

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/11
Date: 10 January 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 redacted version

**Decision on the "Prosecution's Request for redactions pursuant to Rule 81(2)
and for disclosure of an anonymous witness summary pursuant to Articles
68(1) and 61(5)"**

Decision to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Fatou Bensouda

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 & Deputy Registrar

Silvana Arbia

Didier Preira

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 for disclosure of an anonymous witness summary pursuant to Articles 68(1) and 61(5)” (the “Request”).²

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 14 December 2012, the Chamber issued the “Decision on the date of the confirmation of charges hearing and proceedings leading thereto”, deciding that the hearing on the confirmation of charges shall commence on 19 February 2012 and establishing time limits for, *inter alia*, the disclosure of incriminating evidence by the Prosecutor.⁵

4. On 21 December 2012, the Prosecutor filed the Request, which seeks: (i) authorisation of certain redactions in the metadata of 13 documentary items of incriminating evidence; and (ii) the authorisation “to withhold the identity, statements and annexes of witness P-0239 and instead, to be

¹ ICC-02/11-01/11-61.

² ICC-02/11-01/11-339-Conf-Exp and annexes. A confidential redacted version is also available, see ICC-02/11-01/11-339-Conf-Red.

³ ICC-02/11-01/11-30 and annexes.

⁴ ICC-02/11-01/11-74-Conf-Exp and annex. A public redacted version is also available, see ICC-02/11-01/11-74-Red.

⁵ ICC-02/11-01/11-325.

permitted to submit a summary thereof which does not include any identifying information of the witness”.⁶

5. The request for authorisation of redactions concerns the names of investigators that appear in the metadata of the chain of custody of seven documents, and the identity of sources appearing in the metadata of eight documents. The Prosecutor seeks the redaction of this information in order to protect ongoing investigations, pursuant to rule 81(2) of the Rules of Procedure and Evidence (the “Rules”). She submits that “[r]evealing the information in question to the Defence would likely adversely affect the Prosecution’s resources and its ability to conduct further investigations expeditiously” and that none of the requested redactions will be unduly prejudicial to the Defence, which will have access to the content of the 13 documents in question.⁷

6. In relation to the request for anonymity of witness 239, the Prosecutor submits that he is currently working [REDACTED]. The Prosecutor states that there is a need for protective measures, which cannot be implemented before the time limit for submission of the document containing the charges and the list of evidence by the Prosecutor.⁸

7. Referring also to the non-consent of the witness to the disclosure of his identity to the Defence, the Prosecutor submits that the witness must remain anonymous. However, as redaction of all identifying information would result in the statement becoming “no longer [...] readable in a meaningful way so as to make use of the incriminating and other information falling possibly under Article 67(2) and Rule 77”, the Prosecutor seeks to disclose an anonymous summary of the statement of witness 239. She submits that this

⁶ Request, para. 20.

⁷ *Ibid.*, paras 7-10.

⁸ *Ibid.*, paras 13-14 and annex 2.

measure does not cause any undue prejudice to the Defence, “as the evidence of P-0239 is merely used to corroborate other evidence that has or will be disclosed to the Defence according to the schedule”.⁹

8. On 8 January 2013, the Defence filed the “*Réponse de la Défense à « Prosecution’s Request for redactions pursuant to Rule 81 (2) and for disclosure of an anonymous witness statement pursuant to articles 68 (1) and 68 (5) » (ICC-02/11-01/11-339-Conf-Red)*” (the “Response”), opposing the Request in its entirety.¹⁰

9. Concerning the Prosecutor’s requests for redactions, the Defence submits, with respect to the proposed redaction of names of investigators, that the reasons are vague and blurred, and with respect to the proposed redaction of “sources”, that this term is not defined in the Statute or the Rules and that the reasoning advanced by the Prosecutor is imprecise. The Defence also states that in the absence of information on sources, it cannot verify the authenticity and reliability of disclosed documents.¹¹

10. With respect to the request of the Prosecutor to submit an anonymous summary of the statement of witness 239, the Defence objects to the Prosecutor’s argument that redactions could render the witness’s statement incomprehensible and unreadable. It states that even a partly redacted statement retains its structure and logic, but that this is not the case with a summary, which is a new text, reflecting the interpretation that the author of the summary wishes to give to the original text. Finally, the Defence states that it cannot comment on the existence of risk for the witness as no information in this regard has been provided to it.¹²

⁹ *Ibid.*, paras 15-16.

¹⁰ ICC-02/11-01/11-346-Conf.

¹¹ Response, paras 5-15.

¹² *Ibid.*, paras 16-21.

11. The Single Judge notes articles 54, 61, 67 and 68(5) of the Rome Statute (the “Statute”) and rules 81 and 121 of the Rules.

12. The Single Judge makes reference to the First Decision on Redactions wherein the overall reasons for granting or rejecting redactions have been provided.¹³ For the present decision, the Single Judge has adhered to the same approach.

13. The redactions proposed are consistent with redactions previously authorised in the case and concern the identity of persons working in the Office of the Prosecutor (category B.1) and the identity of sources of documents (category B.3). The proposed redactions concern only metadata and not the items of evidence themselves. In this sense, while the reasoning advanced by the Prosecutor is brief and straightforward, the Single Judge does not share the view of the Defence that it is deficient. Having reviewed the individual proposed redactions, the Single Judge considers that they conform to the applicable requirements and should, therefore, be granted.

14. Turning to the request for authorisation to disclose an anonymous summary of the statement of witness 239, the Single Judge recalls that article 61(5) of the Statute provides that at the confirmation of charges hearing the Prosecutor “may rely on documentary or summary evidence”. In this respect, the Appeals Chamber stated that “the use of summaries by the Prosecutor at the confirmation hearing [...] is not subject to any explicit condition” and that “neither the Statute nor the Rules of Procedure and Evidence foresee that such summaries must be approved by the Pre-Trial Chamber prior to their presentation at the confirmation hearing.”¹⁴ The

¹³ First Decision on Redactions, paras 55-59, 82-92 and 99-102.

¹⁴ Appeals Chamber, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and

Defence argument against the use of summaries by the Prosecutor can therefore not be upheld.

15. However, as previously stated in the First Decision on Redactions, the Prosecutor must still obtain authorisation to conceal from the Defence the identities of those witnesses in respect of which he wishes to rely on summaries.¹⁵ Accordingly, in light of the particular circumstances of witness 239, the Single Judge will assess whether (i) there is an objectively justifiable risk to the witness; (ii) anonymity is necessary to overcome or reduce that risk; and (iii) anonymity is not prejudicial to or inconsistent with the rights of the suspect.

16. According to the available information, witness 239 is [REDACTED].¹⁶

17. Further, according to the information provided by the Prosecutor, [REDACTED].¹⁷

18. The Prosecutor informs the Chamber that [REDACTED]. However, the Prosecutor notes that [REDACTED]. The Prosecutor also submits that other protective measures will be required, which are unlikely to be implemented before 17 January 2013.¹⁸

19. On the basis of the above, the Single Judge considers that the disclosure of the identity of witness 239 would pose an objectively justifiable risk to the safety of the witness as there is a possibility that [REDACTED] if revealed to Mr Gbagbo. The Single Judge is further of the view that the said risk cannot currently be mitigated by less intrusive protective measures, and that

Amended Requests for Redactions under Rule 81'', 14 December 2006, ICC-01/04-01/06-773, para. 43; see also First Decision on Redactions, para. 32.

¹⁵ First Decision on Redactions, paras 33-36.

¹⁶ [REDACTED]

¹⁷ [REDACTED]

¹⁸ Request, para. 14; ICC-02/11-01/11-339-Conf-Exp-Anx2, p. 3.

anonymity is therefore necessary at this stage. Finally, the Single Judge is of the view that the use by the Prosecutor of the anonymous summary of the statement of witness 239 would not be prejudicial to or inconsistent with the rights of the suspect. Accordingly, the request for anonymity should be granted.

20. Finally, the Single Judge underlines 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.¹⁹

FOR THESE REASONS, THE SINGLE JUDGE

GRANTS the Prosecutor's requests for redactions;

AUTHORISES the non-disclosure of the identity of witness 239.

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



Judge Silvia Fernández de Gurmendi

Single Judge

Dated this 10 January 2013

At The Hague, The Netherlands

¹⁹ Decision on Disclosure, p. 30.