on the expeditiousness of the proceedings, as well as in relation to the question of whether immediate resolution of the issue may materially advance the proceedings, are the same as referred to above.⁵⁸

(ii) The Prosecutor’s Response

53. The Prosecutor submits that the issues of the amount and level of information that the Defence should receive in the process of authorising redactions pursuant to a request of the Prosecutor does not arise from the Decision, as those issues were settled in a prior decision, namely the Decision on Disclosure. The Prosecutor thus argues that the Defence has had ample opportunity to raise these issues before, and submits that the failure of the applicant to raise an issue at the point that it actually arose has previously resulted in leave to appeal being denied.⁵⁹

54. Moreover, the Prosecutor argues that the Third and Fourth Issue are based on a mischaracterisation of the Decision, as, contrary to the contention of the Defence, the Single Judge did provide reasons for her decision. The

⁵⁶ *Ibid.*, paras 46-47.

⁵⁷ *Ibid.*, paras 63-67.

⁵⁸ See above paras 16-17.

⁵⁹ Response, paras 28-32.

Prosecutor also notes in this context that reasons for individual redactions cannot be provided since they may nullify the purpose of the redaction.⁶⁰

55. The Prosecutor goes on to argue that, even if the Single Judge had provided insufficient reasoning, this would have a negligible impact on the fairness of the proceedings, as the Defence is fully on notice regarding the specific types of redactions being discussed and the overall reasons for granting or rejecting redactions.⁶¹

(iii) Conclusions of the Single Judge

56. The Single Judge observes that the Third and Fourth issue are framed by the Defence in abstract terms, with no explicitly articulated link to the Decision. In this respect the Single Judge recalls that leave to appeal can only be granted in respect of issues arising from a particular decision, and not with respect to hypothetical concerns or abstract legal questions.⁶²

57. Nevertheless, rather than rejecting the Third and Fourth Issue on this ground, the Single Judge considers it appropriate to assess the Third and Fourth Issue in the context of the Decision and the totality of the Defence submissions on the matter in the Application. The latter are, however, not clear.

58. First, it appears that the Third and Fourth Issue are essentially predicated upon the assumption that the reasons underlying the Single Judge's disposition of Prosecutor's requests for redactions have not been communicated to it. Contrary to these submissions, however, the Decision states:

⁶⁰ *Ibid.*, para. 33.

⁶¹ *Ibid.*, para. 34.

⁶² See above para. 11.

The Single Judge makes reference to the First Decision on Redactions wherein the overall reasons for granting or rejecting redactions have been provided. For the present decision, the Single Judge has adhered to the same approach.⁶³

It follows that any issue concerning a possible violation of the rights of the Defence by way of not communicating to it any reasons for a decision authorising redactions cannot be said to constitute anything more than an abstract legal question which is not an issue arising from the Decision.⁶⁴

59. Second, the Single Judge has considered the question whether the Defence is, under its Third and Fourth Issue, in fact seeking to challenge the *ex parte* nature of the procedure for adjudicating requests for redactions. However, while the Application refers to appellate jurisprudence establishing certain procedural principles which were also taken into consideration for the establishing of the system of adjudicating requests for redactions in the present case,⁶⁵ no explicit submission is made in this regard. The relevant context of the Decision on Disclosure and the First Decision on Redactions is not referred to. More importantly, the Application does not contain any arguments with respect to the conflict between the notification to the Defence of the entire reasoning of a decision on redactions, and the object and purpose of redactions. As such, the Single Judge takes the view that the submissions contained in the Application cannot support the conclusion that any issue regarding the *ex parte* nature as such of the procedure for adjudicating requests for redactions has been identified.

60. In sum, it appears that the Defence is, under its Third and Fourth Issue, somehow seeking to challenge the extent to which it has been notified of the reasons underlying the granting or rejecting of particular requests for

⁶³ Decision, para. 13 (footnotes omitted).

⁶⁴ See also Pre-Trial Chamber I, "Decision on an application for leave to appeal submitted by the Defence of Abdullah Al-Senussi", 28 August 2013, ICC-01/11-01/11-419, para. 65.

⁶⁵ Application, para. 46; Decision on Disclosure, para. 55; First Decision on Redactions, para. 55.

redactions in the Decision. However, the Single Judge is unable to discern in this respect an issue arising out of the decision, within the meaning of article 82(1)(d) of the Statute, *i.e.* a subject the resolution of which is essential for the determination of the matter at stake. Consequently, leave to appeal in respect of the Third and Fourth Issue must also be 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 29 August 2013

At The Hague, The Netherlands