

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/11
Date: 13 December 2012

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 document

**Decision on the “Requête de la défense aux fins de levée de certaines
expurgations accordées par la Juge unique au Procureur dans sa Décision du
13 novembre 2012 (ICC-02/11-01/11-294)”**

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 Defence “*Requête de la défense aux fins de levée de certaines expurgations accordées par la Juge unique au Procureur dans sa Décision du 13 novembre 2012 (ICC-02/11-01/11-294)*” (the “Request”).²

1. 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”).³

2. On 31 October 2012, the Prosecutor filed the “Prosecution’s Request pursuant to Regulation 35 for variation of time limit to disclose incriminating evidence and modify the list of evidence for the confirmation hearing, and Request for redactions”.⁴

3. On 13 November 2012, the Single Judge issued the “Decision on the ‘Prosecution’s Request pursuant to Regulation 35 for variation of time limit to disclose incriminating evidence and modify the list of evidence for the confirmation hearing, and Request for redactions’” (the “Decision of 13 November 2012”).⁵

¹ ICC-02/11-01/11-314-Conf.

² ICC-02/11-01/11-178.

³ 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.

⁴ ICC-02/11-01/11-284-Conf-Exp.

⁵ ICC-02/11-01/11-294 and annex.

4. On 19 November 2012, the Prosecutor disclosed to the Defence the evidence to which redactions were authorised in the Decision of 13 November 2012.⁶

5. On 7 December 2012, the Defence submitted the Request, requesting the Chamber to:

- *Lever les expurgations accordées au Procureur par le Juge Unique dans les paragraphes 111, 114, 119, 120, 124, 128, 129, 130 138, 143, 145 et 171 de la déclaration du témoin P-164 (CIV-OTP-0028-0481)*
- *Lever les expurgations accordées au Procureur par le Juge Unique dans les paragraphes 32, 58, 62, 63, 64, 65, 70, 72, 73, 75, 76, 77, 79, 88, 89, 92, 94, 98, 99, 101, 104, 105, 113, 117, 120, 122, 125 et 126 de la déclaration du témoin P-172 (CIV-OTP-0028-0550);*
- *Lever les expurgations accordées au Procureur par le Juge Unique dans les paragraphes 58, 85, 97, 102, 103 et 119 de la déclaration du témoin P-184 (CIV-OTP-0032-0011) ;*
- *Lever les expurgations accordées au Procureur par le Juge Unique dans les paragraphes 39, 51 et 67 de la déclaration du témoin P-185 (CIV-OTP-0029-0656).⁷*

6. The Defence argues that certain redactions to the statements of witnesses 164, 172, 184 and 185 are “*préjudiciables à la compréhension des témoignages et par conséquent, constituent un obstacle à la capacité de l’équipe de défense à enquêter sur les évènements décrits*”.⁸ It submits that it does not require the disclosure of identity of the Prosecutor’s staff which participated in the interviews of the witnesses, or of names of places where the interviews took place, but rather: “*Les seules informations dont la défense demande ici la divulgation portent sur l’identité de tiers – non identifiés comme des témoins potentiels par le Procureur – qui pourraient disposer d’informations de nature à éclairer la défense.*”⁹ The Defence specifies which redactions in the statements of witnesses 164, 172, 184 and 185 it considers to fall within this category.¹⁰

⁶ ICC-02/11-01/11-299.

⁷ Request, p. 11.

⁸ *Ibid.*, para. 11, see also para. 36.

⁹ *Ibid.*, para. 14.

¹⁰ *Ibid.*, paras 15-18.

7. The Defence refers to the law applicable to redactions, in particular to the text of rule 81 of the Rules of Procedure and Evidence (the “Rules”) and the related jurisprudence of the Appeals Chamber, and argues that the conditions for withholding the concerned information from the Defence are not met.¹¹

8. On 11 December 2012, the Prosecutor filed the “Prosecution’s Response to Defence Requests Relating to Redactions Authorized by the Single Judge” (the “Response”),¹² submitting that the Request should be rejected, as it “effectively amounts to a request for the Chamber to reconsider its prior Decision. The facts as described in the Defence Request are partially inaccurate and do not meet the threshold for reconsideration.”¹³

9. The Prosecutor submits that “in principle [...] Chambers have the discretion to reconsider their decisions. However, the circumstances in which reconsideration will follow ordinarily will be exceptional and rare.” In the view of the Prosecutor, reconsideration is only available when “a decision is manifestly unsound and its consequences are manifestly unsatisfactory” or when “new or previously unavailable information requires that the Chamber reconsider its previous ruling”, neither of which circumstances are present at the moment.¹⁴

10. In addition, the Prosecutor argues that the Defence has failed to demonstrate how the redactions authorised by the Chamber prejudice its understanding of the content of the four witness statements and much less that the consequences of the Decision are “manifestly unsatisfactory”.¹⁵

¹¹ *Ibid.*, paras 19-35.

¹² ICC-02/11-01/11-319-Conf.

¹³ *Ibid.*, para. 6.

¹⁴ *Ibid.*, para. 8.

¹⁵ *Ibid.*, para. 10.

11. The Single Judge notes articles 54, 61 and 67 of the Rome Statute and rules 81 and 121 of the Rules.

12. The Single Judge notes that the Request effectively challenges the adjudication in the Decision of 13 November 2012 of redaction requests submitted by the Prosecutor, on the basis that the redactions are prejudicial to the interests of the Defence or otherwise unwarranted.

13. In this respect, the Single Judge recalls that the Decision of 13 November 2012 makes reference to the First Decision on Redactions and “adhere[s] to the same approach”.¹⁶ The Decision of 13 November 2012 refers, *inter alia*, to the following part of the First Decision on Redactions:

55. Turning now to the analysis of the Prosecutor Requests for Redactions, the Single Judge recalls that the overriding principle is that of full disclosure, the authorisation of non-disclosure of information being therefore an exception. The Single Judge further recalls the relevant judgments of the Appeals Chamber, which provide guidance in addressing the present requests for redactions.

56. In light of the Defence Observations, the Single Judge emphasises, for the sake of clarity, that for any redaction to be authorised pursuant to Rule 81(2) and (4) of the Rules, she must first and foremost, reach the conclusion that the disclosure to the Defence of the information sought to be redacted, at this stage of the proceedings, could: (i) prejudice further or ongoing investigations by the Prosecutor (Rule 81(2) of the Rules); (ii) affect the confidential character of the information under Articles 54, 72 and 93 of the Statute (Rule 81(4) of the Rules); or (iii) pose a danger to a particular person (Rule 81(4) of the Rules). As specified by the Appeals Chamber, “the alleged danger must involve an objectively justifiable risk” to either the safety of the person concerned or to the Prosecutor’s further or ongoing investigations. The Appeals Chamber further held that the “circumstances of the individual suspect should be considered, including, *inter alia*, whether there are factors indicating that he or she may pass on the information to others or otherwise put an individual at risk by his or her actions.

57. After having ascertained the existence of such risk, the Single Judge will assess whether the requested redactions are necessary namely that the redactions sought could overcome or reduce such risk and that at this stage there are no less intrusive alternative protective measures available.

58. 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

¹⁶ Decision of 13 November 2012, para. 15.

such information “would not result in the confirmation of the charges, viewed as a whole, to be unfair to the suspect.”

59. The Single Judge will only grant the requested redactions if she is satisfied that the abovementioned conditions are met. The Single Judge also underlines that information that has been withheld may need to be subsequently disclosed, should circumstances change. The Prosecutor should therefore bring to the attention of the Chamber any factors that may warrant a variation of a ruling on non-disclosure.¹⁷

14. Accordingly, in the Decision of 13 November 2012 the Single Judge was bound to examine and has indeed taken a position on the matters which the Defence raises in the Request, including the question whether requested redactions were prejudicial to the rights of Mr Gbagbo. To the extent that the Single Judge determined that the requested redactions were not inconsistent with the rights of Mr Gbagbo, and on the condition of other relevant criteria, the redactions were granted upon individual review as specified in the *ex parte* Annex to the Decision of 13 November 2012.¹⁸ For this reason, the Single Judge does not deem it necessary to entertain any further the arguments of the Defence as to the proper application of criteria for authorisation of redactions in the Decision of 13 November.

15. The Single Judge notes, as recalled above, that authorisation of redactions may be withdrawn and full disclosure ordered in case of change of any relevant circumstances. However, none of the submissions of the Defence can be understood as alleging any such change of relevant circumstances. The Prosecutor, on the other hand, indicates that such change of circumstances is not present.¹⁹ Accordingly, variation of the previous authorisation of redactions is unwarranted and the Request must be rejected.

¹⁷ First Decision on Redactions, paras 55-59 (footnotes omitted).

¹⁸ Decision of 13 November 2012, para. 16.

¹⁹ Response, para. 8.

FOR THESE REASONS, THE SINGLE JUDGE

REJECTS the Request.

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

A handwritten signature in black ink, appearing to read 'S. Fernández de Gurmendi', is written over a horizontal line.

Judge Silvia Fernández de Gurmendi

Single Judge

Dated this 13 December 2012

At The Hague, The Netherlands