

Cour
Pénale
Internationale



International
Criminal
Court

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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 "Requête de l'Accusation aux fins de non divulgation de l'identité d'un témoin fournissant une information tombant potentiellement dans le champ de l'article 67-2 pour laquelle de l'information similaire a été communiquée"

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 *“Requête de l’Accusation aux fins de non divulgation de l’identité d’un témoin fournissant une information tombant potentiellement dans le champ de l’article 67-2 pour laquelle de l’information similaire a été communiquée”* (the “Request”).²

1. On 21 December 2012, the Prosecutor filed the Request, requesting that the Chamber authorise the non-disclosure of the identity of witness 43.³

2. The Prosecutor submits that witness 43 provides incriminating information, but that she has decided not to use this statement at the confirmation of charges hearing as the witness does not have direct knowledge of the incidents encompassed in the charges [REDACTED].⁴

3. However, the Prosecutor submits that the testimony of witness 43 is potentially exculpatory insofar as the witness states, with respect to Charles Blé Goudé: *“un jour il était en train de parler à la télé et il a dit qu’il n’avait pas d’armes, pas de couteaux, ni de machettes”*.⁵ Referring to the nature of this exculpatory information and the vulnerability of the witness, the Prosecutor requests to inform the Defence of what witness 43 has heard on television, and of the context of that information, without disclosing the identity of the witness.⁶

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 *Ibid.*, para. 8.

⁴ *Ibid.*, para. 3.

⁵ *Ibid.*, para. 4.

⁶ *Ibid.* paras 4-5.

4. The Prosecutor highlights that comparable information has already been communicated to the Defence and provides specific examples thereof in the Request.⁷ The Prosecutor further submits that despite not knowing the identity of witness 43, the Defence may investigate to obtain a copy of the televised programme or hear other witnesses who would have presumably watched it.⁸ Therefore, the Prosecutor alleges that no prejudice would arise to the Defence from the non-disclosure of the identity of witness 43.⁹

5. On 8 January 2012, the Defence responded to the Request, arguing that the Single Judge should reject it and should order the disclosure of the totality of the statement of witness 43, including the witness's identity.¹⁰ In its submissions, the Defence contends that in the absence of information related to the identity of witness 43 and to the witness statement, the Defence would not be in position to utilise in an efficient manner the information disclosed by the Prosecutor and to conduct its investigation accordingly.¹¹ The Defence submits that the Prosecutor failed to give legal and factual justifications to support the non-disclosure of the identity of witness 43.¹²

6. The Single Judge notes articles 54, 61 and 67 and 68 of the Rome Statute (the "Statute"), rules 81 and 121 of the Rules of Procedure and Evidence (the "Rules").

7. The Single Judge notes that the Prosecutor has identified within the statement of witness 43 information falling within the ambit of article 67(2) of the Statute. As a matter of general rule, the statement of witness 43 is thus subject to mandatory disclosure to the Defence.

⁷ *Ibid.*, para. 6.

⁸ *Ibid.*, para. 7.

⁹ *Ibid.*, para. 7.

¹⁰ ICC-02/11-01/11-345-Conf, p. 6.

¹¹ ICC-02/11-01/11-345-Conf, para. 7.

¹² ICC-02/11-01/11-345-Conf, para. 11.

8. However, the Single Judge observes that, while framing the Request as a request for anonymity, the Prosecutor is in fact requesting authorisation not to disclose the statement of witness 43 but to communicate to the Defence an extract containing the information falling within the ambit of article 67(2) of the Statute.

9. In accordance with article 68 of the Statute, the Single Judge shall take the appropriate measure to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Pursuant to rule 81(4) of the Rules, the Single Judge may for this purpose restrict disclosure, including by authorising, when necessary, the non-disclosure of identity of witnesses prior the commencement of the trial. In so doing, the Single Judge is mandated to assess: (i) whether the disclosure may endanger the witness or his or her family members; (ii) whether the protective measure is necessary; and (iii) whether the protective measure would not be prejudicial to or inconsistent with the rights of the suspect and a fair and impartial trial.¹³

10. Taking into consideration [REDACTED],¹⁴ the Single Judge considers that there exist security concerns with regard to witness 43 and that protective measures are necessary in order to safeguard the safety and well being of the witness.

11. In light of the fact that the statement is not to be relied upon by the Prosecutor at the confirmation of charges hearing and taking into account the nature of the information falling under article 67(2) provided by the witness and the fact that comparable information has already been disclosed to the Defence, the Single Judge considers that the non-disclosure of the statement of witness 43, including of the witness's identity, constitutes an appropriate

¹³ 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 Amended Requests for Redactions under Rule 81'", ICC-01/04-01/06-773, para. 21.

¹⁴ [REDACTED].

measure to ensure the protection of this witness. In the particular circumstances, the Single Judge is of the view that the rights of the Defence will be properly safeguarded by the separate disclosure by the Prosecutor of the information falling under article 67(2) of the Statute, as provided by the witness, together with any information to assist the Defence in identifying the relevant televised program.

FOR THESE REASONS, THE SINGLE JUDGE

AUTHORISES the Prosecutor non to disclose the statement of witness 43, including the witness's identity, and to disclose separately the information falling within the ambit of article 67(2) of the Statute, together with any information to assist the Defence in identifying the relevant televised program.

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