

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 2 August 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

with confidential *ex parte* annex only available to the Defence

**Decision on issues related to the proceedings under rule 135 of the Rules of
Procedure and Evidence and postponing the date of the confirmation of
charges hearing**

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, 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 related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing.

I. Procedural history

1. On 19 June 2012, the Defence submitted its application for a medical evaluation of Mr Gbagbo.²

2. On 26 June 2012, the Single Judge issued the “*Ordonnance aux fins de faire procéder à un examen médical*” whereby she appointed three medical experts to proceed with the medical evaluation of Mr Gbagbo, with a view to determining whether he is fit to take part in the proceedings against him.³

3. On 19 July 2012, the Registry filed in the record of the case the medical reports of the three experts appointed by the Chamber, as confidential *ex parte* only available to the Defence and the Registry (“Expert Reports”).⁴

4. On 26 July 2012, the Single Judge issued the “*Ordonnance relative au niveau de confidentialité des rapports médicaux déposés par les experts désignés par la Chambre*” (“Order as to the level of confidentiality”).⁵

5. On 31 July 2012, the Defence submitted its proposal for redactions to the Expert Reports.⁶

¹ ICC-02/11-01/11-61.

² ICC-02/11-01/11-158-Conf-Exp-tENG and ICC-02/11-01/11-158-Conf-Red2.

³ ICC-02/11-01/11-164-Conf.

⁴ ICC-02/11-01/11-190-Conf.

⁵ ICC-02/11-01/11-196-Conf.

⁶ ICC-02/11-01/11-198-Conf and its confidential *ex parte* annexes.

6. On the same day, the Defence also submitted the *“Requête aux fins d’extension du nombre de page autorisé”*, requesting an extension of page limits for its request for a postponement of the confirmation of charges hearing (*“Defence Request for Extension of Page Limits”*).⁷

7. On 1 August 2012, the Prosecutor filed her response to the Defence proposal for redactions to the Expert Reports.⁸

II. Submissions of the parties

A. *Level of confidentiality of the three reports*

(i) The Defence

8. The Defence informs the Chamber that Mr Gbagbo does not wish the Experts Reports to be transmitted to the Prosecutor in their entirety. The Defence contends that, pursuant to regulation 156(2) of the Regulations of the Court, in the absence of consent by the detained person his medical record shall not be consulted by any person other than the medical officer, his or her deputy, any medical staff directly involved in the detained person’s treatment, or the medical personnel belonging to the independent inspecting authority.⁹ The Defence further submits that the term “medical record” extends to all information about the person’s health status, medical condition, diagnosis, prognosis and treatment and all other information of a personal kind.¹⁰

9. The Defence states that the Expert Reports contain: (i) detailed information concerning the health of Mr Gbagbo, which is not directly linked to the determination of his fitness to stand trial and which can be used against him if disclosed; (ii) certain information strictly related to the private life of Mr Gbagbo; and (iii) declarations irrelevant for the pending issue. In annexes

⁷ ICC-02/11-01/11-199-Conf.

⁸ ICC-02/11-01/11-200-Conf.

⁹ ICC-02/11-01/11-198-Conf, para. 19.

¹⁰ ICC-02/11-01/11-198-Conf, para. 20.

to its filing, the Defence submits individual proposals for redactions to the three medical reports.

(ii) The Prosecutor

10. The Prosecutor submits that, in order to submit her observations, she must be given full access to the Expert Reports.¹¹ She contends that since the experts have been appointed by the Chamber in order to resolve a medical litigation, their reports shall be accessible, in principle, to the Chamber and the parties. She further submits that the experts are not medical doctors of Mr Gbagbo and as a result, their relationship with Mr Gbagbo is not privileged and the latter's consent is not needed for the disclosure of the Expert Reports to the Prosecutor. In addition, the Prosecutor submits that Mr Gbagbo has been informed of the non-privileged status of the expertise.¹²

11. The Prosecutor further submits that by its nature all information contained in the reports are relevant to the reasoning which has led to the experts' conclusions.¹³

12. Finally, the Prosecutor notes that the reports, even if disclosed to her, will remain confidential and not be disseminated to the public.¹⁴

B. Defence Request for Extension of Page Limits

13. The Defence submits that in light of the experts' conclusions, it contemplates the possibility to file a request for postponement of the confirmation of charges hearing or to submit observations.¹⁵ For this purpose, it requests an extension of page limits from 20 pages to 45 pages, submitting that the complexity of the questions to be addressed and the fact that the issue

¹¹ ICC-02/11-01/11-200-Conf, para. 4

¹² ICC-02/11-01/11-200-Conf, para. 5

¹³ ICC-02/11-01/11-200-Conf, para. 6

¹⁴ ICC-02/11-01/11-200-Conf, para. 8

¹⁵ ICC-02/11-01/11-199-Conf, paras 22-23.

touches upon the fairness of the proceedings warrant the requested extension of page limits.¹⁶

III. Applicable law

14. The Single Judge notes articles 61 et 67 of the Rome Statute, rules 113, 121(7) and 135 of the Rules of Procedure and Evidence (“Rules”) and regulation 37 of the Regulations of the Court.

IV. Determination of the Single Judge

15. As previously held by the Single Judge, rule 135 of the Rules is intended to ensure that the crucial determination of the fitness of the person to participate in proceedings is made following an impartial procedure resorting to approved experts only and with proper oversight by the Chamber and the parties.¹⁷

16. The Single Judge considers it necessary to give the parties the opportunity to submit observations on the Expert Reports received, as well as on the subsequent procedure to be followed before issuing a decision on the issue of Mr Gbagbo fitness to take part in the proceedings against him.¹⁸

17. In order to enable the Prosecutor to provide such observations, the Defence suggests that the Expert Reports be disclosed to her in redacted form. Bearing in mind the nature and importance of the matter at stake, the Single Judge is of the view that the redactions proposed by the Defence are disproportionate and cannot be fully granted. Concerning the extent to which redactions are justified, the Single Judge is of the view that the expertise conducted by an expert appointed by the Chamber does not *per se* fall within the ambit of regulation 156 of the Regulations of the Registry, but that,

¹⁶ ICC-02/11-01/11-199-Conf, paras 26-34.

¹⁷ ICC-02/11-01/11-152-Conf, para. 26 and ICC-02/11-01/11-196-Conf, para. 8.

¹⁸ ICC-02/11-01/11-196-Conf, para. 9.

nevertheless, information contained in any reports produced by such experts may make reference to information covered by the said regulation.¹⁹

18. However, in the case at hand, the Single Judge notes that the Defence, going beyond the guidelines of the Order as to the level of confidentiality, also seeks to redact information that does not stem from his medical record maintained at the detention center. The redaction of such information cannot be permitted, unless further justified, such as redaction of information of a strictly personal nature and irrelevant to the issue under consideration.

19. Having reviewed the Defence proposals in light of these general considerations, the Single Judge is of the view that limited redactions are warranted with respect to two reports, while the third can be disclosed to the Prosecutor in its entirety.

20. The Single Judge wishes to inform the parties that the extent of redactions may be reconsidered at a later stage, should it become apparent that certain redacted information is relevant to the determination of Mr Gbagbo's fitness to take part in the proceedings against him.

21. Furthermore, in order to enable the filing of properly developed observations on the Expert Reports as well as on the subsequent procedure to be followed, the Single Judge deems it appropriate to extend the page limit for the observations to be submitted, both by the Prosecutor and the Defence.

22. Finally, the Single Judge notes that the confirmation of charges hearing is presently scheduled to start on 13 August 2012. In light of the fact that the issue of Mr Gbagbo' fitness to take part to the proceedings against him is currently pending and that it will not be possible to resolve it before the said

¹⁹ ICC-02/11-01/11-196-Conf, para. 10.

date, the Single Judge considers it appropriate to postpone the confirmation of charges hearing until such issue is resolved.

FOR THESE REASONS, THE SINGLE JUDGE

ORDERS the Defence to file in the record of the case, by 6 August 2012, confidential redacted versions of documents ICC-02/11-01/11-190-Conf-Exp-Anx1 and ICC-02/11-01/11-190-Conf-Exp-Anx3, redacted to the extent specified in the *ex parte* annex to the present decision;

ORDERS the Registrar to reclassify as confidential document ICC-02/11-01/11-190-Conf-Exp-Anx2;

ORDERS the Prosecutor to file her observations on the Expert Reports and on the subsequent procedure to be followed, if any, by 13 August 2012;

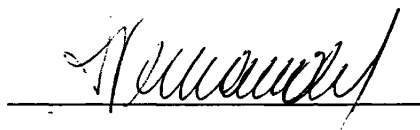
ORDERS the Defence to file its observations on the Expert Reports and on the subsequent procedure to be followed, if any, by 21 August 2012;

AUTHORISES the Prosecutor and the Defence to file observations on the Expert Reports not exceeding 45 pages;

DECIDES that the commencement of the confirmation of charges hearing is postponed until the issue of Mr Gbagbo's fitness to take part in the proceedings against him is resolved;

DECIDES that any other time limits decided in the present case are not altered by the present decision.

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 2 August 2012

At The Hague, The Netherlands