

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/11-01/11

Date: 26 July 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

Decision on the “Requête de la Défense aux fins d’expurgation de deux attestations” and the “Demande aux fins de mesures de protection”

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

The Office of the Prosecutor
Fatou Bensouda, 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
Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
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 (“Chamber”) of the International Criminal Court (“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 la Défense aux fins d’expurgation de deux attestations*”² and the “*Demande aux fins de mesures de protection*.”³

I. Procedural history and submissions of the parties

1. On 23 November 2011, Pre-Trial Chamber III issued an arrest warrant for Laurent Gbagbo (“Mr Gbagbo”),⁴ who was transferred to the Court on 30 November 2011. On 5 December 2011, the first appearance of Mr Gbagbo was held before the Court. During the hearing, Pre-Trial Chamber III scheduled the commencement of the confirmation of charges hearing for 18 June 2012.⁵

2. On 6 March 2012, the Single Judge issued the “Decision on the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations” (“Decision on the Protocols”).⁶

3. On 12 June 2012, the Single Judge postponed the commencement of the hearing to 13 August 2012 and modified certain time limits for the disclosure of evidence and the submission of requests for protective measures.⁷ In particular, the Single Judge ordered the Defence:

¹ ICC-02/11-01/11-61.

² ICC-02/11-01/11-191-Conf-Exp.

³ ICC-02/11-01/11-192-Conf-Exp.

⁴ ICC-02/11-01/11-1.

⁵ ICC-02/11-01/11-T-1-ENG, p. 8.

⁶ ICC-02/11-01/11-49 and its annex.

⁷ ICC-02/11-01/11-152-Red, p. 12.

- (i) to submit no later than 12 July 2012 any request under Rule 81 of the Rules for redactions to evidence collected by the Defence;
- (ii) to make *ex parte* applications for protective measures other than redactions as expeditiously as possible but no later than 5 July 2012; and
- (iii) to file in the record of the Case no later than 27 July 2012 the Defence List of Evidence, if any, to be presented at the confirmation hearing.

4. Upon request of the Defence, the Single Judge further extended to 20 July 2012 the time limit for the Defence to submit its requests for redactions and for other protective measures.⁸

5. On 20 July 2012, the Defence submitted the "*Requête de la Défense aux fins d'expurgation de deux attestations*" ("Request for Redactions")⁹ and the "*Demande aux fins de mesures de protection*" ("Request for Protective Measures").¹⁰

6. In its Request for Redactions, the Defence submits that the disclosure to the Prosecutor of the identity and whereabouts of the two individuals who gave statements to the Defence, as well as of the identities of their family members, may endanger their safety. The Defence contends that as several persons within the Office of the Prosecutor work on the field in Côte d'Ivoire, the risk that the identity of these two individuals and of their family members could be disclosed increases.¹¹ The Defence further requests the redactions of

⁸ ICC-02/11-01/11-177 and ICC-02/11-01/11-179.

⁹ ICC-02/11-01/11-191-Conf and its annexes.

¹⁰ ICC-02/11-01/11-192-Conf-Exp and its annexes.

¹¹ ICC-02/11-01/11-191-Conf, paras 18-26.

the dates and places of interviews as the disclosure of such information may endanger the ongoing and the future investigations of the Defence.¹²

7. In its Requests for Protective Measures, the Defence requests that pseudonyms be assigned to two persons who gave statements to the Defence. It further requests the disclosure of the excerpts of the “Situation Threat and Risk Assessment” which relate to the situation of persons associated or perceived to be associated with Mr Gbagbo.¹³ The Defence also requests the Chamber to order the Victims and Witnesses Unit (“VWU”) to prepare in collaboration with the Defence a report assessing the threats and risks to persons associated or perceived to be associated with Mr Gbagbo and in particular in relation to the proceedings before the Court.¹⁴

8. On 23 July 2012, the Prosecutor filed the “Prosecution’s Response to *‘Requête de la Défense aux fins d’expurgation de deux attestations’*”, opposing the Request for Redactions on the grounds that: (i) the alleged risk referred to in the Request for Redactions is not attributable to the Office of the Prosecutor; (ii) allegations as to risk created by the Office of the Prosecutor are ill-founded since the Prosecutor is bound by articles 54(1) and 68(1) of the Statute; and (iii) the Protocols concerning the disclosure of the identity of witnesses of the other party and the handling of confidential information in the course of investigations sufficiently safeguard the security of witnesses.¹⁵

II. Applicable law

9. The Single Judge notes articles 54, 57(3), 61, 67 and 68 of the Rome Statute (“Statute”) and rules 15, 18 to 20, 81 and 121 of the Rules of Procedure and Evidence (“Rules”).

¹² ICC-02/11-01/11-191-Conf, para.27.

¹³ ICC-02/11-01/11-192-Conf-Exp, paras 24-26.

¹⁴ ICC-02/11-01/11-192-Conf-Exp, paras 27-28.

¹⁵ ICC-02/11-01/11-194-Conf, para. 2.

III. Analysis and conclusions of the Single Judge

A. Request for redactions and attribution of pseudonyms

10. The Single Judge recalls that to grant requests for redactions pursuant to rule 81(4) of the Rules, she must first and foremost, reach the conclusion that the disclosure to the Prosecutor of the identities of these persons, at this stage of the proceedings, could pose a danger to their safety.¹⁶ It is recalled that the alleged risk to safety must be “objectively justifiable”.¹⁷ After having ascertained the existence of any such risk, the Single Judge must assess whether the requested redactions are necessary, namely that the redactions sought could overcome or reduce such risk; and whether at this stage there are less intrusive alternative protective measures available.

11. Having reviewed the statements submitted by the Defence as well as the supporting materials, the Single Judge is of the view that if the statements were to be disclosed *to the public* in unredacted format, there would be an objectively justified security risk to the safety of the two persons who provided the statements to the Defence as well as to their family members.

12. The Single Judge however observes that the Defence is seeking the anonymity of the two authors of the statements also *vis-à-vis* the Prosecutor. To authorise such a measure, the Single Judge must be satisfied that objectively justifiable risk to the safety of the persons concerned would arise out of the disclosure to the Prosecutor.¹⁸ In light of the information provided by the Defence, the Single Judge observes that the sources of potential harm are persons or entities other than the Office of the Prosecutor. The Defence nonetheless submits that as several persons within the Office of the Prosecutor work in the field in Côte d’Ivoire, there is a likelihood that the

¹⁶ ICC-02/11-01/11-74-Red, paras 55-66, 82-102.

¹⁷ Judgment of 13 May 2008, ICC-01/04-01/07-475, para.71.

¹⁸ See also ICC-02/11-01/11-136.

identity of these two persons and their family members, if disclosed to the Prosecutor, could subsequently be disclosed to the public.

13. In this respect, the Single Judge recalls that: (i) article 54(1)(b) of the Statute sets an obligation for the Prosecutor to “respect the interests and personal circumstances of victims and witnesses” during his investigations; and (ii) article 68(1) of the Statute puts an obligation on the Court to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses” and expressly states that the “Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes”.

14. The Single Judge further emphasizes that, following consultations with the parties, she issued the Decision on the Protocols which aims at safeguarding the security of witnesses during the investigations, whilst taking into account the rights and the obligations of the parties. In particular, the Single Judge underlines that the Protocols regulate the use of witnesses’ names in the course of investigations and notably clearly specify that in cases where it becomes necessary to refer to the name of a person who is a witness to a third party, *the party cannot disclose that the person is a witness or involved with the Court*.¹⁹ Further safeguards are envisaged in the event that a third party becomes aware that a named person is involved with the Court and all parties are under the obligation to alert to the possible danger that their investigations may have for witnesses. Any reasonable suspicion that a witness may have been placed at risk should be brought to the attention of the VWU and the Chamber as soon as possible.²⁰

¹⁹ ICC-02/11-01/11-49, p.3 (b).

²⁰ ICC-02/11-01/11-49, p.3 (c).

15. In light of the abovementioned, the Single Judge considers that so long as: (i) the identities of the authors of the statements remain confidential and are therefore not disclosed to the public; and (ii) the parties comply with the abovementioned Protocols, the safety of the concerned persons would be sufficiently protected. The Single Judge further considers that the risk of disclosure of their identities to the public will be further mitigated if these statements are not filed publicly, even in a redacted form. The Single Judge is thus of the view that pseudonyms, as requested by the Defence, should be conferred to the two individuals. Should reference to these statements be made in public sessions of the confirmation of charges hearing or in public written submissions, the parties are directed to refer to the authors' pseudonym, which are to be conferred to them by the Defence in compliance with the E-court protocol.

16. For the abovementioned reasons, the Single Judge is of the view that the risk alleged by the Defence due to disclosure to the Prosecutor of the identity of the two persons who gave a statement to the Defence, of their whereabouts and of the identity of their family members is hypothetical and is not objectively justifiable. For these reasons the Request for Redactions must be rejected.

17. With respect to the request to redact the places and dates of interviews conducted by the Defence, the Single Judge does not consider that objectively justifiable risk would arise from the disclosure of such information to the Prosecutor as opposed to the public. Accordingly, the Defence request to redact such information must also be rejected.

B. Request for a Situation Threat and Risk assessment to persons associated or perceived to be associated with Mr Gbagbo

18. The Single Judge notes that the Defence seeks to have access to the Situation Threat and Risk Assessment²¹ which was jointly prepared by the Prosecutor and the VWU and submitted to the Chamber on 20 March 2012. The Defence seeks access in particular to any excerpts that might be related to the risk to persons associated or perceived to be associated with Mr Gbagbo or anyhow collaborating with the investigations of the Defence.

19. This document has not been made available to the Defence as it refers to the assessment of the risks faced by Prosecutor's witnesses. In the document, there is no assessment related to the risk faced by persons associated or perceived to be associated with Mr Gbagbo or anyhow collaborating with the investigations of the Defence. Accordingly, the Defence requests to have access to excerpts of the Situation Threat and Risk Assessment must be rejected.

20. The Single Judge considers however appropriate that the VWU assist the Defence in determining the existence of any risks or threats with respect to persons associated or perceived to be associated with Mr Gbagbo or anyhow collaborating with the investigations of the Defence. For this purpose, the Defence is to liaise directly with the VWU.

FOR THESE REASONS,

REJECTS the requests for redactions;

²¹ ICC-02/11-01/11-HNE-1-Conf-Exp.

ORDERS the parties to only refer to the authors of the two statements by their pseudonyms, to be assigned by the Defence in compliance with the E-court protocol;

REJECTS the Defence request to have access to excerpts of the Situation Threat and Risk Assessment;

ORDERS the Defence to file a confidential or a public redacted version of the Request for Protective Measures by 6 August 2012.

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



Judge Silvia Fernández de Gurmendi

Single Judge

Dated this Thursday 26 July 2012

At The Hague, The Netherlands