

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 20 April 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 "Prosecution's request pursuant to Regulation 35 for variation of time limit to submit a request for redactions and for the extension of time for disclosure"

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

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy 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**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Silvana Arbia, Registrar
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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 of the International Criminal Court (“Chamber”), 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 pursuant to Regulation 35 for variation of time limit to submit a request for redactions and for the extension of time for disclosure” (“Request”).²

I. Procedural history

1. On 24 January 2012, the Single Judge issued the “Decision establishing a disclosure system and a calendar for disclosure” (“Decision on Disclosure”) in order to ensure, in compliance with Rule 121(2)(b) of the Rules of Procedure and Evidence (“Rules”), that disclosure takes place under satisfactory conditions while safeguarding the interests at stake. To that end, the Decision on Disclosure, *inter alia*: (i) required that the Prosecutor disclose to the Defence, as soon as practicable and no later than 3 February 2012, any evidence on which he intends to rely at the confirmation hearing which was collected before 25 October 2011 and for which no protective measures are required; and (ii) required that the Prosecutor submit to the Chamber, as soon as practicable and no later than 9 March 2012, any request for redactions of evidence on which he intends to rely at the confirmation hearing and which was collected between 25 October 2011 and 15 February 2012.³

¹ ICC-02/11-01/11-61.

² ICC-02/11-01/11-90 and confidential *ex parte* Annex.

³ ICC-02/11-01/11-30 and its annexes.

2. On 27 March 2012, the Single Judge issued the “First decision on the Prosecutor’s requests for redactions and other protective measures” (“First Decision on Redactions”).⁴

3. On 12 April 2012, the Prosecutor filed the Request, requesting the Chamber to: (i) grant an extension of time for the submission of additional requests for redactions; (ii) grant the requests for redactions in question; and (iii) grant the extension of time for the disclosure of certain other evidence.⁵

4. On 17 April 2012, the Defence filed its “Réponse de la Défense du Président Gbagbo à « Prosecution’s request pursuant to Regulation 35 for variation of time limit to submit a request for redactions and for the extension of time for disclosure »” (“Response”), urging the Chamber to remind the Prosecutor to respect the time limits established by the Disclosure Decision, and to reject the Request.⁶

II. Submissions of the parties

A. *The Prosecutor*

5. The Prosecutor requests an extension of time for the submission of redaction requests in relation to 11 video excerpts, related to the statement of witness 87, which were received on 3 February 2012. He explains that these items of evidence were collected as part of a batch of 310 video excerpts and were only fully uploaded into Ringtail on 2 March 2012. It was only thereafter that the video material could be analysed and ultimately 11 video excerpts were identified for use at the confirmation of charges hearing. According to

⁴ ICC-02/11-01/11-74-Conf-Exp and confidential ex parte Annex. A public redacted version has also been issued (ICC-02/11-01/11-74-Red).

⁵ ICC-02/11-01/11-90, para. 14.

⁶ ICC-02/11-01/11-94.

the Prosecutor, the volume of these videos and the time required to process them made it impossible to include them in previous requests for redactions.⁷

6. The Prosecutor submits that the Defence will not suffer prejudice as a result of extension of time, as it already has the statement of witness 87 and the core video material provided by the witness. In addition, according to the Prosecutor, although the 11 video excerpts total 2 hours and 30 minutes of viewing time, the Prosecutor will rely at the confirmation of charges hearing on “much shorter extracts to be identified by specific time stamps in the disclosure list and the List of Evidence”.⁸

7. In the event that the extension of time to present requests for redactions is granted, the Prosecutor requests redactions to the metadata of the 11 video excerpts, pursuant to Rule 81(2) of the Rules, of the name of an investigator who was present during the interview of witness 87.⁹

8. Separately, the Prosecutor requests the extension of time to disclose a video (CIV-OTP-0007-0167) and a news article containing its transcript (CIV-OTP-0007-0168), which were collected on 18 October 2011 and initially classified as items material for the preparation of the Defence under Rule 77. However, the Prosecutor submits that in light of the ongoing investigation, the relevance of the video and its transcript “were recently re-evaluated and the Prosecution now wishes to use them as incriminating evidence for the purposes of the confirmation hearing”.¹⁰

9. The Prosecutor submits that the Defence will not suffer prejudice if this request is granted, since the material relates to a public statement of Mr

⁷ ICC-02/11-01/11-90, para. 6-7.

⁸ ICC-02/11-01/11-90, para. 8.

⁹ ICC-02/11-01/11-90, para. 9 and Annex.

¹⁰ ICC-02/11-01/11-90, para. 11.

Gbagbo himself, was obtained from an open source, and, therefore, “would have already been available to the Defence”.¹¹

B. The Defence

10. The Defence submits that Regulation 35(2) of the Regulations of the Court is applicable, requiring the Prosecutor to demonstrate that he was unable to file the application within the time limit for reasons outside of his control. According to the Defence, such justification has not been provided by the Prosecutor. Specifically in relation to the 11 videos for which the Prosecutor requests an extension of time to present requests for redactions, the Defence contends that the Prosecutor has been in possession of this evidence since 3 February 2012, and that, consequently, he could have anticipated the analytical work on the videos and was in position to request extension before the expiration of the time limit on 9 March 2012. In relation to the request for extension of time to disclose two additional items of evidence, the Defence submits that the Prosecutor has not advanced any reasons “outside of his control” which could justify the delay.¹²

11. In addition, the Defence draws attention to the fact that the Request is the third application of its kind by the Prosecutor and argues that, rather than this situation being a series of individual errors, the Prosecutor appears to be attempting to circumvent the time limits established by the Chamber.¹³ Further, the Defence submits that disclosure of evidence outside of the established time limits is prejudicial to its work, considering that it only has at its disposal scarce resources.¹⁴

¹¹ ICC-02/11-01/11-90, para. 13.

¹² ICC-02/11-01/11-94, paras 25-29.

¹³ ICC-02/11-01/11-94, para. 31.

¹⁴ ICC-02/11-01/11-94, para. 36-37.

III. Applicable law

12. The Single Judge notes Articles 54, 61 and 67 of the Rome Statute, Rules 76, 81 and 121 of the Rules, and Regulation 35 of the Regulations of the Court.

IV. Analysis and conclusions of the Single Judge

A. *Request for variation of time limits*

13. The Single Judge considers it appropriate to commence the analysis of the Request by way of reference to the relevant previous decisions in the case. In relation to the nature and purpose of time limits of disclosure, the Decision on Disclosure stated:

[W]hile Rule 121(3) of the Rules allows the Prosecutor to file the DCC and LoE on the 30th day preceding the start of the confirmation hearing, this is 'only indicative of the minimum time-limits that a party can avail itself to comply with its disclosure obligations'. Furthermore, such provision should be read in conjunction with and subject to Articles 61 and 67 of the Statute. Article 61 of the Statute allows the suspect to object to the charges, challenge the evidence presented by the Prosecutor and to present evidence. Article 67 (1) of the Statute sets out as minimum guarantees the right of the suspect to be 'informed properly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks' and 'to have adequate time' for the preparation of the defence (footnotes omitted).¹⁵

14. Further, the Single Judge has stated recently in the First Decision on Redactions:

[T]he Single Judge, recalling the Decision on Disclosure, notes that specific time limits for the submission of redaction requests to the Chamber were set in order for the Defence to have evidence disclosed as soon as possible and on an ongoing basis. Although the parties are under obligation to comply with such time limits, the latter do not have preclusive effect with respect to the parties' ability to seek protective measures or to rely on evidence at the confirmation of charges hearing. Any consequences of non-compliance with time limits for disclosure are to be determined by the Chamber, within its powers and obligations in

¹⁵ ICC-02/11-01/11-30, para. 37.

relation to the disclosure process, as provided for by Article 61(3) of the Statute and Rule 121(2) of the Rules (footnote omitted).¹⁶

15. The Single Judge notes that the evidence identified at paragraph 8 above was initially not intended for use at the confirmation of charges hearing, but this decision was later changed, in good faith and on the basis of the result of subsequent investigation. It would be thus unjust to prevent the Prosecutor from relying on this evidence at the confirmation hearing. For this reason, the Single Judge considers it appropriate to allow the Prosecutor to rely on this evidence, and to set a short time limit for its disclosure to the Defence.

16. Turning now to the request for extension of time to present requests for redactions to the items of evidence identified above at paragraph 5, the Single Judge expresses concern over the fact that the present Request is the Prosecutor's fourth application to the Chamber for extension of time in relation to the exercise of his disclosure obligations, invoking difficulties in the processing and analysis of particular items of evidence.¹⁷ The Single Judge does not consider, as suggested by the Defence, that the Prosecutor may be deliberately attempting to circumvent the calendar for disclosure. However, she strongly reminds the Prosecutor of the right of the Defence to have the evidence disclosed within a reasonable time before the hearing in order to enable its adequate preparation, and the responsibility of the Prosecutor to diligently dispose of his disclosure obligations.

17. Furthermore, the Single Judge agrees with the Defence argument that Regulation 35(2) of the Regulations does not provide a legal basis for granting the request for extension of time in the particular circumstances, as the reasons advanced by the Prosecutor cannot be deemed to fall outside of his control. As recalled above at paragraph 14, the present situation must be

¹⁶ ICC-02/11-01/11-74-Red, para. 28.

¹⁷ See ICC-02/11-01/11-63, ICC-02/11-01/11-64; ICC-02/11-01/11-77.

deemed a situation of failure to comply with the time limits imposed by the Chamber in the Disclosure Decision, and the question before the Single Judge is what consequences to attach to this failure.

18. The Single Judge has considered the Response, and shares the Defence's view that compliance with the calendar for disclosure is important for its preparation for the confirmation of charges hearing. However, in light of the fact that the Request concerns 11 video excerpts which must be viewed together with other evidence provided by witness 87, which is already disclosed to the Defence, the Single Judge still considers that the prejudice caused to the Defence, if the Prosecutor is allowed to disclose and to rely at the confirmation hearing on this evidence, will be minimal and would not cause the present proceedings to be unfair, as the Defence will still be able to analyse it and appropriately respond.

19. Accordingly, the Single Judge considers that it would be disproportionate to preclude the Prosecutor from relying at the confirmation of charges hearing upon the items of evidence in question and will address the Prosecutor's requests for redactions to the items of evidence in question.

B. Requests for redactions

20. The Single Judge makes reference to the relevant parts of the First Decision on Redactions, wherein the overall reasons for granting or rejecting requests for redactions have been provided.¹⁸ For the present decision, the Single Judge has adhered to the same approach.

21. The Single Judge has reviewed the individual redactions proposed by the Prosecutor in the Annex to his Request, which relate to 11 references to the name of an investigator in the respective metadata of the 11 video

¹⁸ ICC-02/11-01/11-74-Red, paras 55-66, 82-92.

excerpts (category B.1), and considers that they are justified and must be granted.

22. Finally, the Single Judge considers it appropriate, in light of both the limited volume of redactions authorised in the present decision and the interests of the Defence, to shorten the general five-day time limit¹⁹ for the disclosure of evidence for which redactions are presently authorised.

FOR THESE REASONS, THE SINGLE JUDGE

DECIDES that the Prosecutor may rely at the confirmation of charges hearing on the items of evidence CIV-OTP-0007-0167 and CIV-OTP-0007-168 provided that they are disclosed to the Defence no later than 25 April 2012;

GRANTS the Prosecutor's requests for redactions; and

ORDERS the Prosecutor to disclose to the Defence the evidence for which redactions are authorised in the present decision no later than 25 April 2012.

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



Judge Silvia Fernández de Gurmendi
Single Judge

¹⁹ See ICC-02/11-01/11-30, p. 30.

Dated this 20 April 2012

At The Hague, The Netherlands